

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED
2010 OCT 27 A 11:57

JANICE JENNINGS,

Petitioner,

v.

SUPERIOR OPTICAL SHOP,

Respondent.

EEOC Case No. 15D20100053

FCHR Case No. 2009-02894

DOAH Case No. 10-0958

FCHR Order No. 10-077

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

Preliminary Matters

Petitioner Janice Jennings filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2009), alleging that Respondent Superior Optical Shop committed unlawful employment practices on the basis of Petitioner's race (African American) by harassing Petitioner, subjecting Petitioner to different terms and conditions of employment, and denying Petitioner proper training. In addition, Petitioner alleged Respondent unlawfully retaliated against Petitioner by terminating Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on January 18, 2010, 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 Lake City, Florida, on May 24, 2010, before Administrative Law Judge James H. Peterson, III.

Judge Peterson issued a Recommended Order of dismissal, dated July 29, 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

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

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, among other things, that Petitioner did not establish that she was qualified for the position in question. Recommended Order, ¶ 37.

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, Hogg v. Arena Sports Cafe, FCHR Order No. 10-049 (May 25, 2010), 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. Findings in the Recommended Order support the conclusion that, even if a prima facie case of discrimination had been established, Respondent had a legitimate nondiscriminatory reason for its actions toward Petitioner, namely poor work performance (see Recommended Order, ¶ 16, ¶ 17, ¶ 18, and ¶ 25), and findings in the Recommended Order further support the conclusion that there was no showing that this reason was a pretext for unlawful discrimination (see Recommended Order, ¶ 27).

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, "Letter of Exceptions," received by the Commission on August 13, 2010.

There is no indication on this 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 August 24, 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 (2009); 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 in all regards.

Petitioner's exceptions document contains 24 numbered exceptions paragraphs. These numbered paragraphs take issue with the facts found (5, 7, 11), contain argument regarding Petitioner's view of the facts as Petitioner perceives they should have been found (3, 6, 9, 10, 12, 13, 14, 19, 20, 21, 22, 23, 24), or contain no exception at all (1, 2, 4, 8, 15, 16, 17).

With regard to Petitioner's exceptions to facts found and inferences drawn from the evidence presented, 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).

Paragraph 18 of Petitioner's exceptions document appears to except to the Administrative Law Judge's conclusion that Petitioner failed to establish a prima facie case of discrimination. We have discussed the issue of the existence of a prima facie case of discrimination in this case in the "Conclusions of Law" section of this Order, above.

Finally, several attachments were included with Petitioner's exceptions document that were not admitted into evidence at the hearing. The Commission has declined to accept "exceptions" which seek to introduce evidence into the record that was not presented at the hearing before the Administrative Law Judge. See, e.g., Bobo v. First Student, Inc., FCHR Order No. 09-032 (April 9, 2009), and Hurtado v. North Florida Rehab and Specialty Care, FCHR Order No. 08-047 (July 29, 2008).

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 26th day of October, 2010.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Darcell Streeter; and
Commissioner Mario M. Valle

Filed this 26th day of October, 2010,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
209 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:

Janice Jennings
c/o John F. Mayo, Qualified Representative
Post Office Box 912
Lake City, FL 32056

Superior Optical Shop
c/o M. Todd Hingson, Esq.
Avera & Smith, LLP
248 North Marion Avenue, Suite 102
Lake City, FL 32055

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 26th day of October, 2010.

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