

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED

2009 SEP 23 A 10:48

BRIAN NEUMANN,

EEOC Case No. 511200702780

Petitioner,

FCHR Case No. 2009-00176

v.

DOAH Case No. 08-5859

UNIVERSITY OF FLORIDA,

FCHR Order No. 09-095

Respondent.

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

Preliminary Matters

Petitioner Brian Neumann 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 University of Florida committed unlawful employment practices on the bases of Petitioner's color (white), sex (male), age (46), and on the basis of retaliation, by harassing Petitioner and terminating Petitioner from employment.

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 in Fort Myers, Florida, on June 17, 2009, before Administrative Law Judge Daniel Manry on the issue of whether the doctrine of equitable tolling excused the filing of Petitioner's complaint of discrimination later than 365 days from the last alleged discriminatory act.

Judge Manry issued a Recommended Order of dismissal, dated July 20, 2009, finding that the evidence did not show that the factual prerequisites for equitable tolling were present in this proceeding and recommending that the Commission dismiss the complaint of discrimination as untimely.

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.

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.

A Commission has stated, "We note that with regard to 'equitable tolling' of the 365-day time period for filing a Complaint of Discrimination under the Florida Civil Rights Act of 1992, a Florida District Court of Appeal reviewing a case brought under the Act has stated, 'the only acts or circumstances that will toll a limitations period are those enumerated in Section 95.051(2)...' Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646, at 648 (Fla. 5th DCA 1997); accord Gonima v. Manatee County School Bd., 2007 WL 1222577 (M.D. Fla. 2007), and Cunningham v. Pinellas County Sheriff's Dept., 2000 WL 641601 (M.D. Fla. 2000)." Thomas v. Progress Energy Florida, Inc., FCHR Order No. 08-023 (April 14, 2008).

A review of Section 95.051, Florida Statutes (2007), indicates that none of the reasons set out therein are applicable to this case. (While "[t]he pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action" can toll a statute of limitations (see Section 95.051(1)(g), Florida Statutes (2007)), we note that the Administrative Law Judge specifically found that in this matter, "The grievance decided by arbitration did not allege that Respondent discriminated against Petitioner." Recommended Order, ¶ 6.)

With this comment regarding "equitable tolling," we adopt the Administrative Law Judge's conclusions of law, and conclude that the matter should be dismissed, as recommended by the Administrative Law Judge.

Exceptions

Petitioner filed exceptions to the Recommended Order in two two-page documents, received by the Commission on either July 24 or July 27, 2009. These documents are entitled, "Exceptions to recommended order," and "Amended Exceptions to recommended order." These documents were treated by the Commission as ex parte communications and were published and provided to Respondent in a Notice of Ex Parte Communication, issued by the Commission on July 29, 2009.

With regard to exceptions to Recommended Orders, the Administrative Procedure Act states, "The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Section 120.57(1)(k), Florida Statutes (2007); see, also, Bartolone v. Best Western Hotels, FCHR Order No. 07-045 (August 24, 2007).

A review of Petitioner's exceptions documents suggest that they do not comply with this statutory provision.

Nevertheless, it can be said that the documents except to the finding that the facts did not exist to establish the doctrine of "equitable tolling" as an excuse for the late-filing of the complaint of discrimination. In addition, Petitioner appears to claim prejudice by alleging that Respondent did not supply all the documents Petitioner requested.

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).

Further, as indicated above, under Section 95.051, Florida Statutes (2007), none of the circumstances that would toll the time for filing the complaint of discrimination exist in this case.

Petitioner's exceptions are rejected.

Dismissal

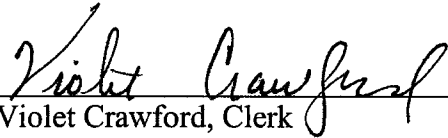
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 22nd day of September, 2009.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Lizzette Gamero; and
Commissioner Watson Haynes, II

Filed this 22nd day of September, 2009,
in Tallahassee, Florida.


Violet Crawford, Clerk
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Daniel Manry, 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 22nd day of September, 2009.

By: 
Clerk of the Commission
Florida Commission on Human Relations