

4-21-03

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

DANIEL LANDRY,

Petitioner,

v.

CHARLOTTE COUNTY,

Respondent.

AT

EEOC Case No. 15D970195

FCHR Case No. 95-2716

DOAH Case No. 98-4683

FCHR Order No. 03-089

REM-clos

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

Preliminary Matters

Petitioner Daniel Landry 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 Charlotte County, committed an unlawful employment practice on the basis of Petitioner's age (55) and marital status (married) when it denied Petitioner a position as an Animal Control Officer.

Petitioner requested an administrative hearing and the Commission transmitted the case to the Division of Administrative Hearings for the conduct of a formal proceeding.

Prior to the conduct of a formal proceeding, Administrative Law Judge Robert E. Meale issued a Recommended Order of Dismissal, dated September 10, 1999, concluding that Petitioner's request for administrative hearing was not timely.

A Commission panel concluded that the request for administrative hearing was timely, and issued an Order Remanding Request for Relief from an Unlawful Employment Practice, dated May 9, 2000 (FCHR Order No. 00-007).

An evidentiary hearing was held in Port Charlotte, Florida, on November 20, 2000, before Judge Meale.

Judge Meale issued a Recommended Order on March 13, 2001, finding that Respondent committed an unlawful employment practice on the basis of Petitioner's age when it failed to hire Petitioner.

A Commission panel upheld this finding of Judge Meale, and issued an Order Finding Unlawful Employment Practice Occurred and Reserving Jurisdiction as to the Appropriate Affirmative Relief, filed November 28, 2001 (FCHR Order No. 01-063). This order directed that the case be remanded to the Administrative Law Judge for determination of the appropriate remedy, if the parties were unable to achieve settlement of the matter.

The case was remanded to Judge Meale, and following a December 16, 2002, evidentiary hearing in Port Charlotte, Florida, Judge Meale issued a Recommended Order, dated April 21, 2003, containing recommendations to the Commission regarding the remedy in this matter.

Pursuant to notice, public deliberations were held on November 13, 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, dated April 21, 2003.

Findings of Fact

Judge Meale's letter to Commission General Counsel, Cecil Howard, transmitting the matter back to the Commission reflects that the record includes a one-volume transcript, Petitioner's Exhibits 1-5, and Respondent's Exhibits 1-4. The Preliminary Statement of the Recommended Order states, "The court reporter filed a transcript on April 3, 2003."

The transcript transmitted to the Commission, however, is not a transcript of the December 16, 2002 proceeding, but rather a transcript of the November 20, 2000 hearing on the merits of the case. And while the Administrative Law Judge's order reflects that the Court Reporter filed the transcript on April 3, 2003, the transcript sent to the Commission reflects that Respondent's counsel sent the November 20, 2000 proceeding transcript to the Administrative Law Judge and that was what was filed on April 3, 2003. This is also borne out by the docket sheet for this case on the Division of Administrative Hearings web site. The docket sheet reflects the filing of a transcript on April 3, 2003, but a review of the first three pages of that transcript as posted on the website reflect that it is the transcript of the November 20, 2000 proceeding.

The record does reflect that a transcript of the December 16, 2002 proceeding on the remedy issues does exist. Respondent's counsel makes reference to it in Respondent's exceptions to the Recommended Order.

However, that transcript is not part of the record currently before the Commission
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.

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, "Charlotte County's Exceptions to Recommended Order."

This document contains two exceptions to the Recommended Order.

First, Respondent requests the Commission reject the Administrative Law Judge's award of attorney's fees, or alternatively, award a substantially reduced fee. See Filing. Second, Respondent requests that the award of damages to Petitioner be reduced by the amount of insurance premiums that would have been deducted for Petitioner's pay had he been hired. See Filing.

attorney's fees

With regard to the attorney's fee award, the Florida Civil Rights Act of 1992 states, "...in any action or proceeding under this subsection, the commission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action." Section 760.11(6), Florida Statutes (2003).

Respondent's exceptions argue that there is a complete lack of competent substantial evidence from which the Administrative Law Judge could determine Petitioner's hourly rate, and that the Administrative Law Judge's arrival at an hourly rate of \$225 is completely arbitrary. See Filing, pages 1 and 2. Further, Respondent argues that if the Commission does find Petitioner entitled to an attorney's fee award the amount should be substantially reduced, because the Administrative Law Judge's award of damages in the matter was substantially less than that sought by Petitioner, and that this should be considered in determining the value of Petitioner's attorney's services. See Filing, page 2.

With regard to Respondent's first argument, in the absence of a transcript of the December 16, 2002 proceeding, it is difficult for the Commission to evaluate the discussion at the proceeding on the issue of proof of attorney's fees and determine whether there is a complete lack of competent substantial evidence in the record to support the Administrative Law Judge's determination of Petitioner's attorney's hourly rate. While Respondent seems to question the credibility of Petitioner's attorney's affidavit (See "Motion for Attorney's Fees and Costs" marked as Respondent's Exhibit # 5, but likely marked incorrectly in that it appears to be Petitioner's Exhibit # 5), it could probably be said that the competent substantial evidence that does exist in the record (i.e., Petitioner's attorney's affidavit) supports a finding that the appropriate hourly rate is \$275 as opposed to the \$225 figure the Administrative Law Judge found and with which Respondent is taking issue.

What we do know is that it is within the Commission's discretion to award a reasonable attorney's fee. See Section 760.11(6), Florida Statutes (2003), cited above. The Commission has recognized that what is a reasonable attorney's fee can vary depending on the circumstances of the case, even to the point of allowing an enhanced fee by applying a multiplier to the amount

determined by multiplying the “reasonable hours expended” times the “reasonable hourly rate.” For example, in Whitehead v. Miracle Hill Nursing and Convalescent Home, Inc., 19 F.A.L.R. 1525 (FCHR 1996), the Administrative Law Judge concluded that Petitioner’s attorney’s reasonable hours expended times the reasonable hourly rate resulted in an entitlement to an attorney’s fee of \$43,759.50. The Administrative Law Judge further concluded that taking into account factors such as “the difficulty of a client in retaining counsel in this type of case, whether contingency risks can be mitigated, and the expectations of counsel in the market,” the evidence in that case supported the use of a 2.0 multiplier resulting in a total attorney’s fee award of \$87,519.00. Id., at 1535.

In our view, given the state of the record, the Commission should not disturb the Administrative Law Judge’s recommendation on this issue.

With regard to Respondent’s second argument that the attorney’s fee awarded should be substantially reduced because of the value of the case, it should be noted that in Whitehead, supra, in which the Commission upheld the Administrative Law Judge’s recommendation of an attorney’s fee of \$87,519.00, the amount of back pay and interest awarded was \$4,475.08 and the amount of costs awarded was \$2,809.82. See Whitehead, supra, at 1531.

Respondent’s exceptions with regard to the attorney’s fee award are rejected.

insurance premiums

With regard to the second exception, the absence of a transcript of the proceeding before the Administrative Law Judge regarding the remedy in this matter makes it difficult to evaluate Respondent’s exception.

Respondent’s exception states, “The petitioner should not be allowed on the one hand to make a claim for uncovered medical expenses, and on the other hand avoid admitting that he would have opted for county insurance. If he, in fact, would not have opted for county insurance, he should not be making a claim for uncovered medical expenses. The petitioner’s claim for lost benefits presupposes that he would have opted for the county insurance. Accordingly, he would have paid for same.” See Filing, ¶ 11.

The exceptions document indicates that the amount of insurance premiums was established in the record at transcript page 64. See Filing, ¶ 12. The exceptions document also reflects that the transcript of the December 16, 2002 proceeding suggests that Petitioner’s answers to questions by Respondent’s counsel were evasive with regard to the issue of whether Petitioner would have purchased medical coverage had he been hired. See Filing, page 2.

As indicated several times, above, the Commission’s file does not contain a transcript of the proceeding on the issue of remedy 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. Admin. Code R. 60Y-4.025(3), and Fla. Admin. Code R. 60Y-4.027(1). In the absence of the filing of such a transcript the Commission has ordered exceptions stricken. See, e.g., Ebeh v.

Consumer Credit Counseling Service of the Tampa Bay Area, Inc., 16 F.A.L.R. 2149, at 2150 (FCHR 1994), an employment discrimination case, and Lee v. Emmer Development Corporation, 20 F.A.L.R. 3132, at 3134 (FCHR 1998), a housing discrimination case.

In the absence of a transcript of the December 16, 2002 proceeding before the Administrative Law Judge, this second exception is stricken.

Affirmative Relief

Through our adoption of the Administrative Law Judge's findings of fact and conclusions of law, as set out above, we have adopted the Administrative Law Judge's recommendations for the remedy of the unlawful employment practice found to have occurred in this matter.

Respondent is hereby ORDERED:

- (1) to remit lost earnings to Petitioner in the manner recommended by the Administrative Law Judge in the Recommended Order, in the amount of \$19,290.24;
- (2) to remit attorney's fees to Petitioner in the manner recommended by the Administrative Law Judge in the Recommended Order, in the amount of \$31,657.50; and
- (3) to remit costs to Petitioner in the manner recommended by the Administrative Law Judge in the Recommended Order, in the amount of \$405.64.

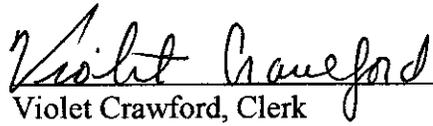
The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right of appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 29th day of December, 2003.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:



Commissioner Gayle Cannon,
Panel Chairperson;
Commissioner Donna Elam; and
Commissioner Gilbert M. Singer

Filed this 29th day of December, 2003,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(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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c/o Amy L. Sergent, Esq.
Lancaster & Eure, P.A.
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Sarasota, FL 34236

Charlotte County
c/o Brendan Bradley, Esq.
c/o Thomas Rapp, Esq.
Charlotte County Administrative Center
18500 Murdock Circle
Port Charlotte, FL 33948-1094

Robert E. Meale, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

FCHR Order No. 03-089

Page 7

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 29th day of December, 2003.

By: Kishel Crampel
Clerk of the Commission
Florida Commission on Human Relations