

8-20-02

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

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ADMINISTRATIVE  
HEARINGS  
EMP-CLOS

AP

GLORIA D. GARCIA,

EEOC Case No. NONE

Petitioner,

DOAH Case No. 96-2868

v.

FCHR Case No. 94-F062

DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES, n/k/a  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

FCHR Order No. 02-104

Respondent.

**FINAL ORDER AWARDING AFFIRMATIVE RELIEF  
FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Gloria D. Garcia filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1993), alleging that Respondent Department of Health and Rehabilitative Services, n/k/a Department of Children and Family Services, committed an unlawful employment practice on the basis of Petitioner's sex (female) and on the basis of retaliation when it disciplined Petitioner for engaging in sexual harassment by terminating Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on April 10, 1996, the Executive Director issued his determination finding that there was 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 in Miami, Florida, on July 18-19, 2001, before Administrative Law Judge Errol H. Powell.

Judge Powell issued a Recommended Order on August 20, 2002, recommending that the Commission enter a final order finding that Respondent committed an unlawful employment practice.

Pursuant to notice, public deliberations were held on December 17, 2002, 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, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida,

32301. At these deliberations, the Commission panel 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.

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, with the exception of the Administrative Law Judge's conclusions relating to the impact of unemployment compensation received on the recommended back pay award.

The Administrative Law Judge found Petitioner entitled to back pay, less unemployment compensation received. Recommended Order, ¶ 81.

In our view, the Administrative Law Judge committed an error of law in concluding that unemployment compensation benefits received should be deducted from the back pay to which Petitioner is entitled.

Commission panels have held that unemployment compensation benefits are not to be offset from back pay awards owed Petitioner. See, McCoy v. Florida Rock & Tank Lines, Inc., 23 F.A.L.R. 4373, at 4374 (FCHR 2001), citing Swenson-Davis v. Orlando Partners, Inc., d/b/a Quality Hotel Orlando Airport, et al., 16 F.A.L.R. 792, at 793 (FCHR 1993), and Larson v. Dracut Corporation, Kings Inn Restaurant, et al., 13 F.A.L.R. 1988, at 1989 and 1991 (FCHR 1990). See, also, McGill v. The Moorings Restaurant, FCHR Order No. 01-044 (FCHR 2001).

In making this correction to the Administrative Law Judge's conclusions of law, we find: (1) that the Administrative Law Judge's conclusion of law that is being corrected is within the substantive jurisdiction of the Florida Commission on Human Relations, namely the determination of entitlement to relief under 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 previous Commission action 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)(I), Florida Statutes (2001).

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

#### Exceptions

Respondent filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled "Respondent's Exceptions to Recommended Order of Hearing Officer." The document contains 25 numbered paragraph exceptions to the Recommended Order.

Exceptions contained in paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10, 12 and 14, appear to except to facts found from the evidence presented.

Since, through our statement in the "Findings of Fact" section of this Order, supra, we have found that the Administrative Law Judge's finding that an unlawful employment practice occurred is supported by competent substantial evidence, these exceptions are rejected.

Exceptions contained in paragraphs 6, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25, appear to except to inferences drawn from facts found and/or evidence presented.

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).

These exceptions are rejected, as well.

#### Affirmative Relief

Through our adoption of the Administrative Law Judge's findings of fact and conclusions of law, as set out above, we find that an unlawful employment practice has occurred in this matter and have adopted the Administrative Law Judge's recommendations for the remedy of that unlawful employment practice, with the indicated modification regarding offset for unemployment compensation received.

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 remit back pay to Petitioner in the manner recommended by the Administrative Law Judge in the Recommended Order, with the exception that no off-set is to be made for amounts of unemployment compensation received by Petitioner;

(3) to pay Petitioner the statutorily established interest on the amounts awarded Petitioner in (2), above;

(4) to make contributions on behalf of Petitioner to the Florida Retirement System in the manner recommended by the Administrative Law Judge in the Recommended Order;

(5) to re-evaluate whether Petitioner should be considered as having a break in service in the manner recommended by the Administrative Law Judge in the Recommended Order;

(6) to pay Petitioner attorney's fees that have been reasonably incurred in this matter by Petitioner; and

(7) to pay Petitioner the amount of costs that has been reasonably incurred in this matter by Petitioner.

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The Commission reserves jurisdiction over the determination of precise remedy in this matter, including, but not limited to, amounts of back pay, interest, retirement system contributions, attorney's fees, and costs awarded Petitioner.

If, within 30 days of the date of the filing of this Order by the Clerk of the Commission, the parties have agreed to the appropriate remedy amounts for the unlawful employment practice found to have occurred, the parties shall prepare and submit to the Commission a Joint Stipulation of Settlement.

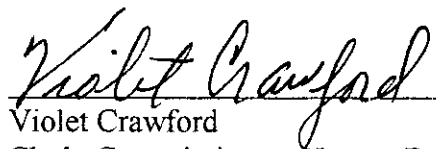
If, within 30 days of the date of the filing of this Order by the Clerk of the Commission, the parties are unable to reach agreement as to the remedy amounts for the unlawful employment practice found to have occurred, the Petitioner is directed to file with the Commission a Notice of Failure of Settlement, and the case will be remanded to the Administrative Law Judge for determination of the appropriate remedy amounts in this matter, as ordered above.

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 of appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 17 day of December, 2002  
FOR THE COMMISSION ON HUMAN RELATIONS:

  
\_\_\_\_\_  
Commissioner Rita Craig,  
Panel Chairperson;  
Commissioner Gayle Cannon; and  
Commissioner Keith Roberts

FILED this 13<sup>th</sup> day of January, 2003  
in Tallahassee, Florida.

  
\_\_\_\_\_  
Violet Crawford  
Clerk, Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, FL 32301  
(850) 488-7082

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Copies furnished to:

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Miami, FL 33133

Department of Health and Rehabilitative Services,  
n/k/a Department of Children and Family Services  
c/o Sheridan K. Weissenborn, Esq.  
Papy, Weissenborn, Poole & Vraspir  
3001 Ponce De Leon Boulevard, Suite 214  
Coral Gables, FL 33134

Errol H. Powell, 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 13<sup>th</sup> day of January, 2003.

By:   
Clerk of the Commission  
Florida Commission on Human Relations