

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIAN NEUMANN,)
)
 Petitioner,)
)
 vs.) Case No. 08-5859
)
 UNIVERSITY OF FLORIDA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted a hearing in this case for the Division of Administrative Hearings (DOAH) on June 17, 2009, in Fort Myers, Florida. The scope of the hearing is limited to the issue stated hereinafter.

APPEARANCES

For Petitioner: Brian Neumann, pro se
1805 6th Street West
Palmetto, Florida 34221

For Respondent: Charles M. Deal, Esquire
University of Florida
123 Tigert Hall
Gainesville, Florida 32611-2703

STATEMENT OF THE ISSUE

The issue is whether the time limit that would otherwise bar Petitioner's claim of alleged discrimination in violation of Subsection 760.10(1), Florida Statutes (2006),¹ is tolled by the doctrine of equitable tolling.

PRELIMINARY STATEMENT

This case has a lengthy procedural history. In relevant part, Respondent filed Respondent University of Florida's Amended Motion for Summary Judgment on March 25, 2009 (the Motion). The Motion is deemed to be a motion for recommended order of dismissal because the undersigned has no statutory authority to issue a summary judgment in this proceeding. Petitioner timely filed Petitioner's response [sic] to Summary Judgment on April 9, 2009 (the Response).

The Motion alleges that Petitioner's claim of discrimination is time barred because Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (the Commission) on December 27, 2007, approximately 442 days after Respondent terminated Petitioner from his employment on October 11, 2006. The Response argues that the doctrine of equitable tolling should prevent the Charge of Discrimination from being time barred.

On April 28, 2009, the undersigned issued an Order on Equitable Tolling. The Order concluded that Petitioner is entitled to an evidentiary hearing on the issue of equitable tolling. The Order limited the disputed facts to those alleged in the Response.

At the hearing, Petitioner testified, called four witnesses, and submitted four exhibits for admission into

evidence. Respondent called two witnesses and submitted two exhibits.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the Transcript of the hearing filed with DOAH on July 2, 2009. Petitioner and Respondent filed their respective Proposed Recommended Orders on June 22 and July 10, 2009.

FINDINGS OF FACT

1. Respondent is a public university located in Gainesville, Florida. Petitioner was an employee of Respondent until October 11, 2006, when Respondent terminated Petitioner's employment on the grounds that Petitioner had allegedly participated in the falsification of employee time records. Respondent deleted Petitioner's name from the payroll records and stopped paying Petitioner. No continuing employment relationship existed after October 11, 2006.

2. Respondent notified Petitioner of the proposed termination of employment by letter dated August 25, 2006. Respondent conducted two predetermination conferences on September 5 and October 5, 2006. Petitioner was represented by counsel in each predetermination conference.²

3. Shortly after the termination of Petitioner's employment on October 11, 2006, Petitioner, through his attorney, filed a grievance against Respondent. The grievance

was resolved against Petitioner in a final arbitration decision that was issued on October 3, 2007.

4. Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (the Commission) on December 27, 2007, approximately 442 days after Respondent terminated Petitioner from his employment on October 11, 2006. Subsection 760.11 requires Petitioner to have filed the Charge of Discrimination within 365 days of the alleged unlawful employment practice that occurred on October 11, 2006.

5. A preponderance of the evidence does not support a finding that the factual prerequisites for equitable tolling are present in this case. For the reasons stated hereinafter, a preponderance of the evidence does not show that Petitioner was misled or lulled into inaction, was in some extraordinary way prevented from asserting his rights, or timely asserted his rights mistakenly in the wrong forum.

6. Petitioner did not mistakenly assert his claim of discrimination in the arbitration proceeding. The grievance decided by arbitration did not allege that Respondent discriminated against Petitioner. Nor did Petitioner allege discrimination at anytime prior to the termination of his employment, including the two predetermination conferences.

7. Respondent did not mislead or lull Petitioner into inaction. Respondent did not represent to Petitioner that

Petitioner had to wait until the conclusion of the arbitration proceeding before Petitioner could file a claim of discrimination. When Petitioner filed the grievance and participated in the arbitration, Petitioner was represented by counsel. At no time did either Petitioner or his attorney contact Respondent and ask if he could, or could not, file a claim of discrimination during the arbitration proceeding.

8. Respondent did not, in some extraordinary way, prevent Petitioner from asserting his claim of discrimination. Respondent did not delay the arbitration unnecessarily. The delay in the arbitration was caused, in relevant part, by the unavailability of counsel for Petitioner.

9. The first available date for all of the arbitrators was April 19, 2007. On April 17, 2007, one of the arbitrators cancelled the arbitration for medical reasons. The next available date for all of the arbitrators was August 31, 2007. The arbitration hearing occurred on August 31, 2007. The arbitrators issued the decision on October 3, 2007.

10. The Charge of Discrimination which Petitioner filed with the Commission on December 27, 2007, does not raise any fact that was not known to Petitioner before the expiration of 365 days after the termination of employment on October 11, 2006. By July 19, 2006, Petitioner was aware of the facts on which Petitioner bases his claim of a hostile work environment.

CONCLUSIONS OF LAW

11. DOAH has jurisdiction of the parties and subject matter of this proceeding. § 120.57(1), Fla. Stat. (2008). DOAH provided the parties with adequate notice of the hearing.

12. Petitioner has the burden of proof. Petitioner must show by a preponderance of the evidence that Petitioner was misled or lulled into inaction, was in some extraordinary way prevented from asserting his rights, or had timely asserted his rights mistakenly in the wrong forum. Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988).

13. Limitation periods for filing discrimination claims are not tolled during a grievance proceeding or some other method of collateral review. Delaware State College et al., v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980); see also Ledbetter v. The Goodyear Tire & Rubber Company, Inc., 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007) (current effects alone cannot breathe life into prior discrimination); Collins v. Miami-Dade County, 361 F. Supp. 2d 1362 (S.D. Fla. 2005) (continuity of employment is insufficient to toll 365-day time period). However, time limitations are not jurisdictional and are subject to equitable doctrines, including, in pertinent part, equitable tolling. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed 2d 106 (2002); United States of America v. Johnson, 541 F.3d

1064 (11th Cir. 2008); Coke v. General Adjustment Bureau, 640 F.2d 584 (5th Cir. 1981).

14. Petitioner is entitled to an evidentiary hearing to determine whether equitable tolling operates to excuse the untimely filing of the Charge of Discrimination. Phillip v. University of Florida, 680 So. 2d 508 (Fla. 1st DCA 1996). If a preponderance of the evidence in the hearing were to have shown that the untimely filing is excused by the doctrine of equitable tolling, Petitioner would have been entitled to a hearing on the merits of his claim of discrimination. Id.

15. A preponderance of the evidence does not show that the factual prerequisites for equitable tolling are present in this proceeding. Petitioner is not entitled to a second hearing on the merits of his claim of discrimination.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Commission enter a final order dismissing the Charge of Discrimination as untimely for the reasons stated in this Recommended Order.

DONE AND ENTERED this 20th day of July, 2009, in
Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of July, 2009.

ENDNOTES

^{1/} References to chapters, sections, and subsections are to Florida Statutes (2006), unless otherwise stated.

^{2/} Respondent cancelled the first predetermination conference before it was completed because Petitioner was represented by counsel and Respondent's counsel was not present. Each party was represented by counsel at the second predetermination conference.

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.