

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

TILCIA MORGAN,

EEOC Case No. 15D201400679

Petitioner,

FCHR Case No. 2014-01069

v.

DOAH Case No. 15-1292

SKIN CANCER ASSOCIATES,

FCHR Order No. 15-035

Respondent.

**FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

This matter is before the Commission for consideration of the Recommended Order of Dismissal, dated April 16, 2015, issued in the above-styled matter by Administrative Law Judge Mary Li Creasy.

Findings of Fact and Conclusions of Law

Judge Creasy's order reflects that Petitioner failed to comply with an order of the Administrative Law Judge. Following Respondent's filing of a motion to dismiss in which Respondent argued that the Petition for Relief contained insufficient information, Judge Creasy, on April 8, 2015, issued an Order to Show Cause directing Petitioner, by April 15, 2015, to provide such information that complied with the requirements for the contents of a Petition for Relief set out in Fla. Admin. Code R. 28-106.201. On April 15, 2015, rather than respond to the Order to Show Cause, Petitioner filed a motion for an extension of time to respond to the already-ruled-upon motion to dismiss that had resulted in the Order to Show Cause. Given that the final hearing in the matter was set for May 4, 2015, the Administrative Law Judge found that Petitioner's action had "resulted in unnecessary prejudice to Respondent in preparation of its defense and warrants the entry of an order recommending dismissal."

We note that, generally, Commission panels have concluded that a Petitioner's failure to respond to orders of an Administrative Law Judge amounts to a voluntary dismissal of the Petition for Relief. See, generally, Pierce v. Bright Horizons Children's Centers, LLC, FCHR Order No. 14-010 (March 26, 2014), Herard v. MasTec, Inc., FCHR Order No. 13-034 (May 1, 2013), Cawley v. Primrose Center, Inc., FCHR Order No. 12-009 (February 21, 2012), Roundtree, et al. v. Advenir at Stonelake, LLC, FCHR Order No. 11-069 (August 30, 2011), Biggers v. Rooms To Go, FCHR Order No. 09-045 (May 12, 2009), Shook v. Riverside National Bank, FCHR Order No. 08-029 (May 6, 2008), Clifton v. Kryss, et al., FCHR Order No. 07-062 (November 7, 2007), Bordonaro v. The Green at the Heather Condominium Association, Inc., FCHR Order No. 07-010 (February 14, 2007), Butler v. The Pepsi Bottling Group, FCHR Order

No. 06-107 (December 4, 2006), Castellanos v. Express Net Airlines Pilots Association, FCHR Order No. 05-061 (June 15, 2005), Mayfield v. Karl's Haberdashery of Florida, Inc., FCHR Order No. 04-020 (March 10, 2004), and Kenny v. Florida Department of Corrections, FCHR Order No. 02-020 (June 3, 2002).

We further note that this has been the case not only in situations where a Petitioner has simply failed to respond to an order of the Administrative Law Judge, but also in situations where the document filed by a Petitioner in response to an order is not responsive to the issues raised in the order. See e.g., Roundtree, et al., supra, and the Recommended Order of Dismissal entered therein in DOAH Case No. 11-1087, dated June 22, 2011. See also, Trayler v. Walt Disney Parks and Resorts U.S., Inc., a Florida Corporation, FCHR Order No. 14-003 (February 19, 2014) and Potter, et al., v. Pointe Vista II, LTD, et al., FCHR Order No. 13-063 (October 16, 2013).

We note that the Recommended Order of Dismissal references Petitioner's failure to timely respond to Respondent's motion to dismiss. We draw no negative inference from this since the applicable rule makes the filing of a response to a motion permissive, but not obligatory, and contains no statement of any adverse effect resulting from not filing a response to a motion. See Fla. Admin. Code R. 28-106.204(1) and Florida Commission on Human Relations o/b/o Bahiyyih Watson v. Viering, FCHR Order No. 10-070 (September 7, 2010). However, we conclude that this has no impact on the outcome of the instant case, given the Administrative Law Judge's findings as to Petitioner's lack of response to the Order to Show Cause and findings as to the resultant "prejudice" to the Respondent.

Based on the foregoing, we conclude that the Petition for Relief should be dismissed.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order of Dismissal, in a document entitled, "Petitioner Tilcia Morgan's Exceptions to the Recommended Order Entered by ALJ," received by the Commission on May 1, 2015.

On May 7, 2015, Respondent filed a response to Petitioner's exceptions, in a document entitled, "Respondent's Response to Petitioner's Exceptions to the Recommended Order Entered by the ALJ."

Petitioner's exceptions document contains four numbered exceptions.

Exception No. 1 argues that, contrary to the apparent representations in the Recommended Order of Dismissal, Petitioner's failure to file a response to Respondent's motion to dismiss is procedurally irrelevant.

To the extent the arguments contained in Exception No. 1 are consistent with our discussion of this issue as set out in the Findings of Fact and Conclusions of Law section of this Order, above, Exception No. 1 is accepted.

Exception No. 2 argues that the Order to Show Cause is not an order deciding the motion to dismiss, as represented in the Recommended Order of Dismissal, and that, therefore, Petitioner's Motion for Extension of Time to file a response to the motion to dismiss, filed on

April 15, 2015, the day on which a response was required to the Order to Show Cause, was timely.

Exception No. 3 argues that even if it is determined that the Motion for Extension of Time is not timely, dismissal is not “mandatory.”

Exception No. 4 argues that the Recommended Order of Dismissal is highly prejudicial to Petitioner and seeks to unjustly penalize Petitioner.

We are somewhat sympathetic to the arguments raised in Exception Nos. 2, 3 and 4. For example, it would appear to us that, given the content of Respondent’s motion to dismiss and the content of the Order to Show Cause, Petitioner’s motion for an extension of time to file a response to the motion to dismiss, while on its face untimely filed, could be viewed as a timely-filed but mislabeled motion for extension of time to respond to the Order to Show Cause.

With regard to Commission review of responses to Orders to Show Cause and subsequent orders issued by Administrative Law Judges, the Commission has the authority to correct conclusions of law contained in those orders if the conclusions of law corrected are within the substantive jurisdiction of the Commission. See, Section 120.57(1)(1), Florida Statutes (2014), which states, “The agency in its final order may reject or modify conclusions of law over which it has substantive jurisdiction.”

For example, in a case in which an Administrative Law Judge concluded that a Petitioner’s response to an Order to Show Cause as to why the case should not be dismissed for lack of jurisdiction was inadequate in that; (1) the Petitioner did not reside in Florida, (2) the Respondent was not headquartered in Florida, and (3) none of the actions complained of appeared to have occurred in Florida, the Commission remanded the matter for further proceedings on the Petition for Relief. The Commission noted that none of the three criteria were dispositive of the issue of jurisdiction under the Florida Civil Rights Act of 1992 – a determination within the “substantive jurisdiction” of the Commission. Tharp v. Lockheed Martin, FCHR Order No. 14-005 (March 26, 2014).

It would seem to us that the conclusions of law excepted to in Exception Nos. 2, 3 and 4, involve the operation of the procedural management of the case by the Administrative Law Judge, and are not within the substantive jurisdiction of the Commission. In addition, we note the specific, albeit excepted-to, finding of the Administrative Law Judge that Petitioner’s actions have resulted in “unnecessary prejudice to Respondent in preparation of its defense and warrants the entry of an order recommending dismissal.” In our view, the Commission has no legal basis for overturning this determination by the Administrative Law Judge of prejudice to Respondent.

Exception Nos. 2, 3 and 4 are rejected.

Request for Attorney’s Fees and Costs

Respondent’s response to Petitioner’s exceptions requests that Respondent be awarded “its attorney’s fees and costs.”

Given our discussion of Petitioner’s exceptions, above, in which we suggest that the Administrative Law Judge could have viewed Petitioner’s untimely motion for an extension of

time to file a response to the motion to dismiss as a timely-filed but mislabeled motion for an extension of time to respond to the Order to Show Cause, Respondent's request for attorney's fees and costs is DENIED.

Dismissal

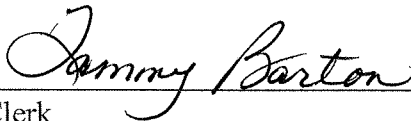
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 10 day of June, 2015.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Tony Jenkins; and
Commissioner Rebecca Steele

Filed this 10 day of June, 2015,
in Tallahassee, Florida.



Clerk
Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, FL 32399
(850) 488-7082

Copies furnished to:

Tilcia Morgan
c/o R. Martin Saenz, Esq.
c/o Ilona Anderson, Esq.
Saenz and Anderson, PLLC
20900 Northeast 30th Ave., Ste. 800
Aventura, FL 33180

Tilcia Morgan
c/o Julisse Jimenez, Esq.
20801 Biscayne Blvd., Ste. 403
Aventura, FL 33180

Skin Cancer Associates
c/o Alejandro F. Garcia, Esq.
Boyd, Richards, Parker and Colonnelli, P.L.
100 Southeast Second Street, Suite 2600
Miami, FL 33131

Mary Li Creasy, 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 10 day of June, 2015.

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