

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

VINCENT P. CITRULLO,

EEOC Case No. NONE

Petitioner,

FCHR Case No. 2016-01702

v.

DOAH Case No. 17-2294

NATIONAL BEVERAGE, INC.,

FCHR Order No. 17-074

Respondent.

**FINAL ORDER DENYING RESPONDENT'S MOTION FOR  
ENTITLEMENT TO ATTORNEY'S FEES AND COSTS**

This matter is before the Commission for consideration of "Respondent's Motion for Entitlement to Attorney's Fees and Costs," received by the Commission on or about July 14, 2017, and of "Petitioner's Verified Response in Opposition to Respondent's Second Motion for Entitlement to Attorney's Fees and Costs," received by the Commission on or about July 21, 2017.

**Preliminary Matters**

Administrative Law Judge June C. McKinney issued an "Order Closing File and Relinquishing Jurisdiction" in the above-styled case, dated June 12, 2017. The issuance of this order was the result of Petitioner having voluntarily dismissed the Petition for Relief.

The Commission issued a "Notice of Dismissal" in the above-styled case, dated June 13, 2017, based on the voluntary dismissal of the Petition for Relief by Petitioner.

Respondent filed "Respondent's Motion for Entitlement to Attorney's Fees and Costs," dated June 20, 2017, with the Division of Administrative Hearings (DOAH). DOAH's docket reflects that this document was filed on June 21, 2017.

Upon receiving a filing extension, Petitioner filed with DOAH "Petitioner's Verified Response in Opposition to Respondent's Motion for Entitlement to Attorney's Fees and Costs," dated July 7, 2017.

Judge McKinney issued an "Order Denying Motion for Entitlement to Attorney's Fees and Costs," dated July 14, 2017. The order states that Judge McKinney was without jurisdiction to make such an award under Section 760.11, Florida Statutes, indicating that the Commission had the authority to make such an award under that statutory provision.

Respondent then filed with the Commission "Respondent's Motion for Entitlement to Attorney's Fees and Costs," dated July 14, 2017.

Petitioner responded, filing with the Commission “Petitioner’s Verified Response in Opposition to Respondent’s Second Motion for Entitlement to Attorney’s Fees and Costs,” dated July 21, 2017.

Respondent’s Motion for Entitlement to Attorney’s Fees and Costs

The Florida Civil Rights Act of 1992 states, “In any action or proceeding under this subsection, the [C]ommission, in its discretion, may allow the prevailing party a reasonable attorney’s fee as part of the costs. It is the intent of the Legislature that this provision for attorney’s fees be interpreted in a manner consistent with federal case law involving a Title VII action.” Section 760.11(7), Florida Statutes (2016).

In conclusions of law adopted by a Commission panel, it has been stated that a prevailing Respondent may be awarded attorney’s fees by the Commission, under the Florida Civil Rights Act of 1992, “if it is determined that an action was ‘frivolous, unreasonable, or without foundation,’ or ‘that the plaintiff continued to litigate after it clearly became so.’ Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-422 (1978).” Tadlock v. Westinghouse Electric Corporation, d/b/a Bay County Energy Systems, Inc., 20 F.A.L.R. 776, at 777 (FCHR 1997), citing Wright v. City of Gainesville, 19 F.A.L.R. 1947, at 1959 (FCHR 1996). Accord, generally, Asher v. Barnett Banks, Inc., 18 F.A.L.R. 1907 (FCHR 1995).

In conclusions of law adopted by a Commission panel, this pronouncement is given explanation: “It is within the discretion of a district court to award attorney’s fees to a prevailing defendant in a Title VII action upon a finding that the action was ‘frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.’ Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). The standard has been described as a ‘stringent’ one. Hughes v. Rowe, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980). Moreover, the Supreme Court has cautioned that in applying these criteria, the district court should resist the temptation to conclude that because a plaintiff did not ultimately prevail, the action must have been unreasonable or without foundation. Christianburg Garment, 434 U.S. at 421-22, 98 S.Ct. at 700-01. Therefore, in determining whether a prevailing defendant is entitled to attorney’s fees under Title VII, the district court must focus on the question of whether the case is seriously lacking in arguable merit. See Sullivan v. School Board of Pinellas County, 773 F.2d 1182, 1188 (11th Cir. 1985).” Doshi v. Systems and Electronics, Inc., f/k/a Electronics and Space Corp., 21 F.A.L.R. 188, at 199 (FCHR 1998). Accord, Quintero v. City of Coral Gables, FCHR Order No. 07-030 (April 20, 2007), and Haynes v. Putnam County School Board, FCHR Order No. 04-162 (December 23, 2004).

The Commission has applied these same legal standards to requests for costs other than attorney’s fees. See, e.g., Green v. Miami-Dade County, FCHR Order No. 09-075 (August 18, 2009), and Columbus v. Mutual of Omaha, FCHR Order No. 09-052 (June 3, 2009).

Respondent's motion seeks attorney's fees and costs under both Section 120.595, Florida Statutes, and Section 760.11(7), Florida Statutes.

An award pursuant to Section 120.595, Florida Statutes, is within the purview of the Administrative Law Judge, and the Commission does not have "final order" authority over an award made pursuant to this statutory section. See, Otto v. Duval County Public Schools, FCHR Order No. 13-021 (March 11, 2013).

With regard to an award pursuant to Section 760.11(7), Florida Statutes, applying the above-stated legal standards, and considering the arguments contained in Respondent's motion, the arguments contained in Petitioner's response to Respondent's motion, the state of the record of the case, itself, and the finding by Judge McKinney that Petitioner voluntarily withdrew the Petition for Relief prior to the conduct of a formal administrative hearing, we are unwilling to say that the record as it exists reflects entitlement of Respondent to an award of attorney's fees and costs.

Rather, we conclude, as is our discretion (see, Section 760.11(7), Florida Statutes (2016)), the record as it exists does not reflect entitlement to attorney's fees and costs under the standards set out above. Accord, generally, Floyd-Trinowski v. Northeast Florida Health Services, FCHR Order No. 13-018 (March 11, 2013), Boland, et al. v. Division of Emergency Management, FCHR Order No. 12-032 (June 27, 2012), Carter v. City of Pompano, FCHR Order No. 12-013 (March 27, 2012), Perry v. Embry-Riddle Aeronautical University, FCHR Order 08-020 (March 13, 2008), Quintero, supra, and Waaser v. Streit's Motorsports, FCHR Order No. 04-157 (November 30, 2004).

"Respondent's Motion for Entitlement to Attorney's Fees and Costs" is DENIED.

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 14 day of September, 2017.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Derick Daniel, Panel Chairperson;  
Commissioner Jay Pichard; and  
Commissioner Sandra Turner

Filed this 14 day of September, 2017,  
in Tallahassee, Florida.



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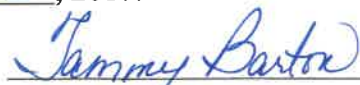
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June C. McKinney, Administrative Law Judge, DOAH

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 14 day of September, 2017.

By:   
Clerk of the Commission  
Florida Commission on Human Relations