

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MARIE CLAIRE PEREZ, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-3478  
 )  
 MARKET SALAMANDER, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER OF DISMISSAL

Pursuant to notice a formal hearing was conducted in this case on August 17, 2009, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings. The parties appeared via video teleconference from West Palm Beach, Florida.

APPEARANCES

For Petitioner: Marie Claire Perez, pro se  
517 Twenty-Ninth Street  
West Palm Beach, Florida 33407

For Respondent: Mark Levitt, Esquire  
Allen, Norton & Blue  
1477 West Fairbanks Avenue, Suite 100  
Winter Park, Florida 32789

STATEMENT OF THE ISSUE

The issue in this case is whether the Petitioner timely filed a complaint of discrimination in accordance with the provisions of Chapter 760, Florida Statutes (2009).

PRELIMINARY STATEMENT

On June 24, 2009, the Florida Commission on Human Relations transmitted to the Division of Administrative Hearings a Petition for Relief filed by the Petitioner, Marie Claire Perez (Petitioner). The petition alleged that the Respondent, Market Salamander (Respondent), had violated provisions of Florida law related to unlawful employment practices.

The case was scheduled for formal hearing for August 17, 2009, and notice of the hearing was provided to all parties at their addresses of record.

At the hearing, the Petitioner testified in her own behalf and late-filed an exhibit (marked as Petitioner's Exhibit 1) that has been considered in evidence. The Respondent did not provide evidence in connection with the case.

A transcript was not be filed in this cause. Both parties timely filed Proposed Recommended Orders that have been fully considered in the preparation of this Recommended Order of Dismissal.

FINDINGS OF FACT

1. Prior to November 28, 2007, the Petitioner was employed by the Respondent.

2. On November 26, 2008, the Petitioner sent a Technical Assistance Questionnaire (TAQ) to the Florida Commission on Human Relations (FCHR). The TAQ was submitted via facsimile

transmission and was not signed. The Petitioner believed she was complying with the directives of the FCHR website and that follow-up assistance (from the FCHR) would not be required. The Petitioner did not understand that a signature was required, notwithstanding the place for same (along with a date) on page 2 of the TAQ.

3. The Petitioner maintains that the FCHR website instructions were unclear and that she erroneously relied on the directions that did not specify she was required to sign the TAQ.

4. The Petitioner filed a signed Charge of Discrimination with the FCHR on January 14, 2009.

5. On February 5, 2009, the Petitioner received a "Notice of Receipt of Complaint" from the FCHR. At the same time, a copy of the complaint was furnished to the Respondent, who was then, presumably, put on notice of the Petitioner's charge.

6. The FCHR did not advise the Petitioner that the TAQ had to be signed.

7. In the course of its review of the instant charge, the FCHR entered a determination of "untimely." Per the FCHR's assessment, the charge of discrimination was filed more than 365 days from the last incident or act of discrimination.

8. Thereafter, the Petitioner elected to file a Petition for Relief to challenge the determination and to seek relief

against the Respondent. The Commission then forwarded the matter to the Division of Administrative Hearings for formal proceedings.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

10. Under Section 760.11(1), Florida Statutes, any person aggrieved by an unlawful employment practice may file a complaint with the FCHR within 365 days after the alleged violation. Failure to do so bars the claim. See Greene v. Seminole Elec. Co-op, Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997); St. Petersburg Motor Club v. Cook, 567 So. 2d 488 (Fla. 2nd DCA 1990).

11. The period for filing the claim starts from the date of the last act of alleged discrimination (in this case the date of termination). See Maggio v. Fla. Department of Labor and Employment Security, 899 So. 2d 1074 (Fla. 2005). Therefore, pursuant to Florida law the Petitioner was required to file her complaint within 365 days of November 28, 2007. She did not.

12. To extend the time for filing by "equitable tolling," the Petitioner would be required to establish the acts or circumstances enumerated in Section 95.051, Florida Statutes (2009). That provision states:

95.051 When limitations tolled.--

(1) The running of the time under any statute of limitations except ss. 95.281, 95.35, and 95.36 is tolled by:

(a) Absence from the state of the person to be sued.

(b) Use by the person to be sued of a false name that is unknown to the person entitled to sue so that process cannot be served on the person to be sued.

(c) Concealment in the state of the person to be sued so that process cannot be served on him or her.

(d) The adjudicated incapacity, before the cause of action accrued, of the person entitled to sue. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action.

(e) Voluntary payments by the alleged father of the child in paternity actions during the time of the payments.

(f) The payment of any part of the principal or interest of any obligation or liability founded on a written instrument.

(g) The pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action.

(h) The minority or previously adjudicated incapacity of the person entitled to sue during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to the minor or incapacitated person, or is adjudicated to be incapacitated to sue; except with respect to the statute of limitations for a claim for medical malpractice as provided in s. 95.11. In any event, the action must be

begun within 7 years after the act, event, or occurrence giving rise to the cause of action.

Paragraphs (a)-(c) shall not apply if service of process or service by publication can be made in a manner sufficient to confer jurisdiction to grant the relief sought. This section shall not be construed to limit the ability of any person to initiate an action within 30 days of the lifting of an automatic stay issued in a bankruptcy action as is provided in 11 U.S.C. s. 108(c).

(2) No disability or other reason shall toll the running of any statute of limitations except those specified in this section, s. 95.091, the Florida Probate Code, or the Florida Guardianship Law.

None of the foregoing circumstances apply to this case.

13. Finally, the Petitioner argues that the FCHR's website directions were unclear and that had she been advised to sign the TAQ, it could have been treated as a timely filed complaint. The acts or omissions of the FCHR do not toll the limitation period. The FCHR is not a party to the complaint. The FCHR serves as an investigatory and conciliatory third party to review the claims of discrimination filed by outside parties against employers. It has no "stake" in the outcome of the matter other than to fulfill its statutory duties. Where the parties cannot reach agreement and a formal administrative hearing is necessary, the FCHR refers the matter to the Division of Administrative Hearings to conduct the hearing pursuant to Sections 120.569 and 120.57, Florida Statutes (2009). In this

case, the factual question of whether a complaint was timely filed is the sole issue for determination.

14. It is concluded that the unsigned TAQ filed by the Petitioner on November 26, 2008, did not qualify as a "complaint" under the rules and statutes that govern this proceeding. Florida Administrative Code Rule 60Y-5.001 provides:

(1) Who May File. A complaint may be filed by any person aggrieved by an unlawful employment practice. A complaint may also be filed by the Attorney General, a Commissioner, or the Commission. When a complaint is filed by a Commissioner, that Commissioner is the complainant, and shall not participate as a Commissioner in any subsequent proceeding upon that complaint.

(2) Time for Filing. A complaint may be filed at any time within 365 days of the occurrence of the alleged unlawful employment practice. If the alleged unlawful employment practice is of a continuing nature, the date of the occurrence may be any date subsequent to the commencement of the unlawful employment practice up to and including the date on which it shall have ceased.

(3) Place and Date of Filing. A complaint may be filed at the office of the Commission. The date of filing shall be the date of actual receipt of the complaint by the Clerk or other agent of the Commission. Any document received by the Clerk or other agent of the Commission after 5:00 p.m. (Eastern Time) shall be filed as of 8:00 a.m. on the next regular business day.

(4) Relation Back of Certain Complaints. A complaint which would not otherwise be timely may be filed if it:

(a) States that another complaint naming the same respondent is properly before the Commission and identifies that other complaint, and

(b) Alleges the same or additional facts which describe an unlawful employment practice related to or growing out of the subject matter of the other, identified complaint, and

(c) Would have been timely if filed at the time of, or other time subsequent to, the filing of the other, identified complaint. A complaint under this subsection may be filed by a new complainant and shall relate back to the date the other, identified complaint was first received.

(5) Form. The complaint must be in writing and shall be signed by the complainant. The complaint shall be verified.

(6) Contents.

(a) The complaint should contain the following information:

1. The name, address and telephone number of the person filing the complaint;

2. The name, address and telephone number of the respondent;

3. A clear and concise statement of the facts, including pertinent dates, constituting the unlawful employment practice;

4. If known, the approximate number of employees of a respondent employer;

5. If known, a statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a Federal, State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provision of paragraph (a) of this subsection, a



complaint is sufficient if it is in writing, signed by the Complainant, verified, and is sufficiently precise to identify the parties and to describe generally the action or practice complained of.

(7) Amendments.

(a) A complaint may be reasonably and fairly amended within 60 days after filing and, thereafter, for good cause with the consent of the Executive Director.

(b) A complaint may be amended to cure technical defects, or omissions, including verification, or to clarify and amplify allegations made therein. Such amendments and amendments which describe an additional unlawful employment practice related to or growing out of the subject matter of the original complaint will relate back to the date the complaint was first received.

(c) An amendment adding or changing a respondent will relate back to the date the complaint was first received if, within the period provided by subsection (2), the new respondent (i) has received such notice of the filing of the complaint as is sufficient to avoid prejudice in a defense on the merits, and (ii) knew or should have known that, but for a mistake concerning identity of the proper respondent, the complaint would have been filed against the new respondent.

(8) Withdrawal. A complaint may be withdrawn by a complainant at any time; however, following the issuance of a Notice of Determination, withdrawal may be made only with the consent of the Executive Director.

(9) Notice to Respondent. When it is determined that a complaint is complete and has been timely filed. The Executive Director shall cause notice of the filing and a copy of the complaint to be served upon the respondent. Notice shall be served within 5 days of the date of filing. An

amendment likewise shall be served upon the respondent.

(10) Maintenance of Records. Once a complaint has been served on a respondent, the respondent shall preserve all records and other evidence which may pertain to the complaint until the matter has been finally determined. (Emphasis Added.)

15. The Petitioner has the burden of proving that she timely filed a complaint in this cause. See Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996). She has failed to meet that burden. Her complaint was filed more than 365 days from the last act of alleged discrimination. Accordingly, this case should be dismissed as untimely filed.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Commission on Human Relations enter a Final Order dismissing the Petitioner's claim of discrimination.

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



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J. D. PARRISH  
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 September, 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.