

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BRANDY LEE COLWELL, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 12-1194  
 )  
 CRACKER BARREL OLD COUNTRY )  
 STORE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER OF DISMISSAL

This cause came on for hearing pursuant to notice on June 7, 2012, in Lake City, Florida, before James H. Peterson, III, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kris B. Robinson, Esquire  
Robinson, Kennon and Kendron, P.A.  
582 West Duval Street  
Post Office Box 1178  
Lake City, Florida 32056-1178

For Respondent: Luis A. Santos, Esquire  
Ford and Harrison, LLP  
Suite 900  
101 East Kennedy Boulevard  
Tampa, Florida 33602

STATEMENT OF THE ISSUE

Whether Respondent, Cracker Barrel Old Country Store (Respondent), subjected Petitioner, Brandy Lee Colwell

(Petitioner), to employment discrimination based upon Petitioner's race, and/or retaliated against Petitioner because of her complaint against Respondent alleging discriminatory employment practices, in violation of the Florida Civil Rights Act of 1992, sections 760.01-760.11 and 509.092, Florida Statutes.

#### PRELIMINARY STATEMENT

The hearing was noticed to be heard at 10:00 a.m. at the Columbia County Courthouse, 173 Northeast Hernando Street, Lake City, Florida. The Notice of Hearing was not returned as undeliverable. Neither Petitioner nor her counsel appeared at the scheduled time of 10:00 a.m. on the day of the hearing. Counsel for Respondent was present with four witnesses ready to proceed. A court reporter was also present and recorded the proceedings outlined below.

#### FINDINGS OF FACT

1. Neither Petitioner nor her counsel appeared at the noticed time for the final hearing in this case.
2. After waiting for approximately 25 minutes, at the undersigned's directions, Respondent's counsel contacted Petitioner's counsel by telephone and arranged for Petitioner's counsel, whose law offices are in Lake City, to join the final hearing for a conference call via speakerphone. During that conference call, Petitioner's counsel advised that he had received

the Notice of Hearing scheduling this case, but that he had erroneously failed to calendar the hearing.

3. Respondent's counsel further advised that, in addition to his client, he intended to offer the testimony of approximately three witnesses, but that he had not subpoenaed those witnesses. He further could not identify the names of those witnesses, but advised that his client knew their names.<sup>1/</sup>

4. Petitioner's counsel verbally requested a continuance.

5. Petitioner's counsel had participated in the preparation of a prehearing stipulation just one week earlier and understood that the prehearing stipulation was untimely because it had not been filed within the time frames of the prehearing instructions.<sup>2/</sup> Petitioner's counsel acknowledged that while he knew that the hearing was in the near future, he did not check to see when it was scheduled. Accordingly, the undersigned denied Petitioner's counsel's request for continuance to the extent that it asked for another day, but ruled that the hearing would be delayed until 1:00 p.m. that afternoon, June 7, 2012.

6. When the final hearing was reconvened at 1:00 p.m., Petitioner's counsel appeared with his assistant, but without Petitioner or any witnesses. Petitioner's counsel presented a written Petitioner's Motion for Continuance.

7. The undersigned first considered Respondent's pending Motion to Dismiss, or Alternatively, to Strike (Respondent's

Motion to Strike). Petitioner's counsel stated that Petitioner had no objection to the granting of Respondent's Motion to Strike because it sought only to strike or dismiss that portion of Petitioner's claim alleging retaliatory discharge. Considering Petitioner's lack of objection, as well as the fact that Petitioner's discharge from Respondent's employ did not occur until after the instant Employment Complaint of Discrimination was filed with the Florida Commission on Human Relations, Respondent's Motion to Strike was GRANTED, thus preserving Petitioner's claim of retaliatory discharge for subsequent action if properly perfected.

8. Petitioner's written Motion for Continuance was then addressed. In the motion, Petitioner's counsel explained that his legal assistant had not calendared the final hearing for June 7, 2012, because his legal assistant's stepdaughter had been involved in an accident on April 19, 2012, and had passed away on April 22, 2012. The Notice of Hearing in this case was issued on April 17, 2012. The motion also stated that "[t]he undersigned counsel accepts full responsibility for the actions of his staff." Petitioner's Motion for Continuance further advised that "[t]he undersigned counsel for the Petitioner when advised that he was not present at the hearing, checked with Petitioner to try to have her available on June 7, 2012, and she was on her way to

Gainesville for a post-operative checkup with her son who had recently had surgery."

9. Respondent's counsel opposed continuance of the case.

10. Upon consideration of Petitioner's Motion for Continuance, Respondent's argument against a continuance, the fact that there was no emergency, and the motion was untimely under Florida Administrative Code Rule 28-106.210 ("Except in cases of emergency, requests for continuance must be made at least five days prior to the date noticed for the hearing"), as well as the circumstances outlined above, Petitioner's Motion for Continuance was DENIED.

#### CONCLUSION OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to section 120.569 and subsection 120.57(1), Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

12. Because Petitioner is asserting the affirmative in this administrative proceeding, she has the burden of proving her claim against Respondent. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

13. After Petitioner's Motion for Continuance was denied, Petitioner's counsel advised that he could not go forward with proof of the case without his client. No evidence was submitted in support of Petitioner's claim against Respondent.

14. As no evidence was presented to support her claim, Petitioner failed to meet her burden.

RECOMMENDATION

Based upon the fact that Petitioner failed to present any evidence in support of her claim, it is RECOMMENDED that the Florida Commission on Human Relations enter an order dismissing this case.

DONE AND ENTERED this 12th day of June, 2012, in Tallahassee, Leon County, Florida.



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JAMES H. PETERSON, III  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of June, 2012.

ENDNOTES

<sup>1/</sup> Petitioner's witness list attached to the prehearing stipulation lists 19 named witnesses and also references unnamed impeachment witnesses and witnesses listed by Respondent.

<sup>2/</sup> The Order of Pre-hearing Instructions, filed April 17, 2012, required the parties to "file their pre-hearing stipulation no later than 10 days prior to the date set for final hearing in this cause."

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.