

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

CLIFFORD MCCULLOUGH,

EEOC Case No. NONE

Petitioner,

FCHR Case No. 2015-00333

v.

DOAH Case No. 15-5662

NESCO RESOURCES,

FCHR Order No. 16-047

Respondent.

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

Preliminary Matters

Petitioner Clifford McCullough filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2013), alleging that Respondent Nesco Resources committed unlawful employment practices on the bases of Petitioner's race (African American), color (dark skinned), sex (male) and age (DOB: 11-7-59) by failing to provide Petitioner with an offer of employment.

The allegations set forth in the complaint were investigated, and, on August 28, 2015, the Executive Director issued a 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 Tampa and Tallahassee, Florida, on April 14, 2016, before Administrative Law Judge William F. Quattlebaum.

Judge Quattlebaum issued a Recommended Order of dismissal, dated June 21, 2016.

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

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner's Exceptions to Recommended Order," received by the Commission on or about July 6, 2016.

Respondent filed a response to Petitioner's exceptions.

Petitioner's exceptions document contains 14 numbered exceptions to the Recommended Order.

Exceptions numbered 2, 3, 5, 6, 7, 9, 10, and 12 all except to inferences drawn by the Administrative Law Judge from the evidence presented.

Exceptions numbered 4, 6, 8, 13, and 14 provide comment on a finding of fact.

The Administrative Procedure Act establishes the extent to which the Commission can modify or reject a finding of fact or conclusion of law contained in a Recommended Order. It states, "The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction... Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law." Section 120.57(1)(l), Florida Statutes (2016).

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999). Accord, Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005), Eaves v. IMT-LB Central Florida Portfolio, LLC, FCHR Order No. 11-029 (March 17, 2011) and Taylor v. Universal Studios, FCHR Order No. 14-007 (March 26, 2014).

In addition, it has been stated, “The ultimate question of the existence of discrimination is a question of fact.” Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, at 1209 (Fla. 1st DCA 1991). Accord, Coley v. Bay County Board of County Commissioners, FCHR Order No. 10-027 (March 17, 2010), Eaves, supra, and Taylor, supra.

These exceptions are rejected.

Exception numbered 1 excepts to the statement in the Preliminary Statement of the Recommended Order that a No Cause determination was issued by the Commission in this matter. Petitioner argues that the No Cause determination was rescinded and changed to a Cause determination. The transmittal document used by the Commission to transmit the Petition for Relief to the Division of Administrative Hearings, dated October 2, 2015, indicates that a “Cause” determination is attached. This appears to be a typographical error in that nothing in the record of this case reflects that the No Cause determination was rescinded and a Cause determination issued in its place.

This exception is rejected.

Exception numbered 11 points out a scrivener’s error in Recommended Order, ¶ 15, in which the Administrative Law Judge referenced “Respondent” instead of “Petitioner.” We agree that this is an error and that in Recommended Order, ¶ 15, the word “Petitioner” should be used in the place where the word “Respondent” is used.

This exception is accepted.

Finally, we note that throughout Petitioner’s exceptions document the issue of the drug testing of Petitioner is raised. In the context of employment discrimination law, the appropriateness of pre-employment drug testing is primarily an issue related to allegations of disability-based discrimination. See e.g., 42 U.S.C. § 12114(d) and 29 CFR § 1630.16(c). In the instant case, Petitioner has not alleged unlawful disability discrimination. With regard to the allegation that the alleged drug testing of Petitioner amounted to unlawful race discrimination as Petitioner pursued employment, this allegation fails. (Petitioner alleges in his complaint that, at the time he made application to Respondent in December 2013, he was drug tested, while a white male applicant was not and that he was again drug tested upon application to Respondent in April 2014. In its Proposed Recommended Order, Respondent takes the position that the only white male applicant who applied on the same day as Petitioner in December 2013 was also drug tested and denies Petitioner was drug tested a second time in April 2014.) Regardless, the Administrative Law Judge specifically found that with regard to the December 2013 application, “The evidence fails to establish that the Respondent had any employer requests at that time which were consistent with Petitioner’s skills” (Recommended Order, ¶ 7), and specifically found with regard to the April 2014 application, “The evidence fails to establish whether [Petitioner] was included with the applicants who were referred to the requesting employer” (Recommended Order, ¶ 15).

Dismissal

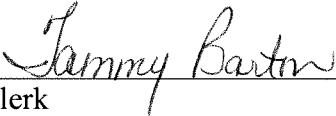
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 8 day of Sept, 2016.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Tony Jenkins, Panel Chairperson;
Commissioner Jay Pichard; and
Commissioner Sandra Turner

Filed this 8 day of Sept, 2016,
in Tallahassee, Florida.


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William F. Quattlebaum, 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 8 day of Sept, 2016.

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