

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

JUSTO J. CARRION,

FILED

EEOC Case No. 15F200800067

Petitioner,

2009 MAY 19 A 10:30 FCHR Case No. 2008-02716

v.

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

DOAH Case No. 08-5487

ENERGY SAVINGS SYSTEMS,

FCHR Order No. 09-054

Respondent.

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**FINAL ORDER DISMISSING PETITION FOR  
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Justo J. Carrion filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2007), alleging that Respondent Energy Savings Systems committed unlawful employment practices on the basis of Petitioner's National Origin (Hispanic) by limiting, segregating, or classifying employees in a discriminatory fashion, and by retaliating against Petitioner for his opposition to unlawful employment practices.

The allegations set forth in the complaint were investigated by the Equal Employment Opportunity Commission.

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 on January 12, 2009, in Orlando, Florida, before Administrative Law Judge Lawrence P. Stevenson.

Judge Stevenson issued a Recommended Order of dismissal, dated February 24, 2009.

Pursuant to notice, public deliberations were held on May 12, 2009, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 200, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order.

Findings of Fact

A transcript of the proceeding before the Administrative Law Judge was not filed with the Commission. In the absence of a transcript of the proceeding before the

Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See National Industries, Inc. v. Commission on Human Relations, et al., 527 So. 2d 894, at 897, 898 (Fla. 5th DCA 1988). Accord, Rubin v. Department of Health, FCHR Order No. 08-069 (October 30, 2008), Beach-Gutierrez v. Bay Medical Center, FCHR Order No. 05-011 (January 19, 2005), and Waaser v. Streit's Motorsports, FCHR Order No. 04-157 (November 30, 2004).

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.

#### Exceptions

Petitioner filed exceptions to the Recommended Order in a document entitled, "Exceptions," received by the Commission on March 12, 2009.

There is no indication on the document that it was provided to Respondent as is required by Fla. Admin. Code R. 28-106.104(4) and Fla. Admin. Code R. 28-106.110. However, the Commission published the document to the Respondent, and placed the document in the record of this case, through the issuance of a Notice of Ex Parte Communication, mailed to the parties on March 13, 2009.

#### *timeliness of exceptions*

The Administrative Procedure Act states, "The agency shall allow each party 15 days in which to submit written exceptions to the recommended order." Section 120.57(1)(k), Florida Statutes (2007). The Recommended Order, itself, advises the parties, "All parties have the right to submit written exceptions within 15 days of 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." See Recommended Order, page 18. Finally, the Florida Administrative Code section dealing with the filing of exceptions to Recommended Orders states, "No additional time shall be added to the time limits for filing exceptions or responses to exceptions when service has been made by mail." Fla. Admin. Code R. 28-106.217(4).

The date of the Recommended Order is February 24, 2009, and, as indicated above, Petitioner's exceptions were received by the Commission on March 12, 2009, 16 days after the date of the Recommended Order.

Petitioner's exceptions are untimely.

The document sets out exceptions to specific Recommended Order “findings of fact” paragraphs (3, 5, 6, 7, 8, 9, 10, 11, 12, 17, 18, 19, 20, 22, 23, 27, 29, 32, 33) and to specific Recommended Order “conclusions of law” paragraphs (43, 44, 45).

*findings of fact exceptions*

In the absence of a transcript of the proceeding before the Administrative Law Judge, the Commission is bound by the facts found in the Recommended Order, since there is no way for the Commission to determine the extent to which the facts found are supported by the testimony presented. Gainey v. Winn Dixie Stores, Inc., FCHR Order No. 07-054 (October 12, 2007).

With regard to findings of fact set out in Recommended Orders, the Administrative Procedure Act states, “The agency may not reject or modify the findings of fact unless the agency first determines from a review *of the entire record*, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law [emphasis added].” Section 120.57(1)(I), Florida Statutes (2007). In the absence of a transcript of the proceeding before the Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See, National Industries, Inc., supra. Accord, Jones v. Suwannee County School Board, FCHR Order No. 06-088 (September 11, 2006), Johnson v. Tree of Life, Inc., FCHR Order No 05-087 (July 12, 2005), Beach-Gutierrez, supra, and Waaser, supra.

Further, 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).

*conclusions of law exceptions*

With regard to the conclusions of law set out in the Recommended Order, as indicated, above, we have concluded that the conclusions of law result in a correct disposition of the case.

*conclusion*

Based on the foregoing, Petitioner's exceptions are rejected.

Dismissal

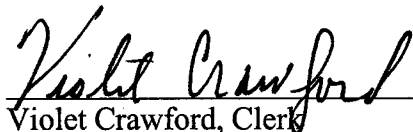
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 18<sup>th</sup> day of May, 2009.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

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

Filed this 18<sup>th</sup> day of May, 2009,  
in Tallahassee, Florida.

  
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Violet Crawford, Clerk  
Commission on Human Relations  
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Copies furnished to:


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P.O. Box 1010  
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Lawrence P. Stevenson, 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 18<sup>th</sup> day of May, 2009.

By:   
Clerk of the Commission  
Florida Commission on Human Relations