

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARING

CAROLYN M. CLEVELAND,)
)
 Petitioner,)
)
 vs.) Case No. 08-4552
)
 WESTGATE HOME SALES, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER AS TO RELIEF
FROM UNLAWFUL EMPLOYMENT PRACTICE

A hearing was held pursuant to notice, on February 1, 2012, in Gainesville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Jennifer C. Biewend, Esquire
Rodney W. Smith, Esquire
Avera & Smith, LLP
2814 Southwest 13th Street
Gainesville, Florida 32222

For Respondent: Kris B. Robinson, Esquire
Robinson, Kennon, & Kendron, P.A.
582 West Duval Street
Post Office Box 1178
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STATEMENT OF THE ISSUE

What is the appropriate relief to be awarded to Petitioner by Respondent as a result of the unlawful employment practice found to have occurred by the Florida Commission on Human Relations?

PRELIMINARY STATEMENT

Following a two-day hearing on the merits, the undersigned entered a Recommended Order on May 5, 2011. By Order of the Florida Commission on Human Relations (FCHR or the Commission) dated August 2, 2011, this matter was remanded to the Division of Administrative Hearings (DOAH or the Division). In its Order remanding the case to the Division, the Commission adopted the Findings of Fact set forth in paragraphs 1 through 47 of the Recommended Order. The Commission adopted the conclusions of law regarding the conclusion that unlawful sexual harassment occurred. However, the conclusions of law regarding Respondent's status as an employer within the meaning of the Florida Civil Rights Act of 1992, were rejected, as the Commission concluded that Respondent is an employer for purposes of this law.

The Commission's Order Finding That Unlawful Employment Practice Occurred and Remanding Case to Administrative Law Judge for Issuance of Recommended Order Recommending Relief remanded the case to the Division "for further proceedings to determine the appropriate relief for the discrimination found to have occurred and the issuance of a Recommended Order as to that relief."

On August 19, 2011, the undersigned issued an Order on Remand reopening the case at the Division. The Order directed the parties to file pleadings regarding their respective positions. The parties filed their respective pleadings.

In addition to filing a response to the Order on Remand, Petitioner also filed a Motion to Amend Case Style and Add Party, which is addressed by separate order. The undersigned issued another Order on October 7, 2011, further addressing the issues raised by the parties, to which the parties filed responses.

A hearing was scheduled for December 12, 2011. Petitioner filed an unopposed Motion to Continue, which was granted. The hearing was rescheduled for February 1, 2012. A pre-hearing conference was held by telephone on January 27, 2012.

The final hearing took place as scheduled on February 1, 2012. At hearing, Petitioner offered Exhibits 1 and 2, which were admitted into evidence. Neither party presented the testimony of any witnesses, but provided argument as to each party's position. Following the hearing, each party filed a letter regarding interest claimed by Petitioner. A one-volume Transcript was filed on February 17, 2012.

Unless otherwise indicated, all references to the Florida Statutes are to 2011.

FINDINGS OF FACT

1. On May 5, 2011, the undersigned Administrative Law Judge entered a Recommended Order in this case (the merits case).

2. On August 2, 2011, the FCHR issued an Order Finding That Unlawful Employment Practice Occurred and Remanding Case to Administrative Law Judge for Issuance of Recommended Order Recommending Relief (Order). In its Order remanding the case to

the Division, FCHR adopted the Findings of Fact in the Recommended Order. FCHR adopted the portion of the Conclusions of Law which concluded that sexual harassment occurred in this matter, but did not adopt the Conclusions of Law regarding Respondent's status as an employer within the meaning of the Florida Civil Rights Act of 1992. FCHR remanded the case to the Division for further proceedings to determine the appropriate relief for the discrimination found to have occurred and the issuance of a Recommended Order as to that relief.

3. On August 19, 2011, the undersigned issued an Order on Remand which required Petitioner to submit documentation, argument, and support for all affirmative relief she believes to be appropriate in this matter, and requiring Respondent to file its response to the claims for relief.

4. On September 12, 2011, Petitioner filed her Compliance with Order on Remand, setting forth Petitioner's claim for relief. Petitioner requested the following: back pay in the amount of \$86,250.00, plus the amount of back pay that accrues from the date of FCHR's Final Order (August 2, 2011), until all back pay is remitted; interest on the amount of back pay awarded as statutorily established; attorney's fees in the amount of \$114,772.50, plus any future attorney's fees expended in obtaining or enforcing the Final Order; and costs in the amount of \$11,733.66, plus any future costs expended in obtaining or enforcing FCHR's Final Order. On September 14, 2011, Petitioner

filed a Supplement to Petitioner's Compliance with Order on Remand in further support of the claim for attorney's fees.

5. On September 30, 2011, Respondent filed its Compliance with Order on Remand. Respondent objected to any further proceedings, asserting that FCHR has no authority to remand this case to the Division. Respondent further objected to all new evidence "whether stated by Petitioner in writing, attached to or included in Petitioner's Compliance with Order on Remand."

6. On October 7, 2011, the undersigned issued an Order addressing Respondent's arguments, finding that evidence was presented regarding back pay in the merits case, and giving Respondent another opportunity to either admit to the reasonableness of the fees and costs sought by Petitioner or state with specificity the basis for disputing the fees and costs.

7. On November 2, 2011, Respondent filed its Compliance with Order of October 7, 2011. Respondent asserts that Petitioner is not entitled to back pay or attorney's fees and costs. Respondent argues that Petitioner's claim for back pay is based on her position that she was constructively discharged, and that this should be rejected. Respondent further argues that the attorney's fees sought were not appropriately delineated as to which claim (sex, age, retaliation) the entries were related to, as set forth in Petitioner's initial employment complaint of discrimination.

8. On November 8, 2011, Petitioner filed a Reply to Respondent's Compliance with Order of October 7, 2011. That is, Petitioner made it clear that she was only pursuing the sexual harassment claim as early as the Petition for Relief filed in August 2008. Petitioner asserts that she never pursued the retaliation or age discrimination claim, and formally abandoned such claims.

9. The record supports Petitioner's assertions in this regard. There was no doubt in the mind of the undersigned that Petitioner was pursuing solely her claim of discrimination based on sexual harassment. See Endnote 8 of Recommended Order. Accordingly, that was the sole issue addressed in the Recommended Order.

Back Pay

10. Petitioner seeks back pay for 230 weeks plus interest at the statutory rate. Paragraphs 1 and 5 of the Recommended Order, which were adopted by FCHR in its Order Finding Unlawful Employment Practice Occurred, found that Petitioner's employment with Respondent ended February 15, 2008, and that her gross earnings were approximately \$400 per week. Petitioner's request for back pay is based on the time period from the date her employment ended in 2008 until August 2, 2011, the date of FCHR's Order. As of the date of the hearing on remedies, Petitioner requests a total of \$100,000 in back pay, calculating from February 2008 until the date of the remedy hearing, February 1,

2012. Petitioner also requests back pay to continue to accrue until the date FCHR issues its Order specifying the amount of relief awarded to Petitioner.

11. The record reflects, through testimony of Petitioner, that at the time of the hearing on the merits, February 1 and 2, 2011, Petitioner had not worked since being employed by Respondent. Counsel for Petitioner represented in Petitioner's Compliance with Order on Remand that, "due to the mental anguish she suffered at Westgate, Ms. Cleveland has not been able to work since her last day at Westgate."

12. Petitioner received temporary unemployment compensation, but the amount she received is not in the record. Petitioner asserts in her Compliance with Order on Remand that, in any event, back pay should not be reduced by any amount received through an unemployment compensation award.

13. Petitioner seeks interest on the back pay per the statutorily established rate set forth in section 55.03, Florida Statutes. The statutorily established rate of interest is 4.75 percent (see Exhibit 2). In a letter dated February 10, 2012, Petitioner calculated the interest as of the date of the hearing to be \$12,282.07. By letter dated March 7, 2012, Respondent objected to Plaintiff's calculations.^{1/}

14. The record of the merits case contains sufficient evidence to support Petitioner's position of constructive

discharge. Moreover paragraphs 44 through 47 of the Findings of Fact in the Recommended Order reference this evidence.

Attorney's Fees and Costs

15. Petitioner requested \$114,772.50 in attorney's fees as of the date of filing the Compliance with Order on Remand. Petitioner's counsel recorded fees as they accrued, and billing records were not recreated after the Commission's Order was received. In Exhibit 2, counsel for Petitioner submitted billing reflecting an additional 17.50 hours, which brings the total of attorney's fees requested to \$120,792.50. While Respondent disputes that Petitioner is entitled to fees, Respondent does not dispute the hourly rate (\$350 per hour for Ms. Biewend, \$500 per hour for Mr. Smith). Petitioner does not seek reimbursement for hours spent by four paralegals employed by counsel for Petitioner's firm.

16. Petitioner requests costs in the amount of \$12,711.16.^{2/} Counsel for Petitioner notes that the law firm "fronted nearly \$12,000 in costs because it was the right thing to do."

17. The undersigned reviewed the affidavits of the attorneys of record and the billing records, and finds Petitioner's requests for attorney's fees and costs to be reasonable. This case was complex, and became more so when the jurisdictional issue was raised approximately six months after the case was referred to the Division. Petitioner then had to

conduct discovery concerning the elements of the integrated enterprise/single employer analysis. The Division's docket for this case is over four pages long, reflecting numerous motions, responses, and discovery matters.

CONCLUSIONS OF LAW

18. The Division has jurisdiction over the subject matter and the parties to this proceeding pursuant to sections 120.569, 120.57(1), and 760.11, Florida Statutes.

19. FCHR's Order Finding That Unlawful Employment Practice Occurred remanded this case to the Division to determine the appropriate relief. Section 760.11 reads in pertinent part as follows:

(6) . . . If the administrative law judge, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay. . . . In any action or proceeding under this subsection, the commission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action.

20. While subsection (6) of section 760.11 deals with cases in which FCHR has initially determined that there is reasonable cause to believe that a discriminatory practice has occurred, subsection (7), dealing with cases in which FCHR initially

determines that there is not reasonable cause to believe that a violation of the Civil Rights Act has occurred (which is what happened in the instant case), contains the identical language regarding attorney's fees and costs.

21. The undersigned concludes that based upon the Commission's Order finding that an unlawful employment practice occurred, that affirmative relief in the form of back pay is warranted and appropriate. The rate of Petitioner's pay was established in the Recommended Order and adopted by the Commission in its Final Order. The undersigned defers to the Commission and its policies as to whether the award of back pay should be limited to the time between the end of Petitioner's employment with Respondent until the Order Finding that Unlawful Employment Practice Occurred, or should be carried forward to the date of issuance of a final order by the Commission awarding relief.

22. The Commission has previously held that award of back pay should not be offset by Petitioner's temporary receipt of unemployment compensation benefits. See McCoy v. Florida Rock & Tank Lines, Inc., Case No. 96-3596 (Fla. DOAH Nov. 9, 2000), rejected in part, Order No. 01-046 (Fla. Comm'n on Hum. Rel., Oct. 2, 2001) (unemployment compensation benefits are not to be offset from back pay awards owed Petitioner). Accordingly, the award of back pay should not be reduced by the award of any unemployment compensation received by Petitioner.

23. Pursuant to section 760.11(7), the Commission may allow the prevailing party a reasonable attorney's fee as part of the costs. This provision is to be interpreted in a manner consistent with federal case law involving a Title VII action. A plaintiff is considered a prevailing party if she "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." Avila v. Coca-Cola Co., 849 F.2d 511, 514 n.3 (11th Cir. 1988) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

24. The starting point in determining reasonable attorney's fees is the lodestar, which is "properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blum v. Stenson, 465 U.S. 886, 888, (1984). The reasonableness of the rate is not in dispute. The attorney's fees sought by Petitioner are reasonable. The costs sought are costs spent in the litigation of the case.

RECOMMENDATION

Upon the consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered by the Florida Commission on Human Relations awarding back pay of a minimum of \$100,000, attorney's fees in the amount of \$120,792.50, and costs in the amount of \$12,711.16 to Petitioner.

DONE AND ENTERED this 6th day of April, 2012, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of April, 2012.

ENDNOTES

^{1/} At hearing, counsel for Respondent did not dispute the statutory rate of 4.75 percent, but voiced an unspecified objection to Petitioner's calculations in the letter be filed post-hearing. The undersigned has not independently calculated the amount of interest, and defers to FCHR in this regard.

^{2/} The \$12,711.16 includes the charge of \$2,000 for attorney's fees of an independent Gainesville attorney, Gloria Fletcher, Esquire, who was retained as an expert witness in regard to the reasonableness of the fee. Since Respondent did not contest the fee rate, Ms. Fletcher did not testify.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.