

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

AUSBON BROWN, JR.,

Petitioner,

v.

DEPARTMENT OF HEALTH,

Respondent.

DRA
closed

EEOC Case No. 15D980383

FCHR Case No. 98-3107

DOAH Case No. 99-4041

FCHR Order No. 01-077

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DIVISION OF ADMINISTRATIVE HEARINGS

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FINAL ORDER AWARDING AFFIRMATIVE RELIEF
FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

Petitioner Ausbon Brown, Jr., filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1997), alleging that Respondent Department of Health committed an unlawful employment practice on the basis of Petitioner's age (born on April 25, 1943), sex (male) and race (Black) when it failed to hire him for several positions for which he had applied.

The allegations set forth in the complaint were investigated, and, on August 18, 1999, the Executive Director issued his 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 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 considered the record of the matter and issued an Order Finding Unlawful Employment Practices Occurred and Remanding Matter for Determination of Relief, dated January 9, 200[1].

Judge Alexander issued a Supplemental Recommended Order, dated March 19, 2001.

Pursuant to notice, public deliberations were held on December 6, 2001, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 325 John Knox Road, Building F, Suite 240, Tallahassee, Florida, 32303-4149. At these deliberations, the Commission panel determined the action to be taken on the Supplemental Recommended Order.

Findings of Fact and Conclusions of Law

The Administrative Law Judge concluded that Petitioner was not entitled to attorney's fees and nonquantifiable economic damages. Supplemental Recommended Order, pages 2 and 3.

We adopt the Administrative Law Judge's conclusions in this regard.

The Administrative Law Judge found that the record did not support an award of back pay to Petitioner. Supplemental Recommended Order, pages 3 through 6.

We adopt the Administrative Law Judge's findings in this regard.

The Administrative Law Judge concluded that Petitioner was not entitled to any relief. Supplemental Recommended Order, pages 6 and 7.

We conclude, by a two to one vote (Commissioners Cannon and Whitefox Stall in the majority, Commissioner Craig in the minority), that the Administrative Law Judge committed an error of law in concluding that Petitioner was not entitled to any relief.

The above-indicated majority notes that in School Board of Leon County v. Weaver, 556 So. 2d 443 (Fla. 1st DCA 1990), a failure-to-hire case like the instant case, the Commission ordered the Respondent to "... offer [Petitioner] the next available full-time position for which he was qualified..." Weaver, at 444.

The above-indicated majority also notes that in DeLeon v. Department of Health and Rehabilitative Services, 19 F.A.L.R. 4493 (FCHR 1996), a failure-to-promote case, the Commission ordered the Respondent, among other things, to "cease and desist from discriminating further in the manner in which it has been found to have unlawfully discriminated against Petitioner." DeLeon, at 4496.

The above-indicated majority concludes Petitioner is entitled to these two types of relief as remedy for the unlawful employment practices found to have occurred.

Finally, the above-indicated majority finds: (1) that the Administrative Law Judge's conclusion of law being corrected is within the substantive jurisdiction of the Florida Commission on Human Relations, namely the interpretation of the remedy provisions of the Florida Civil Rights Act of 1992; (2) the reason the correction is being made is that the conclusion of law as stated by the Administrative Law Judge runs contrary to cited authority on the issue; and (3) that in making this correction the conclusion of law being substituted is as or more reasonable than the conclusion which has been rejected. See, Section 120.57(1)(1), Florida Statutes (1999).

Exceptions

Petitioner filed a document entitled "Exceptions to Supplemental Recommended Order dated March 19, 2001, in the DOAH case # 99-4041 and FCHR # 98-3107," containing 8 numbered reasons Petitioner objects to the Supplemental Recommended Order, some of which contain numerous subparts.

In paragraph 1, Petitioner sets out his representation of his pay history from 7-28-95 until present, indicating that this reflects mitigation of the remedy owed him. We conclude this to be an attempt to present new evidence not in the record before the Administrative Law Judge, and, therefore, the presented information cannot be considered by the Commission. See Weaver, supra, at 445.

The exception as presented in paragraph 1 is rejected.

In paragraph 2, Petitioner notes his request for \$50,000 as a remedy for discrimination, and states that if the Commission does not have the authority to make this award the remedy should be back pay and attorney's fees. The Commission has adopted conclusions of law denying an award of attorney's fees and nonquantifiable damages, and has adopted findings of fact reflecting that the record does not support an award of back pay. See, Findings of Fact and Conclusions of Law, supra.

The exception as presented in paragraph 2 is rejected.

In paragraph 3, Petitioner seems to suggest that if he sought an improper remedy, the case should be treated as if he sought a proper remedy. To the extent this excepts to the denial of a back pay award, there is no suggestion that back pay is an improper remedy, rather, the Administrative Law Judge found that the evidence presented did not support a back pay award. See Supplemental Recommended Order, page 6. Further, as indicated, supra, the Commission has adopted conclusions of law indicating that an award for nonquantifiable damages and an award for attorney's fees are improper remedies in the instant case.

The exception as presented in paragraph 3 is rejected.

In paragraph 4, Petitioner states that the Administrative Law Judge is authorized to recommend affirmative relief from the effects of an unlawful employment practice, and that affirmative relief includes, but is not limited to, back pay. It would appear that this excepts to the denial of back pay, which is discussed, supra.

The exception as presented in paragraph 4 is rejected.

In paragraph 5, Petitioner appears to be excepting to the denial of damages that the Commission has no authority to award (e.g., pain and suffering, attorney's fees to a nonattorney) or for which there is no evidence in the record to support (e.g., back pay), all of which are discussed, supra.

The exception as presented in paragraph 5 is rejected.

In paragraph 6, Petitioner appears to continue to except to the denial of back pay, which is discussed, supra.

The exception as presented in paragraph 6 is rejected.

In paragraph 7, Petitioner appears to continue to except to the denial of back pay, which is discussed, supra.

The exception as presented in paragraph 7 is rejected.

In paragraph 8, Petitioner appears to continue to except to the denial of back pay and the denial of attorney's fees, both of which are discussed, supra.

The exception as presented in paragraph 8 is rejected.

Affirmative Relief

By a two to one vote (Commissioners Cannon and Whitefox Stall in the majority, Commissioner Craig in the minority) the Commission hereby provides affirmative relief from the unlawful employment practices found to have occurred in the Commission's January 9, 200[1], Order Finding Unlawful Employment Practices Occurred and Remanding Matter for Determination of Relief (FCHR Order No. 00-025).


Respondent is hereby ORDERED:

(1) to cease and desist from discriminating further in the manner in which it has been found to have unlawfully discriminated against Petitioner; and

(2) to offer Petitioner the next available full-time position for which Petitioner is qualified.

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 6 day of December, 2001.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

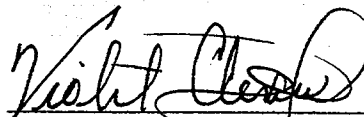


Commissioner Rita Craig,
Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Billy Whitefox Stall

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Filed this 7th day of January, 2002
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
325 John Knox Rd., Bldg. F, Suite 240
Tallahassee, FL 32303-4149
(850) 488-7082

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 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 of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131.

Copies furnished to:

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Donald R. Alexander, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel