

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

MICHAEL B. CARTER,

EEOC Case No. 15D201000479

Petitioner,

FCHR Case No. 2010-01925

v.

DOAH Case No. 10-10513

CITY OF POMPANO,

FCHR Order No. 12-013

Respondent.

**FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE AND DENYING
RESPONDENT'S MOTION FOR ATTORNEY'S FEES AND COSTS**

Preliminary Matters

Petitioner Michael B. Carter 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 City of Pompano committed unlawful employment practices on the basis of Petitioner's race (African American) by decreasing Petitioner's responsibilities, by refusing to allow Petitioner to fill open positions, by giving Petitioner lower than warranted performance evaluations, and by other management employees refusing to communicate with Petitioner.

The allegations set forth in the complaint were investigated, and, on November 4, 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 by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida, on June 28 and 29, July 1, and October 12, 13 and 14, 2011, before Administrative Law Judge Edward T. Bauer.

Judge Bauer issued a Recommended Order of dismissal, dated January 25, 2012.

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

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

Respondent's Motion for Attorney's Fees and Costs

Respondent filed "Respondent, City of Pompano Beach's, Corrected Motion to Establish Entitlement to Attorneys' Fees and Costs," received by the Commission on or about February 9, 2012. The document acknowledges that at the time of its filing the Commission had not yet issued a final order in the case, but requests that the Commission consider the issue of Respondent's entitlement to attorney's fees and costs in this matter contemporaneously with its consideration of the Recommended Order.

The Florida Civil Rights Act of 1992 states, "In any action or proceeding under this subsection, the [C]ommission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action." Section 760.11(7), Florida Statutes (2011).

In conclusions of law adopted by a Commission panel, it has been stated that a prevailing Respondent may be awarded attorney's fees by the Commission, under the Florida Civil Rights Act of 1992, "if it is determined that an action was 'frivolous, unreasonable, or without foundation,' or 'that the plaintiff continued to litigate after it clearly became so.'" Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-422 (1978)." Tadlock v. Westinghouse Electric Corporation, d/b/a Bay County Energy Systems, Inc., 20 F.A.L.R. 776, at 777 (FCHR 1997), citing Wright v. City of Gainesville, 19 F.A.L.R. 1947, at 1959 (FCHR 1996). Accord, generally, Asher v. Barnett Banks, Inc., 18 F.A.L.R. 1907 (FCHR 1995).

In conclusions of law adopted by a Commission panel, this pronouncement is given explanation: "It is within the discretion of a district court to award attorney's fees to a prevailing defendant in a Title VII action upon a finding that the action was 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.'" Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). The standard has been described as a 'stringent' one. Hughes v. Rowe, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980). Moreover, the Supreme Court has cautioned that in applying these criteria, the district court should resist the temptation to conclude that because a plaintiff did not ultimately prevail, the action must have been

unreasonable or without foundation. Christianburg Garment, 434 U.S. at 421-22, 98 S.Ct. at 700-01. Therefore, in determining whether a prevailing defendant is entitled to attorney's fees under Title VII, the district court must focus on the question of whether the case is seriously lacking in arguable merit. See Sullivan v. School Board of Pinellas County, 773 F.2d 1182, 1188 (11th Cir. 1985)." Doshi v. Systems and Electronics, Inc., f/k/a Electronics and Space Corp., 21 F.A.L.R. 188, at 199 (FCHR 1998). Accord, Quintero v. City of Coral Gables, FCHR Order No. 07-030 (April 20, 2007), and Haynes v. Putnam County School Board, FCHR Order No. 04-162 (December 23, 2004).

The Commission has applied these same legal standards to requests for costs other than attorney's fees. See, e.g., Green v. Miami-Dade County, FCHR Order No. 09-075 (August 18, 2009), and Columbus v. Mutual of Omaha, FCHR Order No. 09-052 (June 3, 2009).

Applying the above-stated legal standards, and considering the arguments contained in Respondent's motion and the record of the case, itself, we are unable to say that the record as it exists before us reflects that "the case is seriously lacking in arguable merit," or that the action brought by Petitioner is "unreasonable or without foundation."

We conclude, as is our discretion (see, Section 760.11(7), Florida Statutes (2011)), the record as it exists does not reflect entitlement to attorney's fees and costs under the standards set out above. Accord, generally, Tucker v. Crane Aerospace and Electronics, FCHR Order No. 09-104 (November 24, 2009), Perry v. Embry-Riddle Aeronautical University, FCHR Order 08-020 (March 13, 2008), Quintero, supra, and Waaser v. Streit's Motorsports, FCHR Order No. 04-157 (November 30, 2004).

Dismissal

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

Respondent's request for attorney's fees and costs as set out in "Respondent, City of Pompano Beach's, Corrected Motion to Establish Entitlement to Attorneys' Fees and Costs," is DENIED.

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 27th day of March, 2012.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner James Johns; and
Commissioner Lizzette Romano

Filed this 27th day of March, 2012,
in Tallahassee, Florida.

_____/s/_____
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:

Michael B. Carter
c/o Jamison Jessup, Qualified Representative
557 Noremac Avenue
Deltona, FL 32738

City of Pompano
c/o Erin Gill Robles, Esq.
Assistant City Attorney
Post Office Box 2083
Pompano Beach, FL 33061

Edward T. Bauer, 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 27th day of March, 2012.

By: _____/s/_____
Clerk of the Commission
Florida Commission on Human Relations