

**STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS**

AUSBON BROWN, JR.,)	EEOC Case No. 15D980383
Petitioner,)	FCHR Case No. 98-3107
)	DOAH Case No. 99-004041
vs.)	FCHR Order No. 02-098A
)	
FLORIDA DEPARTMENT OF HEALTH,)	
Respondent)	

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

On December 5, 1997, Petitioner filed a complaint with the Florida Commission on Human Relations (FCHR) alleging that the Respondent failed to hire him for several positions for which he applied because of his age, sex and race. On August 18, 1999, the FCHR issued a No Cause Determination based upon its investigation. The Petitioner filed a Petition for Relief and was granted a formal evidentiary hearing that was held by video teleconferencing in Tallahassee, Florida, and Daytona Beach, Florida, on February 14, 2000, before Administrative Law Judge Donald R. Alexander.

Judge Alexander issued a Recommended Order of Dismissal dated March 14, 2000. A Commission panel held a telephonic non-evidentiary hearing on October 26, 2000, and issued its Order 00-025, dated January 9, 2001, in which a majority (2-1) of the panel found that the Administrative Law Judge (ALJ) committed an error of law in concluding that there was no evidence that Respondent's actions were a pretext for discrimination, and concluded that the Respondent unlawfully discriminated against the petitioner for the three positions at issue. The panel remanded the case to the ALJ for determination of appropriate remedy.

Subsequently, the ALJ reopened the case and required the parties to "submit proposed supplemental orders which were to contain a suggested final disposition of the case, together with references to the record which supported their suggested disposition." He reviewed the submissions made by both parties and issued a Supplemental Recommended Order, dated March 19, 2001. A Commission panel reviewed this Supplemental Recommended Order in a telephonic non-evidentiary hearing held on December 6, 2001, and issued its Order 01-077, dated January 7, 2002. The panel upheld the ALJ's conclusions that the Petitioner was not entitled to attorney's fees, non-quantifiable economic damages and back pay; but, it did not agree with his conclusion that the Petitioner was not entitled to any relief. Instead, by a majority (2-1) it ordered that the Respondent "(1) cease and desist from discriminating further in the manner in which it has been found to have unlawfully discriminated against the Petitioner; and (2) to offer Petitioner the next available full-time position for which the Petitioner is qualified."

The Respondent appealed the final agency action by the Commission to the District Court of Appeals, 1st District (Florida)-case number 1D02-138. The Commission subsequently filed a Petition for Relinquishment of Jurisdiction on September 30, 2002. The Petition was granted by the Court on October 16, 2002 "for a period of 90 days from the date hereof for the purpose of reviewing, modifying, and/or amending the final order being appealed herein."

The Commission held an en banc telephonic non-evidentiary hearing on November 12, 2002, in which 9 Commissioners participated. It considered the record of this matter and unanimously determined the following action to be taken on the Recommended Order and vacates its prior Orders numbered 00-025 and 01-077.

Findings of Fact

The Commission's file does not contain a transcript of the proceeding before the Administrative Law Judge. In the absence of a transcript of the proceeding before the Administrative Law Judge, his Recommended Order is the only evidence for the Commission to consider. *National Industries, Inc. vs. Commission on Human Relations, et al.*, 527 So. 2d 894, at 898 (Fla. 5th DCA 1988).

The Administrative Law Judge (ALJ) found that, in 1996, Petitioner filed a number of job applications with the former Department of Health and Rehabilitative Services (HRS). Shortly after the applications were filed, HRS was abolished and many of its functions were transferred to at least three other agencies, including the Respondent. The ALJ found that four such transferred positions, as follows, were at issue in this case.

The ALJ found that the Petitioner did not file an application for one of the positions (#29618) after it was restructured and readvertised by the Respondent and thus concluded that no consideration need to be given the allegations pertaining to this job. The ALJ then provided findings for each of the other three positions in question and found that the greater weight of evidence supported a finding that the most qualified person was selected for each of the positions.

The ALJ found that, while the Petition for Relief alleges that Respondent "classified positions and varied conditions of employment" in an effort not to hire Petitioner, there was no evidence to support this claim, or that the Department's actions were a pretext for discrimination. The ALJ noted that Petitioner suggested that employees within an agency have an inherent advantage over outsiders in acquiring the specific job experience required for vacant positions, but the ALJ found that, even if true, this did not constitute a discriminatory act under the laws in question. Finally, the ALJ found that while Petitioner contended that his applications were not properly scored, "the more persuasive evidence belies this contention."

Since an Administrative Law Judge's finding of whether discrimination occurred is a finding of fact, the Commission may overturn such a finding only if, after reviewing the complete record of the case, the Commission determines that the finding is not supported by competent substantial evidence in the record or that the proceeding leading to the determination did not comply with the essential requirements of law. See Florida Department of Community Affairs v. Bryant, 586 So2d 1205, at 1210 (Fla. 1st DCA 1991). See also, Department of Health and Rehabilitative Services v. Yhap, 680 So2d 559 (Fla. 1st DCA 1996); Southpointe Pharmacy v. Department of Health and Rehabilitative Services, 596 So2d 106 (Fla.1st DCA 1992); Clay County Sheriff's Office v. Loos, 570 So2d 394 (Fla. 1st DCA 1990); National Industries, Inc. v. Commission on Human Relations, 527 So2d 894 (Fla. 5th DCA 1988); Howard Johnson Co. v. Kilpatrick, 501 So2d 59 (Fla. 1st DCA 1987); Holmes v. Turlington, 480 So2d 150 (Fla. 1st DCA 1985); Brevard County Sheriff's Department v. Florida Commission on Human Relations, 429 So2d 1235 (Fla. 5th DCA 1983); and School Board of Leon County v. Hargis, 400 So2d 103 (Fla. 1st DCA 1981).

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

In "failure to hire" cases, such as the instances presented in this case, a Commission panel has concluded that, to establish a prima facie case of discrimination, a Petitioner must establish: "(1) that he belongs to a protected group; (2) that he was qualified for the job for which the employer was seeking applicants; (3) that he was rejected despite his qualifications; and (4) that, after rejection, the position remained opened and the employer continued to seek

applicants with the Petitioner's qualifications." Longariello v. The School Board of Dade County, 19 F.A.L.R. 1960, at 1961 (FCHR 1996); Blum v. National Enquirer, Inc., 21 F.A.L.R. 426, at 434 (FCHR 1998).

If a prima facie case is established, "the Respondent must articulate some legitimate nondiscriminatory reason for its action." Hart v. Double Envelope Corporation, 15 F.A.L.R. 1664, at 1673 (FCHR 1992). Once this is articulated, the burden returns to the Petitioner to demonstrate the Respondent intentionally discriminated against the Petitioner; that is, the reason is only a pretext to cover discriminatory intent. O'Neill v. Sarasota County School Board, 18 F.A.L.R. 1129, at 1130 (FCHR 1994).

The ALJ found that the Petitioner failed to make a prima facie case in certain instances; and, in others, where he did establish that (1) he was a member of a protected class; (2) he met the minimum qualifications for the job; and (3) he was rejected and a person outside the protected class was later chosen, the ALJ further found that the Respondent did articulate a legitimate nondiscriminatory reason for not hiring the Petitioner in those instances. Namely, the ALJ found that the Respondent, in each case, selected someone who was better qualified, and that there was no evidence that Respondent's actions were a pretext for discrimination, or that Respondent acted with discriminatory intent.

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

Exceptions

Petitioner filed eight pages of exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner's Exceptions to Recommended Order filed March 14, 2000, for case #99-4041, FCHR #98-3107." In addition, he filed a "Brief in support of Exceptions," which was received by the Commission on November 6, 2002, purporting to be filed pursuant to Commission Rule 60Y-4.027(3), Florida Administrative Code. Although clearly not filed simultaneously with the exceptions, there were no objections raised by the Respondent and, therefore, the Petitioner was allowed to present those points in his oral argument.

As indicated above, the Commission's file does not contain a transcript of the proceeding before the Administrative Law Judge. The filing of such a transcript is a requirement to the filing of exceptions to a Recommended Order. See, Fla. Administrative Code Rule 60.y-4.025(3), and Fla. Administrative Code Rule 60.y-4.027(1). In the absence of the filing of such a transcript the Commission has ordered the exceptions stricken. See Ebeh vs. Consumer Credit Counseling Service of the Tampa Bay Area, Inc., 16 F.A.L.R. 2149, at 2150 (FCHR 1994), and Lee v. Emmer Development Corporation, 20 F.A.L.R. 3132, at 3134 (FCHR 1998).

Based on the foregoing, the Petitioner's exceptions are not accepted.

Dismissal

The Request for Relief and Complaint of Discrimination are DISMISSED with prejudice and FCHR Orders numbered 00-025 and 01-077 are vacated.

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.

NOTICE TO COMPLAINANT/PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), you have the right to request the EEOC to review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days

