STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

DR. PHILLIP ST. LOUIS,

Petitioner,

v.

FLORIDA PHYSICIAN MEDICAL GROUP,

Respondent.
_____/

EEOC Case No. 15D201000350

FCHR Case No. 2010-01617

DOAH Case No. 10-9141

FCHR Order No. 11-078

FINAL ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

Petitioner Dr. Phillip St. Louis 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 Florida Physician Medical Group committed an unlawful employment practice on the bases of Petitioner's race (Black) and National Origin (Trinidad) by failing to hire Petitioner.

The allegations set forth in the complaint were investigated, and, on August 27, 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 Orlando, Florida, on May 4 and 5, 2011, before Administrative Law Judge J. D. Parrish.

Judge Parrish issued a Recommended Order of dismissal, dated August 3, 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.

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 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 "Memorandum of Law – Exceptions to Recommended Order." The document was filed with the Division of Administrative Hearings on August 15, 2011.

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, Garcia v. Heart of Florida Medical Center, FCHR Order No. 10-061 (August 10, 2010) and Lane v. Terry Laboratories, Inc., FCHR Order No. 08-022 (April 14, 2008), and cases cited therein.

Respondent subsequently filed "Respondent's Response to Petitioner's Exceptions to Recommended Order."

Petitioner's exceptions document contains 14 numbered exceptions paragraphs. In each instance, except exceptions paragraph 11, the exceptions paragraphs take issue with facts found (1, 4, 5, 12, 13), suggest facts not found (8), take issue with inferences drawn from the evidence presented (1, 2, 3, 4, 5, 7), and / or contain explanation or argument as to the significance or correctness of the fact found (6, 8, 9, 10, 12, 13, 14).

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 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.

Exceptions paragraph 11 argues that the Administrative Law Judge "...failed to delineate any standard for [proof of the case by] indirect or circumstantial evidence."

In our view, the conclusions of law set out at Recommended Order, ¶ 31 through ¶ 35, adequately address the issue that proof by circumstantial evidence was not established in this case.

Petitioner's exception as set out in exceptions paragraph 11 is rejected.

Dismissal

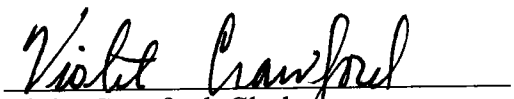
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 6th day of October, 2011.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Mario M. Valle, Panel Chairperson;
Commissioner Watson Haynes, II; and
Commissioner Lizzette Romano

Filed this 6th day of October, 2011,
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:

Dr. Phillip St. Louis
c/o Jerry Girley, Esq.
The Girley Law Firm, P.A.
125 East Marks Street
Orlando, FL 32803

Florida Physician Medical Group
c/o Alan M. Gerlach, Esq.
Adventist Health System – Legal Services
111 North Orlando Avenue
Winter Park, FL 32789-3675

Florida Physician Medical Group
c/o Mark H. Jamieson, Esq.
Moran Kidd Lyons Johnson & Berkson, P.A.
111 North Orange Avenue, Suite 1200
Orlando, FL 32801-2361

J. D. Parrish, 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 6th day of October, 2011.

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. PHILLIP ST. LOUIS
Petitioner

DOAH Case No: 10-9141

FLORIDA PHYSICIAN MEDICAL GROUP,
Respondent
_____/

MEMORANDUM OF LAW

EXCEPTIONS TO RECOMMENDED ORDER

Dear Commission:

The purpose of this correspondence is to acknowledge receipt of the Administrative Law Judge's recommended order and to list the Petitioner's exception.

They are as follows:

FACTUAL AND CONCLUSIONS OF LAW EXCEPTIONS

1. Paragraph 4 of the proposed order asserts "approval for medical malpractice coverage by AHS through the Risk Management Department was a prerequisite to employment with Respondent." The evidence does not support this assertion. Doctors Lu, Baker and Swain were never approved by Risk Management Department but are employed by the Respondent. (T. 368, 380).
2. In paragraph 11, the Administrative Law Judge, hereafter referred to as the ALJ, states that most

Filed August 15, 2011 3:00 PM Division of Administrative Hearings

physicians covered by the Trust do not have any malpractice claims, and for those that do have claims, the vast majority have had only one or two incidents. There was no evidence presented that substantiated this claim. The ALJ does not cite to a portion of the transcript or a particular exhibit entered into evidence that establishes this alleged finding of fact. Moreover, the vast majority of the physicians covered were not listed as comparators. Rather, the Petitioner listed five physicians as comparators all of them had three or more claims.

3. In paragraph 12, the ALJ acknowledges the subjective nature of the application process. However, in paragraphs 13-14 the ALJ ascribes weight to the various considerations given during the application process. The evidence, though, does not support this ascribing of weight to factors. The Respondent admitted that it had no matrix or checklist for evaluating candidates. (T. 206).
4. In paragraph 14, the ALJ states that none of the Petitioner's claim fell within the category of claims that do not result in any monetary award or damages to the patient. This is factually inaccurate. In the case of Y.C., there was never a lawsuit that arose

from the claim. (T. 124). Also, in the case of J.H., the Petitioner received a summary judgment order in his favor and never paid the patient. (T. 127-28).

5. In paragraph 16, the ALJ stated that no physician, regardless of specialty, with claims similar to Petitioner was hired by the Respondent. This is not accurate. The Petitioner would direct this commission's attention to the extended discussion in his PRO outlining how doctors Swain, Baker, Lu, Redan and Trumble are similar in this respect. (Pet. PRO ¶19-23, 41-55).
6. In paragraph 17, the ALJ mentioned that the Petitioner was investigated by the Florida Department of Health. This however, was not unique to the Petitioner. Both Dr. Lu and Dr. Baker had been investigated and disciplined by the Department of Health. (T. 38-43, 274-75).
7. In paragraphs 19, 20, 23 and 35 the ALJ stated that there were no comparators. In so doing, the ALJ wholly ignored the evidence presented by the Petitioner during the hearing as well as the arguments set forth in the Petitioner's Proposed Recommended Order. There was competent evidence presented during

the hearing that shows the five doctors the Petitioner listed were comparators. (Pet. PRO ¶¶19-23, 41-55).

8. In paragraph 21, the ALJ raised the issue of the Petitioner being "bare" for almost nine year. Dr. Trumble, who applied during the same time as the Petitioner, had been bare for about seven years as well. Dr. Trumble was given employment; the Petitioner was not. Furthermore, the ALJ failed to address the fact that several witnesses, who were physicians, testified that the nature of the industry was such that many physicians in the Central Florida area were electing to go bare, not because they could not obtain coverage, but because the cost of obtaining such coverage had become prohibitive. State law, with respect to insurance coverage for physicians, allows for physicians to fulfill their financial responsibilities by alternative means and the Petitioner chose to do that.

9. The ALJ raised the issue in paragraph 22 of the Petitioner having a claim for a wrong side surgery. Again, another doctor, Dr. Lu, also performed a wrong side surgery as well. Withstanding that, he was hired by the Respondent.

10. In Paragraphs 24 and 35, the ALJ differentiates between Risk Management and AHS. In reality, Risk Management, the Trust and FPMG are all part of AHS. In other words, collectively they are all pieces of the Respondent and it was the Respondent that denied the Petitioner employment.

11. In her conclusions of law, the ALJ's discussion seemingly applied a direct evidence standard in this case and foreclosed the use of indirect or circumstantial evidence. The ALJ outlined what direct evidence is, but failed to delineate any standard for indirect or circumstantial evidence. See Proposed Order ¶ 33.

12. In that paragraph the ALJ states, "Petitioner failed to present any evidence that race was a motivating factor in why he was not employed by Respondent." However, the Petitioner presented five comparators, who have similar profiles as the Petitioner, but were offered employment. Further, the Petitioner rebutted every reason the Respondent gave for denying him employment through the use of these comparators. The Petitioner highlighted how the Respondent deviated from its normal procedure when it came to Doctors Lu, Sawin and Baker concerning approval by Risk Management

and coverage by the Trust. Such evidence would qualify as circumstantial evidence. Thus, for the ALJ to state that the Petitioner presented no evidence addressing whether race was a motivating factor is factually inaccurate.

13. The ALJ also discussed in paragraph 31 that Respondent employs persons from Petitioner's race. However, discussions of these other employers are inapposite to the issue here because they are not comparators. The ALJ's should have analyzed the Respondent's treatment of the Petitioner with those outside of the Petitioner's protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n 8 (1981)

14. Finally, the ALJ's repeated assertion that no none-black person was hired instead of the Petitioner (paragraphs 31, 32) seems to completely misconstrue the nature of the Petitioner's claim. The Petitioner has not asserted that the Respondent hired a less qualified physician. Rather, the Petitioner asserted that the Respondent applied a different standard when it considered his application than that which was used to consider the applications of the comparators.

Because the ALJ made critical errors in this rendition of the essential facts, it led her to an erroneous conclusion with respect to the Petitioner's claim of unlawful discrimination.

Wherefore, the Petitioner request that this honorable commission not adopt the recommended order of the ALJ and find that unlawful discrimination, based upon gender and race did occur in this case.

CERTIFICATE OF SERVICE

I certify that a true and correct copy has been furnished to the following via U.S. postal service on this 15th day of August 2011 to: Alan Gerlach, Esquire, Legal Services Department, 111 North Orlando Avenue, Winter Park, FL 32789.

/s/ Jerry Girley
Jerry Girley
The Girley Law Firm
Florida Bar No: 35771
125 East Marks Street
Orlando, FL 32803
Tel: (407) 540-9866
Fax: (407) 540-9867
thegirleylawfirm@bellsouth.net