

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

FILED  
2010 MAR 19 A 11:40  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

TRACEY FRANCIS,

EEOC Case No. 15D200800909

Petitioner,

FCHR Case No. 2008-02709

v.

DOAH Case No. 09-1337

WAL-MART,

FCHR Order No. 10-025

Respondent.

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

Preliminary Matters

Petitioner Tracey Francis 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 Wal-Mart committed unlawful employment practices on the bases of Petitioner's race (Black) and disability. Specifically, Petitioner alleged that she had been discriminated against and harassed on the basis of her race, and that Respondent failed to provide a reasonable accommodation for her disability.

The allegations set forth in the complaint were investigated, and, on February 5, 2009, the Executive Director issued his determination finding that there was no 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 in Tallahassee, Florida, on October 12, 2009, before Administrative Law Judge P. Michael Ruff.

Judge Ruff issued a Corrected Recommended Order of dismissal, dated January 8, 2010.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Corrected 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, Hall v. Villages of West Oaks HOA, FCHR Order No. 08-007 (January 14, 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 Administrative Law Judge's Corrected Recommended Order in a 7-page document received by the Commission on January 25, 2010.

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 February 1, 2010.

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 document suggests that it does not comply with this statutory provision.

However, it can be said, generally, that Petitioner excepts to the Administrative Law Judge's finding that she was not discriminated against and harassed and that no unlawful employment practice occurred in this matter.

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)(l), Florida Statutes (2007). As indicated, above, 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, Hall, supra, 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.

Finally, 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).

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

#### Dismissal

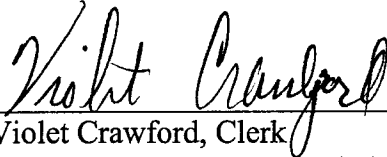
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 17th day of March, 2010.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;  
Commissioner Anice R. Prosser; and  
Commissioner Mario M. Valle

Filed this 17th day of March, 2010,  
in Tallahassee, Florida.

  
Violet Crawford, Clerk  
Commission on Human Relations  
2009 Apalachee Parkway, Suite 200  
Tallahassee, FL 32301  
(850) 488-7082

NOTICE TO COMPLAINANT / PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), you have the right to request EEOC to review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131.

Copies furnished to:

Tracey Francis  
284 Water Oak Drive  
Tallahassee, FL 32305

Wal-Mart  
c/o Scott A. Forman, Esq.  
Littler Mendelson, P.C.  
One Biscayne Boulevard, Suite 1500  
Miami, FL 33131

Wal-Mart  
c/o Cornelius D. Boone, Esq.  
Littler Mendelson, P.C.  
3344 Peachtree Road Northeast, Suite 1500  
Atlanta, GA 30326

P. Michael Ruff, 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 17th day of March, 2010.

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

008021701 9-1337

Handwritten name

Troay France

FLORIDA COMMISSION ON HUMAN RELATIONS  
10 14 25 11 PM 3:35

(1) The purpose intent to obtain copies of transcripts, there was charge of approximately \$300 for these transcripts and without a job I could not afford this.

(2) The employment dates are wrong I started at Walmart Killbuck 1995 on March 3 2003, not 1999 ~~Walmart~~  
(a) I transferred to 1027 March 2005

(3) The personal ~~employee~~ <sup>Associate Manager</sup> is known by a witness of the petitioner whom she had had problems with at another place of employment ~~at Walmart~~ <sup>where she was in the personnel file</sup> upon is also African American. She was notorious to the petitioner's supervisor so that she could have the records and she said to respondent I know this lady she was personal at my place of employment and she complained about my clothing but I never had to change.

(4) The hair color was not a natural color but it was a natural blond as respondent says but honey blond which is 2 shades darker, and what African American has natural blond hair by the way

That I apply it, it looks natural  
with hair coming from the scalp.  
But I don't think she should  
have said anything to me about  
and I don't remember getting an  
apology as the Respondent noted.  
Respondent don't think that her  
statement ~~was~~ was off a record  
locally mounted statement by being  
an ~~exaggeration~~ saying this to an  
African American ~~Representative~~

(11) The alleged disability is a lab  
situation. I fell on ~~the~~ stairs  
while visiting my mom in Dulles  
on the date that I was preparing  
to leave and I went to Emergency Room  
and she discharged me and I continued  
my plans to return to Miami, FL  
where the bus and when I arrived  
I could not get off the bus because  
of my back and neck and ~~the~~ pain

I had to be taken to ER in Miami, FL  
2004 ~~the~~ 2004 had to eventually have  
surgery ~~to~~ ~~the~~ and ~~the~~ the surgeon put a  
pin in my neck to correct the ~~problem~~ but  
I still have pins in my ~~back~~ neck  
that ~~irradiate~~ damage my back, up and across  
my arm and shoulder on left side.

continued

(16) In 2007 I was in a car accident that required the work that the pins was placed and I had to go to the Dr. Wittig, Dr. [unclear] and Dr. Muller for ~~the~~ injection that was placed at site of pin to relieve the pain and inflammation which was ~~not~~ considered ~~an~~ out-patient surgery.

(17) (18) I was ~~terminated~~ because I was ~~terminated~~ at the different times because of ~~mistake~~ ~~in~~ ~~management~~ made. (a) worked for ~~unpaid~~ absence (b) ~~proper~~ ~~documentation~~ not timely filed.

(20) (21) (22) I considered myself as one of the best dressed employees so I follow the policy of ~~color~~ ~~and~~ ~~color~~ and I corrected my hair ~~and~~ ~~hair~~ and ~~hair~~ was told that they were not correct colors I spoke with ~~management~~ ~~management~~ and was told to go back to work so I feel that ~~if~~ ~~if~~ since this happen ~~in~~ ~~in~~ more times I was being singled out to be given a hard time. Why did this ~~continued~~ ~~happening~~

(24) Even though I ~~as~~ ~~as~~ respondent says



cont. (24)

never suffered adverse employment action, this was extremely stressful and I had to just pray before I left home all the way to work that ~~nothing~~ no one would ~~do~~ <sup>miss</sup> me a printer each day.

(35)

Yes I was harassed ~~and~~ each time these things happen but ~~being~~ <sup>being</sup> a strong person that I try to be I took it and continued to work because I have a 9 year old daughter to support. Think about it, when a Caucasian male a state statement about African American ~~hair~~ <sup>hair</sup> that the ~~color~~ <sup>color</sup> that normally on caucasian wear I believe that it was racially harassment.

(40)

If the respondent feels that ~~the~~ <sup>the</sup> ~~petitioner~~ <sup>petitioner</sup> was ~~an~~ <sup>an</sup> imaginary harassment why did they do this to correct it if it was imaginary, you can't correct or ~~you~~ <sup>you</sup> change any ~~imaginary~~ <sup>imaginary</sup>.

41. Even though my disability is not visible it is there so hang in my mother so keep up your back as if there is nothing wrong continue to do what you can do and do it well.

5.

I have been off of work since June 16, 2009 and I have had to move in with my mother and aunt so that my daughter and I would have a place to stay. I was hoping that I could go back to Walmart and work but not at a different location as to Sam's ~~store~~ because I am a good Customer Service Representative that has gotten many <sup>good</sup> comments and compliments from Customers. ~~Walmart~~ I am a well deserved associate and basically did not deserve what has happened to me, through this whole journey I have been very ~~strong~~ brave, I am only fighting for my dignity. My anniversary is March 20th and I am hoping to be back to work, doing a Biggen and better job as a leader.

10 JAN 25 PM 3:36

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P.S.

Sorry about the picture I was  
in a lot of pain trying to answer  
these questions. I hope that you  
can read them clearly.

Sincerely

Gracey Farris

1-25-2010

FLORIDA COMMISSION ON  
HUMAN RELATIONS  
10 JAN 25 16

#1 In asking that I be reinstated  
my job

#2 Reinstated my backpay from being  
suspended from June 10, 2009

#3 Transfer to another location, any type  
of management position where I can  
help customers

#4 A formal or written apology for  
all the pain and agony this has  
caused, not just me but my  
Daughter and most of all my mother  
who has been there from day 1. And  
knows the impact this has made on  
my life.

Sincerely,  
Mr. Tracy D. Francis

1-25-2010