

1-30-04

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED
2004 JUN 28 P 1:26
DIVISION OF
ADMINISTRATIVE
HEARINGS

LARI THOMAS,

Petitioner,

v.

J. C. PENNEY COMPANY, INC.,

Respondent.

AP

EEOC Case No. 15D980671

FCHR Case No. 98-2544

DOAH Case No. 03-0724

FCHR Order No. 04-075

SDC-CW3

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

Preliminary Matters

Petitioner Lari Thomas 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 J. C. Penney Company, Inc., committed an unlawful employment practice on the basis of Petitioner's race (Black), sex (female) and age (42) when it terminated Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on January 23, 2003, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred on the bases of age and sex, but that there was reasonable cause to believe that an unlawful employment practice had occurred on the basis of race.

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 Pensacola, Florida, on November 4 and 5, 2003, before Administrative Law Judge Diane Cleavinger.

Judge Cleavinger issued a Recommended Order of dismissal, dated January 30, 2004.

The Commission panel designated below considered the record of this matter and 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 limitations set out below.

Based on the Supreme Court of Florida's decision in Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000), the ALJ concluded that the Petition for Relief was time-barred, because it was filed more than 4 years after the last act of alleged discrimination. Recommended Order, ¶ 52.

We conclude that the Administrative Law Judge committed an error of law in concluding that the Petition for Relief was not timely filed.

We note that the Administrative Law Judge found that the Petition for Relief was filed within 35 days of the issuance of the Commission's Notice of Determination. Recommended Order, Preliminary Statement.

Commission panels have dealt with the issue of the timeliness of a Petition for Relief filed more than 4 years after the alleged violation, but within 35 days of the issuance of a determination by the Commission. In one of those cases, Ford v. Mold-Ex Rubber Company, 23 F.A.L.R. 1586, at 1587 (FCHR 2001), the Commission's Order states:

"The Administrative Law Judge....concluded that since Petitioner's Petition for Relief was filed more than four years after the alleged violation, 'Petitioner's Petition for Relief should be dismissed for lack of jurisdiction under Section 760.11(1), Florida Statutes, and Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000) (where FCHR fails to make a determination of cause within 180 days after the filing of a charge of discrimination, the petitioner has four years from the date of the alleged discriminatory action to file a claim in state court).' Recommended Order, ¶ 16.

We reject this conclusion of law as incorrect.

We note that the Administrative Law Judge found that the Petition for Relief in this matter was filed within 35 days of the issuance of the no reasonable cause determination. Recommended Order, Preliminary Statement.

A Commission panel has stated, '...a complainant may request an administrative hearing at any time after the conclusion of the initial 180-day period following the filing of the complaint and no later than 35 days after the date of a determination by the Commission (or simply no later than 35 days after the date of determination, if the Commission's investigation is completed within 180 days of the filing of the complaint).' Wilson v. Scotty's, Inc., FCHR Order No. 98-032 (FCHR 1998).

Joshua, supra, overturned lower appellate courts that had concluded that if the Commission had not yet issued a 'reasonable cause' determination within 180 days of the filing of the complaint, the complainant had to file its law suit within one year of this initial 180-day period or be barred from doing so later. In so doing, the Court held that in cases in which a 'reasonable cause' determination had not been issued by the Commission the four-year statute of

limitation for causes of action based on statutory liability applied, not a limitation of 180 days plus 1-year from complaint-filing.

We note that Joshua dealt with the time frame for filing a civil action in court, as opposed to the time frame to request an administrative hearing, the issue presented in this case, and conclude that nothing in the Joshua decision requires deviation from the Commission's position set out in Wilson, supra.

Based on the foregoing, and since the Petition for Relief in this matter was filed within 35 days of the issuance of the no reasonable cause determination, we conclude that Petitioner's request for administrative hearing is timely and, as indicated, above, that the Administrative Law Judge committed an error of law in concluding that the Petition for Relief is untimely. Accord, Prentice v. North American Realty Corp., d/b/a North American Acquisition Corp., FCHR Order No. 00-021."

Accord, Tutson v. Department of Children and Family Services, FCHR Order No. 02-094 (November 8, 2002). See, also, Indish-Militello v. Pinellas Suncoast Transit Authority, FCHR Order No. 02-016 (April 17, 2002), in which a Petition for Relief was deemed timely filed when it was filed more than four years after the alleged discriminatory act and no determination was issued by the Commission.

Based on the foregoing, as indicated above, we conclude that the Administrative Law Judge committed an error of law in concluding Petitioner's Petition for Relief was time-barred. In so doing, we find: (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 time period for filing a request for administrative relief under the Florida Civil Rights Act of 1992; (2) that 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)(1), Florida Statutes (2003).

Finally, we note that the Administrative Law Judge's conclusions of law indicate that Petitioner has no damages. Recommended Order, ¶ 53 and ¶ 54. In our view, it would be more accurate to conclude that damages were not proved, given the Administrative Law Judge's finding that, "No testimony was presented for any periods of unemployment or underemployment." Recommended Order, ¶ 37.

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

Exceptions

Neither party filed exceptions to the Administrative Law Judge's Recommended Order.

Dismissal

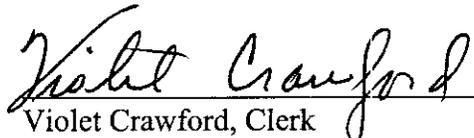
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 25th day of June, 2004.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Rita Craig, Panel Chairperson;
Commissioner Roosevelt Paige; and
Commissioner Keith Roberts

Filed this 25th day of June, 2004,
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:

Lari Thomas
c/o Anthony Nathan Thomas, Sr.
Qualified Representative
1055 Wonderwood Court
Pensacola, FL 32514-8512

Lari Thomas
1055 Wonderwood Court
Pensacola, FL 32514-8512

J. C. Penney Company, Inc.
c/o Cynthia Farris-Gruver, Esq.
6501 Legacy Drive, Mail Station 1111
Plano, TX 75024

Diane Cleavinger, 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 25th day of June, 2004.

By: *Viola Crawford*
Clerk of the Commission
Florida Commission on Human Relations