

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

DEREK A. ROBINSON,

EEOC Case No. 15D200900512

Petitioner,

FCHR Case No. 2009-01683

v.

DOAH Case No. 09-6377

GULF COAST COMMUNITY COLLEGE,

FCHR Order No. 12-007

Respondent.

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

Preliminary Matters

Petitioner Derek A. Robinson filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2008), alleging that Respondent Gulf Coast Community College committed unlawful employment practices on the basis of Petitioner's race (African American) in the manner in which he was treated by a supervisor and by creating a hostile work environment and on the basis of retaliation by changing Petitioner's work schedule and ultimately terminating Petitioner for complaining about the alleged disparate treatment.

The allegations set forth in the complaint were investigated, and, on October 12, 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 Panama City, Florida, on March 30, August 18, and August 19, 2011, before Administrative Law Judge James H. Peterson, III.

Judge Peterson issued a Recommended Order of dismissal, dated December 6, 2011.

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, except the finding of fact at Recommended Order, ¶ 83, as discussed in the Exceptions section of this Order, below.

We adopt the Administrative Law Judge's findings of fact, with that limitation.

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.

The Administrative Law Judge indicated that for Petitioner to establish a prima facie case of race discrimination based on disparate treatment, it must be shown that: "(1) he belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified to do the job." Recommended Order, ¶ 117.

With regard to the first element of the test cited above, it should be noted that people of all races are entitled to establish discrimination claims under the Florida Civil Rights Act of 1992, not just those belonging to a "racial minority."

The Commission has adopted conclusions of law that reflect that to establish a prima facie case of discrimination one of the elements a Petitioner must demonstrate is "that he belongs to a group protected by the statute..." See Martinez v. Orange County Fleet Manager, 21 F.A.L.R. 163, at 164 (FCHR 1997), citing Arnold v. Department of Health and Rehabilitative Services, 16 F.A.L.R. 576, at 582 (FCHR 1993),...or that "she belongs to a protected group." Martinez v. Boca Diner, FCHR Order No. 04-019 (February 25, 2004), adopting conclusions of law set out in the Recommended Order of DOAH Case No. 03-1277, dated October 31, 2003.

It would seem that these would be more legally correct statements of the first element required to demonstrate a prima facie case of discrimination than that used by the Administrative Law Judge, and we make this modification to the first element of the test set out by the Administrative Law Judge. Accord, Cesarin v. Dillard's, Inc., FCHR Order No. 03-037 (April 29, 2003); Saint Fleur v. Superior Protection, FCHR Order No. 03-072 (November 21, 2003); Bamawo v. Department of Corrections, FCHR Order No. 04-120 (September 22, 2004); Warren v. Department of Revenue, FCHR Order No. 04-152 (December 7, 2004); Assily v. Memorial Hospital of Tampa, FCHR Order No. 05-059 (May 31, 2005); Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005); McGee v. AIG Marketing, Inc., FCHR Order No. 06-023 (March 7, 2006); Mays v. Progress Energy Corporation, FCHR Order No. 06-024 (March 7, 2006); Jones v. Suwannee County School Board, FCHR Order No. 06-088 (September 11, 2006); Cartwright v. Florida Department of Revenue, FCHR Order No. 07-018 (March 16, 2007); Pate v. Homes of Merit, FCHR Order No. 08-015 (February 8, 2008); and Alexander, et al. v. Solid Wall Systems, FCHR Order No. 08-024 (April 14, 2008); Modley v. The Fresh Market, FCHR Order No. 08-052 (July 29, 2008); McTaggart v. Pensacola Bay Transportation Company, FCHR Order No. 10-063 (August 10, 2010); and Rogers v. Calder Race Course, Inc., FCHR Order No. 11-025 (March 17, 2011), all in which similar modifications to the conclusions of law were made by Commission panels.

In modifying this conclusion of law of the Administrative Law Judge, we conclude: (1) that the conclusion of law being modified is a conclusion of law over which the Commission has substantive jurisdiction, namely a conclusion of law stating what must be demonstrated to establish a prima facie case of unlawful discrimination under the Florida Civil Rights Act of 1992; (2) that the reason the modification 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 modification 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 (2011).

With the indicated correction, 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 "Petitioner's Exceptions to Recommended Order," received by the Commission on or about December 21, 2011.

Respondent subsequently filed a response to Petitioner's exceptions.

Petitioner's exceptions document contains 23 numbered paragraphs excepting to the following paragraphs of the Recommended Order: 25, 27 and 28, 30 and 35, 38, 52 and 54, 70, 83, 90, 108-111 and 115, 116-128, 129-135, and Endnote 3. In addition, paragraph 10 of the exceptions document takes exception to the entire Recommended Order because the Recommended Order contains no cites to the record of the case.

With regard to the specific Recommended Order paragraphs excepted to, Petitioner's exceptions take issue with facts found (90), take issue with inferences drawn from the evidence presented (25, 27 and 28, 30 and 35, 38, 70, 90, 108-111 and 115, 116-128, 129-135, Endnote 3), take issue with credibility determinations of the Administrative Law Judge (52 and 54) and / or contain explanation or argument as to the significance or correctness of the fact found (38, 70) [references are to Recommended Order paragraph numbers to which exception was made].

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).

Noting that we have above found the facts as found by the Administrative Law Judge to be supported by competent substantial evidence, except the finding of fact set out at Recommended Order, ¶ 83, as discussed below, and the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter, Petitioner's above-described exceptions are rejected.

Paragraph 17 of the exceptions document excepts to the finding of fact at Recommended Order, ¶ 83, that "Latoya 'Red' McNair testified that he was being monitored like other custodians but did not believe it was because of race." In our view, there is no competent substantial evidence in the record to support this finding. Paragraph 41 of "Respondent's Post-Hearing Submittal" proposes a finding of fact that "Latoya 'Red' McNair testified that he was being monitored like other custodians but did not believe this was because of race," citing page 212 of Volume 1 of the hearing transcript. A review of Mr. McNair's testimony, including the page cited by Respondent, above, would suggest to us that a more accurate finding of fact would be that "Latoya 'Red' McNair did not testify that his monitoring was based on race."

We accept Petitioner's exception to Recommended Order, ¶ 83, although this in no way affects the outcome of the case, and we disagree with Petitioner's assertion in making the exception that "[t]his is a substantial and significant mistake of facts and evidence which calls into question the basis of the Proposed Recommended Order."

Finally, as indicated above, paragraph 10 of the exceptions document takes exception to the entire Recommended Order because the Recommended Order contains no cites to the record of the case.

In our view, the form of the Recommended Order conforms with the requirements of Section 120.57(1)(k), Florida Statutes (2011) and Fla. Admin. Code R. 28-106.216(1).

Petitioner's exception as set out in exceptions paragraph 10 is rejected.

Dismissal

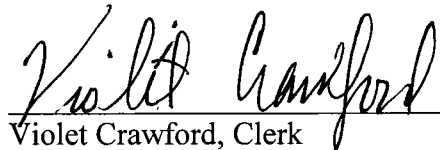
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 21st day of February, 2012.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Onelia Fajardo; and
Commissioner Michell Long

Filed this 21st day of February, 2012,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
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:

Derek A. Robinson
c/o Cecile M. Scoon, Esq.
Peters & Scoon
25 East Eighth Street
Panama City, FL 32401

Gulf Coast Community College
c/o Robert E. Larkin, III, Esq.
c/o Jason Vail, Esq.
Allen, Norton & Blue, P.A.
906 North Monroe Street
Tallahassee, FL 32303

James H. Peterson, III, 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 21st day of February, 2012.

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