

2-14-03

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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DIVISION OF
ADMINISTRATIVE
HEARINGS

LENEVE PLAISIME,

EEOC Case No. NONE

Petitioner,

ATP

FCHR Case No. 98-3179

v.

DOAH Case No. 02-2183

JVL-CWS

MARRIOTT KEY LARGO RESORT,

FCHR Order No. 03-075

Respondent.

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

Preliminary Matters

This cause came before the Commission for review of the Recommended Order issued in this matter on February 14, 2003, by Administrative Law Judge John G. Van Laningham.

Pursuant to notice, public deliberations were held on September 23, 2003, 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 and Conclusions of Law

The Administrative Law Judge found that Respondent Marriott Key Largo Resort committed an unlawful employment practice on the basis of Petitioner Leneve Plaisime's national origin (Haitian) when it terminated Petitioner from employment, and recommended the Commission award Petitioner \$925 in back pay to relieve the effects of the unlawful discrimination. See Recommended Order.

Based on facts found by the Administrative Law Judge which are supported by competent substantial evidence in the record, we find by a 2-1 vote (Commissioners Gayle Cannon and John Corbett in the majority, Commissioner Donna Elam dissenting) that the complaint in this matter was not timely filed and that the Commission is, therefore, without jurisdiction to find that Petitioner's termination is an unlawful employment practice.

The Florida Civil Rights Act of 1992 states that any person aggrieved by a violation of that law "may file a complaint with the commission within 365 days of the alleged violation..." Section 760.11(1), Florida Statutes (2001).

The Administrative Law Judge found that when the Commission transmitted Petitioner's Petition for Relief to the Division of Administrative Hearings, "it included a document that appears to be a copy of [Petitioner's] Charge of Discrimination. This latter instrument bears a date stamp purporting to show that the [Commission] received the document on October 5, 1998." Recommended Order, ¶ 13.

The Administrative Law Judge found that the alleged discriminatory act, Petitioner's discharge, occurred on September 13, 1997 (Recommended Order, ¶ 1), and concluded that if, in fact, Petitioner's Charge of Discrimination was filed no sooner than October 5, 1998, "then his claim...was brought outside the prescribed 365-day period and hence is stale, as [Respondent] maintains." Recommended Order, ¶ 13.

The Charge of Discrimination submitted to the Division of Administrative Hearings by the Commission alleges that the date that the most recent or continuing discrimination took place was September 26, 1997. See Document. However, based on Petitioner's testimony at the hearing, the Administrative Law Judge found that Petitioner was actually discharged on September 13, 1997.

A review of the Commission's file in the matter suggests that the initial complaint-filing in this case by Petitioner took place on September 14, 1998. A copy of this document is attached as Appendix A to this Order. (See Hicks v. Treasure Service/Metro Dade Transit and Ron Jones, FCHR Order No. 02-067 (November 5, 2002), for a case in which a Commission panel looked at documents in the Commission's file, but not before the Division of Administrative Hearings, to determine issues raised in the case – in the cited instance that a Petition for Relief had been timely filed, when the Administrative Law Judge had determined otherwise.)

In conclusions of law adopted by a Commission panel it has been indicated that the 365-day filing period might be extended through the operation of the doctrine of "equitable tolling," if complainant "has: (1) been misled or lulled into inaction; (2) has in some extraordinary way been prevented from asserting his rights; or (3) has timely asserted his rights mistakenly in the wrong forum." Woods v. American Red Cross Blood Services, FCHR Order No. 02-032 (July 26, 2002), adopting conclusions of law at ¶ 12 in the Recommended Order for that case.

None of the findings of the Administrative Law Judge suggest any of these to be present in the instant case.

The Commission is without jurisdiction to find that events occurring outside of the 365-day filing period are "actionable" unlawful employment practices. See, e.g., Woods, supra, where in the "Preliminary Statement" section of the Recommended Order it is explained that the Commission issued a "determination of a lack of jurisdiction" because of the late-filing of the complaint; see, also, Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646 (Fla. 5th DCA 1997), a case brought pursuant to the Florida Civil Rights Act of 1992, in which the complaint was filed with the Commission on June 16, 1994, and the court indicated that any claim for damages in the matter predating June 16, 1993 was time-barred.

Petitioner's testimony in this matter that the alleged discriminatory act occurred on September 13, 1997, leaves the Commission without jurisdiction to determine whether the discharge was an unlawful employment practice given that the complaint was filed more than

365 days from the alleged discriminatory act regardless of whether the October 5, 1998 date or the September 14, 1998 date is used as the filing date.

Commissioner Donna Elam dissents to the above findings of the majority, and would conclude that the Administrative Law Judge's findings of fact are supported by competent substantial evidence, that the Administrative Law Judge's application of the law to the facts results in a correct disposition of the matter, and that, therefore, Petitioner is entitled to the relief recommended by the Administrative Law Judge to relieve the effects of the unlawful employment practice that occurred.

Exceptions

Respondent filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Exceptions to Recommended Order."

Generally, the document excepts to the Administrative Law Judge's conclusion that the complaint in this matter was timely filed.

By a 2-1 vote (Commissioners Cannon and Corbett in the majority, Commissioner Elam dissenting), Respondent's exceptions are accepted to the limited extent that they except to the Administrative Law Judge's conclusion that this matter was timely filed.

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 21st day of November, 2003.
FOR THE COMMISSION ON HUMAN RELATIONS:



Commissioner Donna Elam,
Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner John Corbett

Filed this 21st day of November, 2003,
in Tallahassee, Florida.

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

Copies furnished to:

Leneve Plaisime
c/o Ralph S. Francois, Esq.
1820 Northeast 163rd Street
Suite 106
North Miami Beach, FL 33162

Marriott Key Largo Resort
c/o Susan L. Dolin, Esq.
Rothstein, Rosenfeldt, Dolin
& Pancier, P.A.
300 Las Olas Place, Suite 860
300 S.E. 2nd Street
Fort Lauderdale, FL 33301

John G. Van Laningham, 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 21st day of November, 2003.

for By: Michelle Jackson
Clerk of the Commission
Florida Commission on Human Relations