

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED

LA'TOYA MILLS,

2010 DEC 16 A 11: 51

EEOC Case No. 15D200800652

Petitioner,

DIVISION OF
ADMINISTRATIVE
HEARINGS

FCHR Case No. 2008-01824

v.

DOAH Case No. 09-0516

BAY ST. JOSEPH CARE AND
REHABILITATION CENTER,

FCHR Order No. 10-092

Respondent.

**ORDER AWARDING AFFIRMATIVE RELIEF
FROM AN UNLAWFUL EMPLOYMENT PRACTICE
AND REMANDING CASE TO ADMINISTRATIVE LAW JUDGE
FOR ISSUANCE OF RECOMMENDED ORDER REGARDING AMOUNTS OF
BACK PAY, ATTORNEY'S FEES AND COSTS OWED PETITIONER**

Preliminary Matters

Petitioner La'Toya Mills 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, Bay St. Joseph Care and Rehabilitation Center, committed an unlawful employment practice on the basis of Petitioner's sex (female / pregnancy) by terminating Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on October 30, 2008, the Executive Director issued his determination finding that there was reasonable cause to believe that an unlawful employment practice had occurred.

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 July 8, 2010, in Port Saint Joe, Florida, before Administrative Law Judge Diane Cleavinger.

Judge Cleavinger issued a Recommended Order, dated October 7, 2010, recommending that the Commission find that an unlawful employment practice occurred and recommending affirmative relief.

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.

We note that in "Findings of Fact" paragraph 19 of the Recommended Order the Administrative Law Judge stated, "Petitioner is entitled to reinstatement as a CNA and to back wages and benefits until she is reinstated, less any unemployment compensation, wages and benefits earned during said period." In addition, in the "Recommendation" section of the Recommended Order, the Administrative Law Judge recommended the Commission issue a final order requiring, among other things, "Payment of lost wages to Petitioner from the date of termination to reinstatement less any unemployment compensation, wages and benefits she received during the same period."

We view these statements that any lost wages owed Petitioner be offset by any unemployment compensation received by Petitioner as a conclusion of law.

With regard to this conclusion of law, Commission Panels have held that unemployment compensation benefits are not to be offset from back pay awards owed Petitioners. See, Cahill v. K.S.L. Fairways Group, L.P., FCHR Order No. 03-015 (March 7, 2003), and cases cited therein; accord Ostrum v. A Unique Floor of the Gulf Coast I, FCHR Order No. 10-067 (September 7, 2010).

Accordingly, we correct the conclusion of law of the Administrative Law Judge that indicates that the back pay award in this matter be offset by amounts of unemployment compensation received by Petitioner.

In correcting this conclusion of law of the Administrative Law Judge, we conclude: (1) that the conclusion of law being corrected is a conclusion of law over which the Commission has substantive jurisdiction, namely a conclusion of law dealing with affirmative relief to be awarded under the Florida Civil Rights Act of 1992; (2) that the reason the correction is being made by the Commission is that the conclusion of law as stated runs contrary to previous Commission decisions on the issue; and (3) that in making this correction the conclusion of law being substituted is as or more reasonable than the conclusion of law which has been rejected. See, Section 120.57(1)(1), Florida Statutes (2009).

With this correction, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

Respondent filed exceptions to the Recommended Order on October 22, 2010, in a document entitled, "Respondent's Exceptions to Recommended Order." The document contains 19 numbered paragraphs, setting out two specific exceptions to the Recommended Order.

The exceptions document states, "The Recommended Order erroneously found Petitioner's pregnancy discrimination claim viable on two basic grounds: (i) Respondent did not offer Petitioner leave in accordance with its own personnel handbook, and (ii) Petitioner remained 'qualified' for her job, as she had continued to perform her normal job duties despite her doctor's lifting restrictions..." Exceptions document, ¶ 1.

In the first instance, the Respondent argues that Petitioner was unable to establish a prima facie case of discrimination because she was unable to show that she had requested and qualified for any applicable "leave" policy. Exceptions document, ¶ 7. In the second instance, for reasons set out in the exceptions document, Respondent argues that Petitioner did not demonstrate the required elements of her prima facie case of pregnancy discrimination. Exceptions document, ¶ 19.

In the discussion of each contained in the document, Respondent takes issue with facts found and inferences drawn from the evidence presented.

With regard to Respondent's exceptions to facts found and inferences drawn from the evidence presented, and to Respondent's comments and argument on the facts found referenced in Respondent's exceptions document, 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, it has been stated, "The ultimate question of the existence of discrimination is a question of fact." Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, at 1209 (Fla. 1st DCA 1991). Accord, Coley v. Bay County Board of County Commissioners, FCHR Order No. 10-027 (March 17, 2010).

Finally, while Respondent's exceptions address the issue of whether Petitioner established a prima facie case of discrimination as part of the steps necessary to prove a discrimination case by circumstantial evidence, we note that the Administrative Law Judge concluded "...the evidence was direct that Petitioner was terminated because of her pregnancy." Recommended Order, ¶ 34.

Respondent's exceptions are rejected.

Affirmative Relief and Remand

Through our adoption of the Administrative Law Judge's findings of fact and conclusions of law, as set out above, we find that unlawful discrimination occurred in this matter in the manner found by the Administrative Law Judge and have adopted the Administrative Law Judge's recommendations for the remedy of the discrimination, except as set out in the "Conclusions of Law" section of this Order. In addition, we conclude the case should be remanded to the Administrative Law Judge for determination of the back pay amount owed Petitioner, recognizing that interest is to be applied to the back pay amount owed as a matter of law, and for determination of the amounts of attorney's fees and costs owed Petitioner.

Respondent is hereby ORDERED:

(1) to cease and desist from discriminating further in the manner it has been found to have unlawfully discriminated against Petitioner;

(2) to reinstate Petitioner as a CNA with all seniority and benefits as if she had not been terminated, as recommended by the Administrative Law Judge;

(3) to pay Petitioner back pay / lost wages from the date of termination to reinstatement, less any wages and benefits she received during the same period, as recommended by the Administrative Law Judge, but with no offset for unemployment compensation received;

(4) to pay Petitioner attorney's fees that have been reasonably incurred in this matter by Petitioner; and

(5) to pay Petitioner the amount of costs that has been reasonably incurred in this matter by Petitioner.

This matter is REMANDED to the Administrative Law Judge for further proceedings to determine the amounts of back pay, including interest, attorney's fees and costs owed Petitioner and the issuance of a Recommended Order as to those amounts.

DONE AND ORDERED this 15th day of December, 2010.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

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

Filed this 15th day of December, 2010,
in Tallahassee, Florida.

Violet Crawford

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Diane Cleavinger, 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 15th day of December, 2010.

By: *Violet Crawford*
Clerk of the Commission
Florida Commission on Human Relations