

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

LATASHA MCCLEARY,

EEOC Case No. 15D201900076

Petitioner,

FCHR Case No. 2019-16366

v.

DOAH Case No. 19-3974

COLE, SCOTT & KISSANE, P.A.,

FCHR Order No. 21-011

Respondent.

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

Preliminary Matters

On October 8, 2018, Petitioner Latasha McCleary 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 Cole, Scott & Kissane, P.A. committed an unlawful employment practice against Petitioner on the bases of race and retaliation.

The allegations set forth in the complaint were investigated, and, on June 20, 2019, the Executive Director issued a determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

On July 22, 2019, Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and, on July 25, 2019, the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

On August 5, 2019, an order was issued scheduling the hearing for October 1, 2019.

On September 18, 2019, Petitioner filed a Motion to Continue Hearing and the final hearing was continued to October 14, 2019.

On October 11, 2019, Respondent filed Respondent's Unopposed Motion to Continue Hearing and Request for Agreed Hearing Date and the hearing was rescheduled again for November 6, 2019.

An evidentiary hearing was held via teleconference in Tallahassee and Lauderdale Lakes, Florida, on November 6, 2019, before Administrative Law Judge John G. Van Laningham.

Judge Van Laningham issued a Recommended Order, dated December 20, 2019.

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

A transcript of the proceeding before the Administrative Law Judge was not filed with the Commission. In the absence of a transcript of the proceeding before the Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See National Industries, Inc. v. Commission on Human Relations, et al., 527 So. 2d 894, at 897, 898 (Fla. 5th DCA 1988). Accord, Coleman v. Daytona Beach, Ocean Center Parking Garage, FCHR Order No. 14-034 (September 10, 2014), Gantz, et al. v. Zion's Hope, Inc., d/b/a Holy Land Experience, FCHR Order No. 11-048 (June 6, 2011), and Hall v. Villages of West Oaks HOA, FCHR Order No. 08-007 (January 14, 2008).

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. However, in Recommended Order paragraph 37, the Administrative Law Judge concludes that Petitioner was not subjected to severe or pervasive harassment because she overheard a racial epithet one time and there was no evidence that Respondent was aware of the incident. We note that, although that conclusion can be drawn in that case, hearing a single racial epithet can be considered severe harassment in other cases.

We adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner submitted Petitioner's Exceptions to the Recommended Order with the Division of Administrative Hearings on January 8, 2020. We will consider the exceptions even though they were filed in the wrong forum. Petitioner took exception to paragraphs 9, 11, and 17 of the Administrative Law Judge's Recommended Order. Petitioner's exceptions provide her explanation of the facts and essentially take issue with inferences drawn from the evidence presented by the Administrative Law Judge in the Recommended Order.

As indicated, above, no transcript of the proceeding before the Administrative Law Judge was filed with the Commission.

In the absence of a transcript of the proceeding before the Administrative Law Judge, the Commission is bound by the facts found in the Recommended Order, since there is no way for the Commission to determine the extent to which the facts found are supported by the testimony presented. See, e.g., Gainey v. Winn Dixie Stores, Inc., FCHR Order No. 07-054 (October 12, 2007), Herring v. Department of Corrections, FCHR Order No. 12-004 (February 21, 2012) and Holloman v. Lee Wesley Restaurants, d/b/a Burger King, FCHR Order No. 14-041 (October 9, 2014).

With regard to findings of fact set out in Recommended Orders, the Administrative Procedure Act states, "The agency may not reject or modify the 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 on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law [emphasis added]." Section 120.57(1)(l), Florida Statutes (2019). As indicated, above, in the absence of a transcript of the proceeding before the Administrative Law Judge, the

Recommended Order is the only evidence for the Commission to consider. See, National Industries, Inc., supra. Accord, Hall, supra, Jones v. Suwannee County School Board, FCHR Order No. 06-088 (September 11, 2006), Johnson v. Tree of Life, Inc., FCHR Order No 05-087 (July 12, 2005), Coleman, supra, and Gantz, supra.

Further, 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 credibilities 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) and Eaves v. IMT-LB Central Florida Portfolio, LLC, FCHR Order No. 11-029 (March 17, 2011).

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) and Eaves, supra.

Therefore, Petitioner's exceptions are rejected.

Dismissal

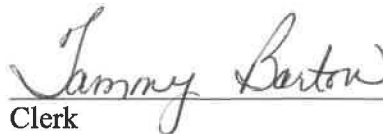
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 25 day of February, 2021.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Darrick McGhee, Panel Chairperson;
Commissioner Larry Hart; and
Commissioner Angela Primiano

Filed this 25 day of February, 2021,
in Tallahassee, Florida.



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John G. Van Laningham, 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 25 day of February, 2021.

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