

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUSIE M. WALTON BANKS,)
)
 Petitioner,)
)
 vs.) Case No. 08-4878
)
 DEPARTMENT OF CORRECTIONS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

This case is before the undersigned based upon the motion to dismiss filed by Respondent on October 9, 2008, and Petitioner's response to the Order to Show Cause filed on October 24, 2008. No hearing is necessary.

APPEARANCES

For Petitioner: Susie M. Walton Banks, pro se
2503 Northeast 10th Terrace
Gainesville, Florida 32609

For Respondent: Mark Henderson, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether the Petition for Relief should be dismissed for lack of jurisdiction because Respondent was not Petitioner's employer.

PRELIMINARY STATEMENT

On or about February 15, 2008, Petitioner filed a Charge of Discrimination (the complaint) with the Florida Commission on Human Relations (FCHR). FCHR investigated the complaint, and on September 4, 2008, FCHR issued a "Determination: No Jurisdiction (No Employment Relationship)." On September 24, 2008, Petitioner filed a Petition for Relief (the petition) with FCHR.

On September 29, 2008, FCHR referred the petition to the Division of Administrative Hearings (DOAH). The referral was received by DOAH on September 30, 2008.

On October 9, 2008, Respondent filed a Motion to Dismiss or in the Alternative for Judgment on the Pleadings. On October 10, 2008, the undersigned entered an Order to Show Cause directing Petitioner to show cause in writing as to why the petition should not be dismissed.

On October 24, 2008, Petitioner filed her response to the Order to Show Cause. Due consideration has been given to that filing. No hearing is necessary.

FINDINGS OF FACT

1. The complaint alleged that Petitioner was the victim of employment discrimination based upon her race.

2. The employers identified in the complaint were Respondent and Civigenics/Community Education Centers (Civigenics).

3. The determination issued by FCHR with respect to Respondent stated in pertinent part:^{1/}

The Commission lacks jurisdiction over the Complaint of Discrimination because the Respondent is not the Complainant's employer. The investigation revealed that Civigenics/Community Education Center, not Respondent, is the proper Respondent in this case.

4. The petition does not allege that Respondent was Petitioner's employer. Rather, the petition "give[s] acknowledgement to the determination [of] no jurisdiction" and then focuses on the merits of Petitioner's discrimination complaint.

5. Respondent argues in its motion to dismiss that "Petitioner acknowledges and therefore, concedes the validity of FCHR's no jurisdiction determination in her request for relief."

6. The Order to Show Cause entered on October 10, 2008, stated in pertinent part:

The petition does not appear to raise any disputed issues of fact as to whether DOC was Petitioner's employer. That is the only issue properly before the undersigned in this case based upon the "no jurisdiction" determination issued by the Florida Commission on Human Relations (FCHR).

Petitioner is entitled to a de novo hearing on the issue of whether DOC was her employer. If it is determined that DOC was her employer, then the case will be returned to FCHR with a recommendation that it investigate the merits of Petitioner's discrimination complaint against DOC.

[Endnote omitted]. If it is determined that DOC was not Petitioner's employer, then the case will be returned to FCHR with a recommendation that the petition be dismissed based upon a lack of jurisdiction.

That said, Petitioner is only entitled to a formal administrative hearing at the Division of Administrative Hearings (DOAH) if there are disputed issues of fact as to whether DOC was Petitioner's employer. If there are no disputed issues of fact, then DOAH must relinquish jurisdiction back to FCHR. See § 120.57(1)(i), Fla. Stat. As stated above, the petition does not appear to raise any disputed issues of fact on this issue; rather, it "give[s] acknowledgement to the determination of no jurisdiction" and then focuses on the merits of the discrimination complaint.

7. The Order to Show Cause directed Petitioner to:

show cause in writing as to why DOC's Motion to Dismiss should not be granted and/or Petitioner shall file an amended petition that identifies the factual basis upon which Petitioner contends that DOC was her employer.

8. The Order advised Petitioner that:

Failure to respond to this Order and/or failure to identify any disputed issues of fact as to whether DOC was Petitioner's employer will result in a Recommended Order of Dismissal or an Order closing DOAH's file and relinquishing jurisdiction to FCHR.

9. Petitioner's response to the Order to Show Cause stated in pertinent part:

This is response to the Order to Show Cause, Case #08-4878.

I am submitting in response to this order the attachments of a notice of hearing to be held in this case at the Board of County Commissioners, Community Treasures [sic] Room, First Floor, County Administration Building, 12 Southeast First Street, on December 1, 2008, at 1:00 p.m., Gainesville, FL. I am also submitting a copy of the Order of Pre Hearing Instructions. All information as required will be provided at the times ordered.

10. The response does not allege any facts that might establish that Respondent was Petitioner's employer.

11. The pleadings do not raise any disputed issues of material fact concerning whether Respondent was Petitioner's employer.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

13. In reviewing a motion to dismiss, all of the factual allegations in the petition must be accepted as true. See St. Francis Parkside Lodge of Tampa Bay v. Dept. of Health & Rehabilitative Servs., 486 So. 2d 32, 34 (Fla. 1st DCA 1986).

14. To state a claim for employment discrimination under Section 760.10, Florida Statutes (2007), Petitioner must allege facts to show that Respondent was her employer. Otherwise, FCHR does not have jurisdiction over the complaint. See, e.g., Enzor v. Florida Developers, Inc., Case No. 08-1228 (DOAH July 10,

2008; FCHR Sep. 16, 2008); Kelly v. Florida Crown Workforce Board, Inc., Case No. 06-0483 (DOAH Mar. 23, 2006; FCHR May 24, 2006).

15. There are circumstances where courts "look beyond the nominal independence of an entity and ask whether two or more ostensibly separate entities should be treated as a single, integrated enterprise when determining whether a plaintiff's 'employer' comes within the coverage of Title VII." See Lyes v. City of Rivera Beach, 166 F.3d 1332, 1341 (11th Cir. 1999).

16. The petition does not allege any facts that might implicate those circumstances or that might otherwise establish that Respondent was Petitioner's employer. Rather, the petition "give[s] acknowledgment" to FCHR's determination that Civigenics was Petitioner's employer, not Respondent.

17. Normally, dismissal of a petition is, at least once, without prejudice. See § 120.569(2)(c), Fla. Stat.

18. However, dismissal of the petition with prejudice is appropriate in this case because the Order to Show Cause gave Petitioner an opportunity to file "an amended petition that identifies the factual basis upon which Petitioner contends that DOC was her employer," but Petitioner failed to do so.

19. Alternatively, because the pleadings do not raise any disputed issues of material fact as to whether Respondent was Petitioner's employer, it is appropriate to relinquish

jurisdiction over the petition to FCHR for entry of a final order after an informal hearing, if necessary. See § 120.57(1)(i), Fla. Stat.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's motion to dismiss is granted, the final hearing scheduled for December 1, 2008, is cancelled, and it is

RECOMMENDED that FCHR issue a final order dismissing the petition with prejudice.

DONE AND ENTERED this 30th day of October, 2008, in Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October, 2008.

ENDNOTE

^{1/} FCHR issued a separate "no cause" determination with respect to Civigenics. The petition filed by Petitioner challenging that determination is pending as DOAH Case No. 08-4875.

COPIES FURNISHED:

Susie M. Walton Banks
2503 Northeast 10th Terrace
Gainesville, Florida 32609

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Mark Henderson, Esquire
Department of Corrections 7000
2601 Blair Stone Road
Tallahassee, Florida 32399

Walt McNeil, Secretary
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399

Kathleen Van Hoene, General Counsel
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399

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.