

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

ASHA J. LOGAN,

EEOC Case No. 15D01700327

Petitioner,

FCHR Case No. 2017-00432

v.

DOAH Case No. 17-5005

BROW ART 23 CORDOVA MALL,

FCHR Order No. 18-038

Respondent.

**INTERLOCUTORY ORDER AWARDING AFFIRMATIVE RELIEF
FROM AN UNLAWFUL EMPLOYMENT PRACTICE
AND REMANDING CASE TO ADMINISTRATIVE LAW JUDGE
FOR ISSUANCE OF RECOMMENDED ORDER REGARDING AMOUNTS OF
ATTORNEY'S FEES AND COSTS OWED PETITIONER**

Preliminary Matters

Petitioner Asha J. Logan filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2016), alleging that Respondent, Brow Art 23 Cordova Mall, committed an unlawful employment practice on the basis of Petitioner's race by subjecting her to workplace harassment and effectively terminating her from employment.

The allegations set forth in the complaint were investigated, and, on August 11, 2017, the Executive Director issued a determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

On September 13, 2017, 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 ordered by Administrative Law Judge Yolanda Y. Green, for November 25, 2017. However, on November 23, 2017, both parties filed a Motion to Continue the hearing and the hearing was rescheduled until January 16, 2018.

An evidentiary hearing was held on January 16, 2018 as scheduled, by teleconference in Pensacola and Tallahassee, Florida, before Judge Green. However, during the hearing, it was determined that a witness would not be available by phone and the case was recessed until February 2, 2018.

A final evidentiary hearing was held by teleconference until completion on February 2, 2018, as scheduled.

Judge Green issued a Recommended Order, dated May 23, 2018, recommending that the Commission find that an unlawful employment practice occurred and recommending affirmative relief.

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 with the following exceptions:

1. In ¶42, the Administrative Law Judge stated that the parties stipulated that Petitioner made \$20 per hour, but this amount is not supported by the record. Transcript Volume 1, page 184, Line 16 establishes that Petitioner actually made \$10 per hour with the Respondent. We will use \$10 per hour as Petitioner's rate of pay.
2. In ¶43, the Administrative Law Judge stated that Petitioner would have made \$950 per week, but this calculation is based on the stipulated \$20 per hour and not the \$10 per hour that Petitioner actually made with Respondent. We will use \$400 per week as Petitioner's weekly rate of pay.
3. In ¶47, the Administrative Law Judge stated that Petitioner is owed back-pay of \$34,960, but this number is not accurate using the numbers presented in the record. We calculate the back-pay amount owed Petitioner for the duration of the Petitioner's non-compete agreement to be \$39,825. ($\$10/\text{hr} \times 40\text{hrs}/\text{wk} = \$400/\text{wk} \times 78.5\text{wks} = \$31,400$; $\$150/\text{wk}$ in tips $\times 78.5\text{wks} = \$11,775$; $\$31,400 + \$11,775 = \$43,175$; $\$200 + \$1,350 + \$1,800 = \$3,350$ in earnings; $\$43,175 - \$3,350 = \$39,825$ in back-pay and lost wages.)

With the above exceptions, 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 note that in "Findings of Fact" ¶44 of the Recommended Order the Administrative Law Judge stated, "Ms. Logan applied for and received unemployment in the amount of \$2,614.00. Ms. Logan introduced re-employment letters for 11 weeks, but was paid a total of 12 weeks, bringing the total paid out closer to \$3,000.00." This was used to offset the amount of back-pay owed to Petitioner as calculated in ¶47.

We view these statements that any lost wages owed Petitioner be offset by any unemployment compensation received by Petitioner as a conclusion of law.

With regard to this conclusion of law, Commission Panels have held that unemployment compensation benefits are not to be offset from back-pay awards owed Petitioners. See, Cahill v. K.S.L. Fairways Group, L.P., FCHR Order No. 03-015 (March 7, 2003), and cases cited therein; accord Ostrum v. A Unique Floor of the Gulf Coast I, FCHR Order No. 10-067 (September 7, 2010) and Mills v. Bay St. Joseph Care and Rehabilitation Center, FCHR Order No. 10-092 (December 15, 2010).

Accordingly, we correct the conclusion of law of the Administrative Law Judge that indicates that the back-pay award in this matter be offset by amounts of unemployment compensation received by Petitioner.

In correcting this conclusion of law of the Administrative Law Judge, we conclude: (1) that the conclusion of law being corrected is a conclusion of law over which the Commission has substantive jurisdiction, namely a conclusion of law dealing with affirmative relief to be awarded under the Florida Civil Rights Act of 1992; (2) that the reason the correction is being made by the Commission is that the conclusion of law as stated runs contrary to previous Commission decisions on the issue; and (3) that in making this correction the conclusion of law being substituted is as or more reasonable than the conclusion of law which has been rejected. See, Section 120.57(1)(l), Florida Statutes (2017).

With this correction, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

Respondent filed exceptions to the Recommended Order on June 7, 2018, in a document entitled, "Respondent's Exceptions to Recommended Order." The document contains 10 pages and 11 numbered sections.

Respondent objected to the first full ¶ under the Preliminary Statement section; ¶s 7, 8, 11, 14, 34, 36, 47, and 48 under the Findings of Fact section; and ¶s 62, 68, 72-76, and 78-80 under the Findings of Law section of the Recommended Order.

Respondent provided Respondent's version of the facts and Respondent takes issue with facts found and inferences drawn from the evidence presented.

With regard to Respondent's exceptions to facts found and inferences drawn from the evidence presented, and to Respondent's comments and argument on the facts found referenced in Respondent's exceptions document, 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).

Further, 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).

Finally, while Respondent's exceptions address the issue of whether Petitioner established a prima facie case of workplace harassment based on race, we note that the Administrative Law Judge concluded "Petitioner established all of the elements required to establish a prima facie case. Petitioner is African-American, and she was subject to unwelcomed intimidation and ridicule based upon her race. The harassment directed toward Petitioner, as described in the Findings of Fact above, was sufficiently severe and pervasive to alter the terms and conditions of her employment and create a hostile work environment." Recommended Order, ¶66.

Respondent's exceptions are rejected.

Affirmative Relief and Remand

Through our adoption of the Administrative Law Judge's findings of fact and conclusions of law, as set out above, we find that unlawful discrimination occurred in this matter in the manner found by the Administrative Law Judge and have adopted the Administrative Law Judge's recommendations for the remedy of the discrimination, except as set out in the "Findings of Fact" section of this Order. In addition, Petitioner is entitled to interest on the back-pay award from the date of discrimination until the date of this Order. (An Appendix to this Order sets out how this amount has been computed.)

Respondent is hereby ORDERED:

1. to cease and desist from discriminating further in the manner it has been found to have unlawfully discriminated against Petitioner;
2. to reinstate Petitioner to a similar position as if she had not been terminated, as recommended by the Administrative Law Judge;
3. to pay Petitioner back-pay and lost wages in the amount of \$39,825, with no offset for unemployment compensation received;
4. to pay the Petitioner interest in the amount of \$3,317.86;
5. to pay Petitioner attorney's fees that have been reasonably incurred in this matter by Petitioner; and
6. to pay the Petitioner the amount of costs that have been reasonably incurred in this matter by Petitioner.

This matter is REMANDED to the Administrative Law Judge for further proceedings to determine the amounts of attorney's fees and costs owed Petitioner and the issuance of a Recommended Order as to those amounts.

DONE AND ORDERED this 2 day of August, 2018.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Latanya Peterson, Panel Chairperson;
Commissioner Jay Pichard; and
Commissioner Gilbert M. Singer

Filed this 2 day of August, 2018,
in Tallahassee, Florida.

Tammy S. Barton
Tammy S. Barton, Clerk of the Commission
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020

Appendix – Interest Computation

<u>Time Period</u>		<u>Interest Rate</u>	<u>Annual Interest</u>
2016			
8/17-12/31	\$10,725	.0184	\$197.34
2017			
1/1-12/31	\$10,725 + \$28,600 = \$39,325	.0513	\$2017.37
2018			
1/1-8/2	\$3,850-\$3,350 = \$500 + \$39,325 = \$39,825	.0277	<u>\$1,103.15</u>
TOTAL INTEREST			\$3,317.86

2016 6.5wks x \$550 = \$3,575 (.125yr x .0484 = .0061)
 13wks x \$550 = \$7,150 (.25yr x .0491 = .0123)
 $\$3,575 + \$7,150 = \$10,725 \times (.0061 + .0123 = .0184) = \197.34

2017 52wks x \$550 = \$28,600 + \$10,725 = \$39,325
 $(.25yr \times .0497 = .0124) + (.25yr \times .0505 = .0126) + (.25yr \times .0517 = .0129) + (.25yr \times .0535 = .0134) = .0513$
 $\$39,325 \times .0513 = \2017.37

2018 7wks x \$550 = \$3,850 - \$3,350 (outside employment) = \$500
 $\$500 + \$39,325 = \$39,825$
 $(.14yr \times .0553 = .0077) + (.25yr \times .0572 = .0143) + (.096yr \times .0597 = .0057) = .0277$
 $\$39,825 \times .0277 = \$1,103.15$

Copies furnished to:

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The Krizner Group
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Tallahassee, Florida 32309

Yolanda Y. Green, Administrative Law Judge, DOAH

Sarah Stewart, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 2 day of August, 2018.

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