

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

TANYA MERIZIER,

Petitioner,

v.

WHOLE FOODS MARKET, INC.,

Respondent.

EEOC Case No. NONE

FCHR Case No. 2014-00488

DOAH Case No. 14-4575

FCHR Order No. 15-054

**ORDER REMANDING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

This matter is before the Commission for consideration of the Recommended Order of Dismissal, dated May 28, 2015, issued in the above-styled matter by Administrative Law Judge Darren A. Schwartz, and for consideration of "Petitioner's Motion for Reconsideration," filed by Petitioner with the Commission on June 18, 2015.

Findings of Fact and Conclusions of Law

Judge Schwartz's Recommended Order of Dismissal finds that, while Petitioner's counsel appeared at the scheduled administrative hearing in the case, Petitioner failed to appear, and concludes that Petitioner failed to meet her burden of proof. The order recommends, therefore, that the Commission issue a final order dismissing the Petition for Relief.

We are not yet ready to adopt the Administrative Law Judge's conclusion that the case be dismissed.

The administrative hearing in this matter took place on May 27, 2015. On June 1, 2015, after the issuance of the Recommended Order of Dismissal, Petitioner filed a motion to reopen the proceedings, and on June 4, 2015, Respondent filed a document in opposition to that motion, arguing that the Administrative Law Judge did not have jurisdiction to grant the requested relief because upon issuance of the Recommended Order of Dismissal the Division of Administrative Hearings no longer had jurisdiction of the case. On June 18, 2015, the Administrative Law Judge issued an order denying Petitioner's motion on the basis of "lack of jurisdiction."

On June 18, 2015, Petitioner filed with the Commission, "Petitioner's Motion for Reconsideration," again asking that the proceedings be reopened, and, on June 29, 2015, Respondent filed with the Division of Administrative Hearings a document in opposition to the motion. (It should be noted, that while "Petitioner's Motion for Reconsideration" was filed with the Commission on June 18, 2015, a reading of the document on its face would suggest that the document was filed with the Division of Administrative Hearings rather than the Commission.)

For the disposition of “Petitioner’s Motion for Reconsideration” we follow the guidance of Shaker Lakes Apartments Company d/b/a Seasons v. Dolinger, 714 So. 2d 1040 (Fla. 1st DCA 1998).

In Dolinger, the Respondent failed to appear at the scheduled administrative hearing in the case, and the Court found that the Commission abused its discretion in not considering Respondent’s motion for remand asking for a new evidentiary hearing, filed after the issuance of the recommended order but prior to the issuance of the Commission’s final order. The Court remanded the case to the Commission to either consider the motion or remand the matter to the Administrative Law Judge to consider the motion. In addition, in a concurring opinion, it was suggested by one of the Judges considering the case that the appropriate action for the Commission to take would be to remand the case to the Administrative Law Judge since “the question whether to reopen or redo the formal administrative hearing does not depend on legal conclusions ‘over which [the Commission] has substantive jurisdiction’” – referring to the section of the Administrative Procedure Act which limits an agency to rejecting or modifying only those conclusions of law over which it has “substantive jurisdiction” – at the time of the Dolinger decision, Section 120.57(1)(j), Florida Statutes (Supp. 1996), now codified as Section 120.57(1)(l), Florida Statutes (2014).

Following the guidance of Dolinger, supra, we conclude that the matter should be remanded to the Administrative Law Judge for consideration of “Petitioner’s Motion for Reconsideration.” Noting that the Administrative Law Judge appears to have dismissed Petitioner’s earlier motion to re-open the proceedings because of a lack of jurisdiction resulting from the issuance of the Recommended Order of Dismissal, our remand pursuant to the guidance of Dolinger, supra, will again confer jurisdiction of the proceedings to the Division of Administrative Hearings. We note that in taking this action it is not necessary for the Commission to decide whether it has jurisdiction itself to consider this filing. Accord, Ziolkowski v. Park Shore Landing Condominium Association, et al., FCHR Order No. 11-042 (May 12, 2011).

Exceptions

Neither of the parties filed exceptions to the Administrative Law Judge’s Recommended Order of Dismissal. On June 1, 2015, after the May 28, 2015, issuance of the Recommended Order of Dismissal, Petitioner filed with the Division of Administrative Hearings a motion to re-open the proceedings, discussed above.

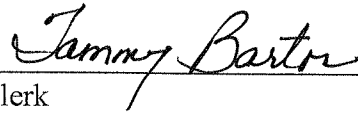
Remand

This matter is REMANDED to the Administrative Law Judge for consideration of “Petitioner’s Motion for Reconsideration,” filed with the Commission on June 18, 2015, and for such further proceedings as that consideration may require consistent with this Order.

DONE AND ORDERED this 21 day of August, 2015.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Donna Elam; and
Commissioner Jay Pichard

Filed this 21 day of August, 2015,
in Tallahassee, Florida.



Clerk

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Darren A. Schwartz, 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 21 day of August, 2015.

By: Jimmy Barton
Clerk of the Commission
Florida Commission on Human Relations