

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

J. L. NIEMAN,

EEOC Case No. 15D201600139

Petitioner,

FCHR Case No. 2016-00326

v.

DOAH Case No. 16-3609

CAROLINA CASUALTY INSURANCE
COMPANY (W.R. BERKLEY),

FCHR Order No. 17-010

Respondent.

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

Preliminary Matters

Petitioner J. L. Nieman filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2015), alleging that Respondent Carolina Casualty Insurance Company (W.R. Berkley) committed unlawful employment practices on the bases of Petitioner's race, sex and age and on the basis of retaliation by failing to interview and hire Petitioner for the position of Vice President Claims.

The allegations set forth in the complaint were investigated, and, on May 20, 2016, 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 in Jacksonville, Florida, on August 17, 2016, before Administrative Law Judge Lawrence P. Stevenson.

Judge Stevenson issued a Recommended Order of dismissal, dated November 1, 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 the Recommended Order of the Administrative Law Judge."

Respondent subsequently filed, "Respondent's Response to Petitioner's Exceptions to the Recommended Order of Judge Lawrence P. Stevenson."

Petitioner's exceptions document contains eight numbered exceptions.

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 the 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).

Petitioner's exception numbered 1 argues that the Administrative Law Judge committed a material error of law and / or abuse of discretion as to discovery and privilege determinations.

Conclusions of law made by an Administrative Law Judge as to discovery issues and issues of attorney-client privilege and attorney work-product privilege are not conclusions of law within the substantive jurisdiction of the Commission that the Commission can "reject" or "modify." See Section 120.57(1)(l), Florida Statutes (2016).

Petitioner's exception numbered 1 is rejected.

Petitioner's exceptions numbered 2, 3, 5, 6 and 8 except to inferences drawn from the evidence presented and / or credibility determinations made by the Administrative Law Judge.

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.

Petitioner’s exceptions numbered 2, 3, 5, 6, and 8 are rejected.

Petitioner’s exception numbered 4 argues that the Administrative Law Judge committed error in refusing to admit into evidence Petitioner’s Exhibit No. 15.

Petitioner’s exception numbered 7 argues that the Administrative Law Judge admitted improper hearsay evidence relating to Nelson Tavares, rather than requiring the appearance of Nelson Tavares.

A Commission Panel has concluded, “The Commission, as the agency charged with reviewing the Recommended Order, does not have substantive jurisdiction to review ‘admissibility of evidence’ determinations of the Administrative Law Judge. See Barfield v. Department of Health, Board of Dentistry, 805 So. 2d 1008 (1st DCA 2001).” Lewis v. Royal American Management, Inc., FCHR Order No. 16-028 (June 9, 2016).

Petitioner’s exceptions numbered 4 and 7 are rejected.

Dismissal

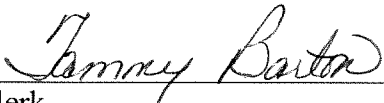
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 19 day of January, 2017.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Rebecca Steele, Panel Chairperson;
Commissioner Derick Daniel; and
Commissioner Gilbert M. Singer

Filed this 19 day of January, 2017,
in Tallahassee, Florida.



Clerk
Commission on Human Relations
4075 Esplanade Way, Room 110
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Copies furnished to:

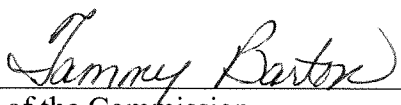
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Lawrence P. Stevenson, Administrative Law Judge, DOAH

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 19 day of January, 2017.

By: 

Clerk of the Commission
Florida Commission on Human Relations