

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

MICHAEL HOGG,

Petitioner,

v.

ARENA SPORTS CAFE,

Respondent.

2010 MAY 26 A 11:06 EEOC Case No. 510200902826

DIVISION OF
ADMINISTRATIVE
HEARINGS

FCHR Case No. 2009-01712

DOAH Case No. 09-5221

FCHR Order No. 10-049

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

Preliminary Matters

Petitioner Michael Hogg 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 Arena Sports Cafe committed an unlawful employment practice on the bases of Petitioner's race (African American) and retaliation by terminating Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on August 17, 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 Deland, Florida, on February 2, 2010, before Administrative Law Judge Barbara J. Staros.

Judge Staros issued a Recommended Order of dismissal, dated March 31, 2010.

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

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 note that in determining that a prima facie case of race discrimination had not been established by Petitioner the Administrative Law Judge concluded that Petitioner did not establish that he was qualified for the position in question. Recommended Order, ¶ 27.

A Commission panel has noted, "For the purposes of establishing a prima facie case of discrimination, the Commission has accepted a showing that Petitioner is minimally qualified for the position." Potasek v. The Florida State University, 18 F.A.L.R. 1952, at 1953 (FCHR 1995). Another Commission panel has indicated, "Petitioners being only minimally qualified...does not mean they failed to establish a prima facie case. Only a total lack of qualification would prevent the establishment of a prima facie case." Little, et al. v. Monsanto Company, 15 F.A.L.R. 621, at 622 (FCHR 1992). In a "termination" case similar to the instant case, a Commission panel concluded that for the purpose of establishing a prima facie case of discrimination Petitioner demonstrated that "she was at least minimally qualified for the position in question by virtue of having been hired for the position." Kesselman v. Department of Transportation, 20 F.A.L.R. 166, at 169 (FCHR 1996); accord, Jones v. Spherion Staffing, FCHR Order No. 09-056 (July 1, 2009), Hamilton v. The Talking Phone Book, FCHR Order No. 08-002 (January 14, 2008), Ricks v. City of Gainesville, FCHR Order No. 05-018 (February 22, 2005), and Brown v. Volusia County School Board, FCHR Order No. 04-160 (December 23, 2004).

We further note that, while based on the foregoing we would conclude that Petitioner in the instant case was "qualified" for the position in question for purposes of establishing a prima facie case, the conclusion of whether Petitioner was qualified for the position in question in the instant case is not dispositive of the case since the Administrative Law Judge further concluded that even if a prima facie case had been established, Respondent articulated a legitimate, nondiscriminatory reason for terminating Petitioner, and there was no showing that this reason was a pretext for unlawful discrimination. Recommended Order, ¶ 28 and ¶ 29.

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

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled "Exceptions to the Recommended Order." The document was filed with the Division of Administrative Hearings on April 15, 2010.

While the exceptions document was filed with the Division of Administrative Hearings instead of the Commission, the document was timely filed, and the Commission will consider the document even though it was filed in the wrong forum. Accord, generally, Lane v. Terry Laboratories, Inc., FCHR Order No. 08-022 (April 14, 2008), and cases cited therein.

Petitioner's exceptions document appears to present three exceptions: (1) Petitioner excepts to the finding that a prima facie case of race discrimination was not established; (2) Petitioner excepts to the finding that Respondent articulated a legitimate, nondiscriminatory reason for terminating Petitioner; and (3) Petitioner excepts to the finding that a prima facie case of unlawful retaliation was not established. All are determinations based on the facts found by the Administrative Law Judge.

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, and noting our comments in the Conclusions of Law section of this Order regarding the establishment of a prima facie case of race discrimination, Petitioner's exceptions are rejected.

Dismissal

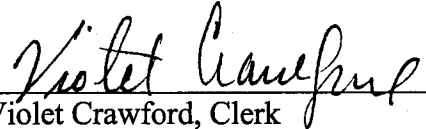
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 25th day of May, 2010.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Gilbert M. Singer; and
Commissioner Darcell Streeter

Filed this 25th day of May, 2010,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
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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:

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c/o David Glasser, Esq.
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116 Orange Avenue
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Arena Sports Cafe
c/o Steven deLaroche, Esq.
1005 South Ridgewood Avenue
Daytona Beach, FL 32114

Barbara J. Staros, 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 25th day of May, 2010.

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