

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

JACQUES PIERRE,

EEOC Case No. 510200700040

Petitioner,

FCHR Case No. 2008-02294

v.

DOAH Case No. 08-3937

SECURITY SERVICES OF AMERICA,

FCHR Order No. 10-036

Respondent.

**FINAL ORDER AWARDING AFFIRMATIVE
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Jacques Pierre filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2005), alleging that Respondent Security Services of America committed unlawful employment practices by discriminating against Petitioner on the on the bases of Petitioner's race (Black) and National Origin (Hispanic), and on the basis of retaliation by terminating Petitioner from employment for having filed an earlier discrimination complaint against Respondent which had been settled.

The allegations set forth in the complaint were investigated, and, on July 2, 2008, the Executive Director issued his determination finding that there was reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held by video teleconference on September 25, 2009, at locations in Tallahassee and Miami, Florida, before Administrative Law Judge Eleanor M. Hunter.

Judge Hunter issued a Recommended Order, dated January 27, 2010, recommending that the Commission find that an unlawful employment practice occurred and recommending affirmative relief.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

FILED
2010 APR 21 A 10:43
DIVISION OF
ADMINISTRATIVE
HEARINGS

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We adopt the Administrative Law Judge's conclusions of law.

Respondent's Exceptions

Respondent filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Respondent's Exceptions to Recommended Order."

Respondent makes the following four exceptions: (1) the Administrative Law Judge used the wrong standard in denying Respondent's Motion for Summary Final Order; (2) a number of the Administrative Law Judge's factual findings are based on nothing but speculation and are unsupported by any record evidence; (3) the Administrative Law Judge reversed the burden of proof and required Respondent to prove that its termination of Petitioner's employment was not retaliatory; and (4) the Administrative Law Judge's damage award is inconsistent with the factual findings, and is also unsupported by the record evidence.

With regard to the first exception, we note that the proceeding before the Administrative Law Judge is to yield a "recommended order" for consideration by the Commission, and, therefore, the Administrative Law Judge does not have the authority to issue a "final" order, "summary" or otherwise, in this matter. See Sections 760.11(6) and 120.57(1)(k), Florida Statutes (2009).

This exception is rejected.

With regard to the second exception, Respondent takes issue with three findings of the Administrative Law Judge, and / or the inferences contained therein or taken from those factual findings. First is the inference drawn from the finding that a senior manager was "directly involved" in the post-settlement disciplinary decisions involving Petitioner (Recommended Order, paragraph 12). Second is the finding that it was "reasonable to believe that [Respondent], while not allowing Mr. Pierre to work, would not help him transfer over to the next contractor..." (Recommended Order, paragraph 11). Third is the finding of an "apparent discrepancy between the relative lack of concern over Petitioner's rule violations by his immediate supervisor, based on his failure to mention the more recent incidents on the reference form [presumably the form Respondent filled out in response to a third party reference request regarding Petitioner], as compared to the consequences faced by Petitioner" (Recommended Order, paragraph 25).

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence

presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999). Accord, Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005).

This exception is rejected.

With regard to the third exception, we do not agree that the Administrative Law Judge placed the burden on Respondent to prove that its termination of Petitioner was not retaliatory. The Administrative Law Judge concluded that Petitioner established a prima facie case of retaliation (Recommended Order, paragraphs 23 and 25). The Administrative Law Judge does note that at the end of Petitioner's case Respondent declined to present any evidence other than its two exhibits, Petitioner's depositions, and the testimony elicited on cross-examination of Petitioner's witnesses, and comments that this was the point in the proceedings that Respondent had the opportunity to demonstrate Petitioner was not treated differently from others and that it had a uniform discipline policy (Recommended Order, paragraph 28). In our view, this does not place the burden on Respondent to prove that it did not retaliate. Rather, the Administrative Law Judge went on to conclude, "Assessing the plausibility of Respondent's position, weighing all the evidence, including the testimony and cross examination of Petitioner's witnesses, it is determined that Petitioner established he suffered an adverse employment outcome for filing a discrimination complaint" (Recommended Order, paragraph 29). In our view, this clearly sets out the Administrative Law Judge's position that Petitioner met his burden in proving discrimination.

This exception is rejected.

With regard to the fourth exception, Respondent argues that if Petitioner is to receive any award it should be limited to the time period from September 5, 2006 until January 31, 2007, given the Administrative Law Judge's finding that, by February of 2007, Respondent no longer had its federal government contract. We note that despite the finding that Respondent's federal government contract would not be renewed, the Administrative Law Judge also found that Respondent "...was transferring its personnel over to work for the next contractor, Alutiq," and that "[i]t is reasonable to believe that [Respondent], while not allowing Mr. Pierre to work, would not help him transfer over to the next contractor" (Recommended Order, paragraph 11). In light of these findings, we conclude there is no error in the monetary remedy recommended by the Administrative Law Judge.

This exception is rejected.

Petitioner's Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner's Exceptions."

Petitioner excepts to the Administrative Law Judge's failure to recommend to the Commission that Petitioner be awarded punitive damages and attorney's fees.

With regard to punitive damages, in conclusions of law adopted by a Commission Panel it has been stated, "Compensatory and punitive damages are not available in this administrative proceeding. Those remedies are only available in a civil action brought pursuant to Section 760.11(4)(a)." See Williams v. Sailorman, Inc., d/b/a Popeye's Chicken and Biscuits, FCHR Order No. 04-037 (June 2, 2004), adopting conclusions of law set out in the Recommended Order of DOAH case number 02-3995, dated August 15, 2003, at paragraph 79.

Petitioner's exception to the Administrative Law Judge's failure to recommend the Commission award punitive damages is rejected.

With regard to attorney's fees, we note that the Commission has the statutorily-provided discretion to award attorney's fees under the Florida Civil Rights Act of 1992, not the Administrative Law Judge. See Section 760.11(6) Florida Statutes (2007).

Attorney's fees and costs have been awarded Petitioner in the Affirmative Relief section of this order, below.

Affirmative Relief

Through our adoption of the Administrative Law Judge's findings of fact and conclusions of law, as set out above, we find that unlawful retaliation-based discrimination occurred in this matter in the manner found by the Administrative Law Judge and have adopted the Administrative Law Judge's recommendations for the remedy of the discrimination, recognizing that interest is to be applied to the back pay amount owed as a matter of law.

Respondent is hereby ORDERED:

(1) to cease and desist from discriminating further in the manner it has been found to have unlawfully discriminated against Petitioner, as recommended by the Administrative Law Judge in the Recommended Order;

(2) to remit back pay to Petitioner in the amount of \$15 an hour for each normal 40-hour week between September 5, 2006, and the date of this final order, offset by earnings from substitute employment, if any, as recommended by the Administrative Law Judge in the Recommended Order;

(3) to pay Petitioner attorney's fees that have been reasonably incurred in this matter by Petitioner; and

(4) to pay Petitioner the amount of costs that has been reasonably incurred in this matter by Petitioner.

The Commission reserves jurisdiction over the determination of the precise remedy in this matter, including, but not limited to, amounts of back pay, interest, attorney's fees, and costs awarded Petitioner.

If, within 30 days of the date of the filing of this order by the Clerk of the Commission, the parties have agreed to the appropriate remedy amounts for the unlawful

employment practice found to have occurred, the parties shall prepare and submit to the Commission a Joint Stipulation of Settlement.

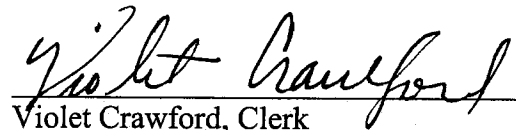
If, within 30 days of the date of the filing of this Order by the Clerk of the Commission, the parties are unable to reach agreement as to the remedy amounts for the unlawful employment practice found to have occurred, Petitioner is directed to file with the Commission a Notice of Failure of Settlement, and the case will be remanded to the Administrative Law Judge for determination of the appropriate remedy amounts in this matter, as ordered above.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 20th day of April, 2010.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Watson Haynes, II; and
Commissioner Billy Whitefox Stall

Filed this 20th day of April, 2010,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 200
Tallahassee, FL 32301
(850) 488-7082

NOTICE TO COMPLAINANT / PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), you have the right to request EEOC to review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131.

Copies furnished to:

Jacques Pierre
c/o Erwin Rosenberg, Esq.
Post Office Box 416433
Miami Beach, FL 33141

Security Services of America
c/o Ronald G. Polly, Esq.
Hawkins & Parnell, LLP
4000 SunTrust Plaza
303 Peachtree Street, Northeast
Atlanta, GA 30308-3243

Eleanor M. Hunter, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 20th day of April, 2010.

By: 
Clerk of the Commission
Florida Commission on Human Relations