

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DIETRICH R. JENKINS,

Petitioner,

vs.

Case No. 14-1919

JONES WALKER,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Todd P. Resavage for final hearing by video teleconference on June 27, 2014, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Kenneth E. Walton, II, Esquire
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Miami, Florida 33145

For Respondent: Laurie Michele Chess, Esquire
Jones Walker, LLP
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STATEMENT OF THE ISSUE

Whether Petitioner timely filed her Employment Complaint of Discrimination ("Complaint") with the Florida Commission on Human Relations ("FCHR"), and, if so, whether FCHR has jurisdiction to entertain Petitioner's Complaint on the merits.

PRELIMINARY STATEMENT

Petitioner, a former employee of Respondent, on November 13, 2012, tendered her resignation via correspondence entitled "Notice of Constructive Discharge." On December 23, 2013, FCHR received an "Employment Complaint of Discrimination," wherein Petitioner alleged Respondent committed various discriminatory practices in violation of chapter 760 of the Florida Civil Rights Act ("FCRA").

On March 20, 2014, FCHR issued a Determination: No Jurisdiction, on the grounds that "[t]he complaint was not timely filed." Petitioner elected to pursue administrative remedies, timely filing a Petition for Relief with FCHR on April 24, 2014. That same day, FCHR referred the matter to the Division of Administrative Hearings ("DOAH") for further proceedings.

On June 17, 2014, the parties filed a Joint Pre-Hearing Stipulation. The parties stipulated to the facts contained therein in paragraph E. To the extent relevant, the stipulated facts have been incorporated herein. The final hearing was scheduled for and conducted on June 27, 2014. The final hearing Transcript was filed on July 7, 2014. The identity of witnesses and exhibits and the rulings regarding each are as set forth in the Transcript. The parties timely filed Proposed Recommended Orders and same have been considered in preparing this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the 2013 editions.

FINDINGS OF FACT

1. Petitioner was previously employed by Respondent as an attorney in its Miami, Florida office.

2. On November 13, 2012, Petitioner tendered her resignation via correspondence entitled a "Notice of Constructive Discharge." The correspondence provided that her resignation would be effective on November 23, 2012.

3. Petitioner's last date of employment with Respondent was November 23, 2012, and she was paid through that date.

4. Petitioner completed a FCHR form entitled Technical Assistance Questionnaire for Employment Complaints ("Questionnaire") and signed the same on November 20, 2013. The Questionnaire provides on its face the following language: "REMEMBER, a charge of discrimination must be filed within 365 days of the alleged act of discrimination." Additionally, the Questionnaire describes the principal purpose of the document as follows:

The purpose of this questionnaire is to solicit information about claims of employment discrimination, determine whether the Florida Commission on Human Relations has jurisdiction over those claims, and provide charge filing counseling, as appropriate.

5. On December 23, 2013, Petitioner filed an Employment Complaint of Discrimination ("Complaint") against Respondent with FCHR. The Complaint was stamped as received by FCHR on December 23, 2013 at 4:47 p.m. In the Complaint, under section C—"Cause of Discrimination"—Petitioner checked the boxes for sex and retaliation. Petitioner alleged discrimination pursuant to chapter 760 of the Florida Civil Rights Act. The Complaint further alleges that November 23, 2012, was the date that the "most recent discrimination took place."

6. On March 20, 2014, following the completion of its investigation, FCHR issued a Determination: No Jurisdiction, on the grounds that "[t]he complaint was not timely filed."

CONCLUSIONS OF LAW

7. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

8. "As a jurisdictional prerequisite to filing an FCRA action, a plaintiff must exhaust her administrative remedies by filing a timely charge with the appropriate agency." Jones v. Bank of America, 2013 U.S. Dist. LEXIS 164730, *7-8 (M.D. Fla. 2013) (citations omitted). "To exhaust administrative remedies under the FCRA, a plaintiff must satisfy the requirements of Fla. Stat. § 760.11." Id., at *8 citing Maggio v. Fla. Dep't of Labor

& Emp. Sec., 899 So. 2d 1074, 1079 (Fla. 2005); Woodham v. Blue Cross & Blue Shield of Florida, Inc., 829 So. 2d 891, 894 (2002).

9. Section 760.11(1), Florida Statutes, provides, in pertinent part, as follows:

(1) Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, naming the employer, employment agency, labor organization, or joint labor-management committee, or, in the case of an alleged violation of s. 760.10(5), the person responsible for the violation and describing the violation On the same day the complaint is filed with the commission, the commission shall clearly stamp on the face of the complaint the date the complaint was filed with the commission. In lieu of filing the complaint with the commission, a complaint under this section may be filed with the federal Equal Employment Opportunity Commission or with any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80. If the date the complaint is filed is clearly stamped on the face of the complaint, that date is the date of filing The complaint shall contain a short and plain statement of the facts describing the violation and the relief sought. The commission may require additional information to be in the complaint. The commission, within 5 days of the complaint being filed, shall by registered mail send a copy of the complaint to the person who allegedly committed the violation. The person who allegedly committed the violation may file an answer to the complaint within 25 days of the date the complaint was filed with the commission. Any answer filed shall be mailed to the aggrieved person by the person filing the answer. Both the complaint and the answer shall be verified.

10. Florida Administrative Code Rule 60Y-5.001(3) further provides, in pertinent part, that, "[a] complaint may be filed at the office of the Commission. The date of filing shall be the date of actual receipt of the complaint by the Clerk or other agent of the Commission."

11. Rule 60Y-5.001 also sets forth the requisite form and contents of a "complaint." Specifically, the rule provides as follows:

(5) Form. The complaint must be in writing and shall be signed by the complainant. The complaint shall be verified.

(6) Contents.

(a) The complaint should contain the following information:

1. The name, address and telephone number of the person filing the complaint;

2. The name, address and telephone number of the respondent;

3. A clear and concise statement of the facts, including pertinent dates, constituting the unlawful employment practice;

4. If known, the approximate number of employees of a respondent employer;

5. If known, a statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a Federal, State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provision of paragraph (a) of this subsection, a complaint is sufficient if it is in writing, signed by the Complainant, verified, and is sufficiently precise to identify the parties and to describe generally the action or practice complained of.

12. Petitioner's unverified Questionnaire does not meet the requirements of a "complaint" within the meaning of section 760.11. See Jones, 2013 U.S. Dist. LEXIS 164730, at *15-21.

13. The only "complaint" in the record is Petitioner's Complaint received and date-stamped by FCHR on December 23, 2013. Petitioner's Complaint was filed more than 365 days after the last date of the alleged unlawful occurrence, November 23, 2012, and, therefore, is untimely, unless the limitations period was tolled by operation of section 95.051, Florida Statutes. See Greene v. Seminole Elec. Coop., Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997) (holding that the limitations period for the filing of a discrimination complaint with FCHR can be equitably tolled, but only based on the act or circumstances enumerated in section 95.051).

14. Section 95.051 provides, in relevant part, as follows:

95.051 When limitations tolled

(1) The running of the time under any statute of limitations except ss. 95.281, 95.35, and 95.36 is tolled by:

(a) Absence from the state of the person to be sued.

(b) Use by the person to be sued of a false name that is unknown to the person entitled to sue so that process cannot be served on the person to be sued.

(c) Concealment in the state of the person to be sued so that process cannot be served on him or her.

(d) The adjudicated incapacity, before the cause of action accrued, of the person entitled to sue. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action.

(e) Voluntary payments by the alleged father of the child in paternity actions during the time of the payments.

(f) The payment of any part of the principal or interest of any obligation or liability founded on a written instrument.

(g) The pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action.

(h) The period of an intervening bankruptcy tolls the expiration period of a tax certificate under s. 197.482 and any proceeding or process under chapter 197.

(i) The minority or previously adjudicated incapacity of the person entitled to sue during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to the minor or incapacitated person, or is adjudicated to be incapacitated to sue; except with respect to the statute of limitations for a claim for medical malpractice as provided in s. 95.11. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action.

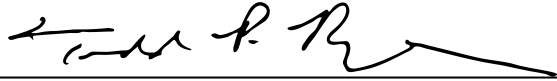
15. Petitioner bears the burden of showing that equitable tolling is appropriate. Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 661 (11th Cir. 1993). As none of the circumstances enumerated in section 95.051(1) are applicable in this proceeding, Petitioner's Complaint is untimely.

16. In summary, since Petitioner filed her Complaint with FCHR more than 365 days after the last date of the alleged unlawful occurrence and no reason has been established to support tolling the time period required under section 760.11(1), Florida Statutes, for filing her Complaint with FCHR, Petitioner's claim is time-barred. There is no jurisdiction in FCHR or DOAH to entertain her claim on the merits.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the subject petition in its entirety due to lack of jurisdiction.

DONE AND ENTERED this 24th day of July, 2014, in
Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2014.

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.