

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MELVIN BUTLER, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-1967  
 )  
 BR WILLIAMS TRUCKING, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on September 8, 2009, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: No appearance

For Respondent: Shaina Brenner, Esquire  
Allen Norton & Blue, P.A.  
906 North Monroe Street  
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

Whether the Petitioner was the victim of employment-related discrimination based on his race, or in retaliation for participation in activity protected by Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

This cause arose on October 17, 2008, when the Petitioner, Melvin Butler, filed a Complaint of Discrimination with the Florida Commission on Human Relations (Commission) alleging that the Respondent, BR Williams Trucking, discriminated against him on the basis of race, and in retaliation for his participation in an activity protected by Chapter 760, Florida Statutes. The Petitioner alleged that he suffered an adverse employment action by being terminated from employment and by being denied the opportunity to be re-assigned to another job. The allegations were investigated by the Commission, and a finding of "No Cause" was entered on March 25, 2009.

The Petitioner filed a Petition for Relief on April 14, 2009, reiterating the charges which had been filed with the Commission. The matter was then duly transmitted to the Division of Administrative Hearings and the undersigned Administrative Law Judge.

The case was first set for hearing on June 1, 2009. It was continued at the request of the Petitioner, based on his purported need to attend a funeral. The case was thereafter set for hearing on September 8, 2009.

The Respondent appeared at the hearing and was prepared to present its witnesses and evidence. The Petitioner never

appeared, even after the Respondent, its counsel and witnesses, as well as the Judge, waited approximately one-half hour for the Petitioner to arrive. His absence was never explained.

The Notice of Hearing was served on the Petitioner at his last-known address of record. There has been no communication, verbal or written, from the Petitioner to the undersigned or to counsel for the Respondent since this case was noticed for hearing this second time. After waiting for the above-referenced period of time and because the Petitioner, with the burden of proof, failed to appear and prosecute his claim, the Respondent was not required to proceed with its case and the hearing was adjourned.

#### FINDINGS OF FACT

1. This matter arose on April 14, 2009, when the Petition for Relief herein was filed with the Commission. The dispute was forwarded to the undersigned Administrative Law Judge at the Division of Administrative Hearings and set for hearing on June 1, 2009. The case was continued at the request of the Petitioner, allegedly because of the need to attend a funeral, and was re-noticed for hearing for September 8, 2009. No further communication from the Petitioner, verbal or written, was thereafter filed or received by the office of the undersigned.

2. The cause came on for hearing, as noticed, on September 8, 2009. The Respondent appeared at the hearing, through counsel, and was prepared to proceed with its witnesses and evidence.

3. The Petitioner never made an appearance, even after the Respondent, its witnesses, and the undersigned waited for approximately one-half hour. There has been no communication from the Petitioner, with the Respondent or with the office of the undersigned, or by any filing from the Petitioner, which would provide any justification for the failure to appear and prosecute his claim. The Notice of Hearing was served on the Petitioner at his last-known address of record. Because the Petitioner produced no proof at all concerning his discrimination claim, no facts can be found regarding the merits of the action. The Respondent does not have the burden of proof in this case and was therefore not required to present its evidence, although it was prepared to do so. In view of this circumstance, the hearing was adjourned.

4. The Respondent seeks attorney fees and costs, by a motion filed post-hearing (and Ore Tenus). The basis for the motion is that the Petitioner participated in this proceeding for an improper purpose. § 120.595, Fla. Stat. (2009). There has been no response to the motion.

5. The Respondent alleges in the motion that this case was set for hearing on June 3, 2009, and continued based on the Petitioner's unsubstantiated need to attend a funeral. The Order granting the continuance required the parties to confer about new hearing dates within a time certain. The Petitioner, however, did not thereafter communicate or cooperate with the Respondent's counsel.

6. The undersigned noticed the case for hearing for September 8, 2009. No motion for continuance, or any other communication was filed by, or received from the Petitioner before the hearing was convened.

7. In the meantime, a companion case, before Judge Diane Cleavinger, Case No. 08-5374, proceeded to hearing, with a Recommended Order being entered on May 29, 2009. Judge Cleavinger found that the claim of discrimination, based on race and on alleged retaliation for engaging in "protected activity," had not been established. Although that case involved a differently named Respondent (the present Respondent's staffing service), the facts and the claimed discriminatory conduct are the same. The Recommended Order was adopted in the Commission's Final Order Dismissing Petition for Relief from an Unlawful Employment Practice, entered on August 18, 2009. The Petitioner was served with a copy of that Recommended Order and Final Order, and thus is charged with knowledge that the same factual

claim of discrimination had not been proven and had been dismissed, well before the September 8th hearing in this case.

8. The Petitioner, however, never communicated with counsel for the Respondent, nor the Division of Administrative Hearings in spite of the fact that a Final Order had been entered to the effect that BR Williams Trucking had not discriminated or retaliated.

9. The Respondent thus prepared for that hearing and attended prepared to present its case. As noted above, the Petitioner failed to appear and failed to respond to the subject motion. The allegations of the motion are accepted as true.

#### CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding, pursuant to Sections 120.569 and 120.57, Florida Statutes (2009).

11. The Respondent urges that a Recommended Order of Dismissal be entered, based on the Petitioner's failure to appear at the hearing and prosecute his claim. The Petitioner is the party with the burden of proof. The Petitioner has failed to appear and present evidence, and has made no explanation concerning his failure to appear. The record reflects that the Petitioner received proper notice of the

hearing. In light of the circumstances found herein, dismissal is warranted.

12. The Motion for Attorney's Fees and Costs is unopposed. Good cause has been established to support a finding that, under the established circumstances, the Petitioner has participated in this proceeding for an improper purpose, with a claim he should have been aware was without merit, after the entry of the Final Order referenced above. § 120.595(1)(c) and (e)1., Fla. Stat. (2009). The Respondent is the prevailing party. The motion is granted, with the Respondent being entitled to an award of attorney's fees and costs attributable to preparation for the September 8, 2009, hearing, attendance at the hearing, and representation of the Respondent's interest in this matter during and after the hearing.

13. The Respondent will provide evidence of the amount of such fees and costs, which may be by supporting affidavits, within ten days of the date hereof. Jurisdiction will be retained for entry of an award of fees and costs by separate Order.

#### RECOMMENDATION

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is,

RECOMMENDED that a Final Order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief

with prejudice. Jurisdiction is retained for entry of an Order awarding attorney's fees and costs, upon the Respondent's submittal of supporting documents, by affidavit, within ten days of the date hereof.

DONE AND ENTERED this 29th day of October, 2009, in Tallahassee, Leon County, Florida.



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P. MICHAEL RUFF  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of October, 2009.

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.