

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

PHILLIP MCTAGGART, 2010 AUG 11 A 11: 06 EEOC Case No. 15D200900822

Petitioner,

DIVISION OF
ADMINISTRATIVE
HEARINGS

FCHR Case No. 2009-02519

v.

DOAH Case No. 10-1182

PENSACOLA BAY TRANSPORTATION
COMPANY,

FCHR Order No. 10-063

Respondent.

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

Preliminary Matters

Petitioner Phillip McTaggart 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 Pensacola Bay Transportation Company committed an unlawful employment practice on the basis of Petitioner's race (white) by failing to hire Petitioner for the position of Driver.

The allegations set forth in the complaint were investigated, and, on January 29, 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 Pensacola, Florida, on May 11, 2010, before Administrative Law Judge Robert S. Cohen.

Judge Cohen issued a Recommended Order of dismissal, dated June 1, 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.

The Administrative Law Judge indicated that for Petitioner to establish a prima facie case of discrimination in this case, 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, ¶ 24.

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);

and Modley v. The Fresh Market, FCHR Order No. 08-052 (July 29, 2008), all in which similar modifications to the conclusions of law were made by Commission panels.

In addition, we note that the Administrative Law Judge concluded that Petitioner was pursuing a claim of "reverse discrimination." Recommended Order, ¶ 26.

In a case in which an Administrative Law Judge made several references in the Recommended Order describing a Petitioner's race discrimination claim as a claim of "reverse discrimination," a Commission panel stated the following: "We note that a Commission panel has stated, 'In a case in which a claim of race discrimination brought by an individual who was white was categorized as a 'reverse discrimination' case by an Administrative Law Judge, a Commission panel explained that the Florida Civil Rights Act of 1992, 'does not recognize the concept of 'reverse discrimination.' The law simply prohibits discrimination in employment on the basis of race and color (among other bases)...a race discrimination case brought by a person who is white is to be analyzed the same way as a race discrimination case brought by a person who is not white.' Bert v. Department of Education, 20 F.A.L.R. 155, at 157 (FCHR 1995). Serwas v. Volusia County Government, 23 F.A.L.R. 4085, at 4086 (FCHR 2001). With this explanatory comment regarding the concept of 'reverse' discrimination, we clarify/correct the indicated conclusions of law." St. Hillaire v. Department of Corrections, FCHR Order No. 04-055 (June 2, 2004). Accord, generally, Hannah v. Parkland Rehabilitation and Nursing Center, FCHR Order No. 09-002 (January 12, 2009).

We apply this comment to the Administrative Law Judge's conclusions of law set out at Recommended Order, ¶ 26.

In modifying these conclusions of law of the Administrative Law Judge, we conclude: (1) that the conclusions of law being modified are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions 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 modifications are being made by the Commission are that the conclusions of law as stated run contrary to previous Commission decisions on the issue; and (3) that in making these modifications the conclusions of law being substituted are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(1), Florida Statutes (2009).

With the indicated corrections, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

Neither of the parties filed exceptions to the Administrative Law Judge's Recommended Order.

Dismissal

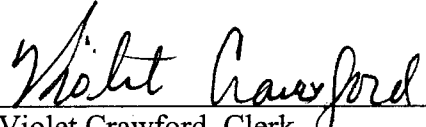
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 10th day of August, 2010.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Michael G. Keller

Filed this 10th day of August, 2010,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
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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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Robert S. Cohen, 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 10th day of August, 2010.

By: 
Clerk of the Commission
Florida Commission on Human Relations