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FLORIDA COMMISSION ON
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STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS
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FILED
2004 JUN 28 P 1:25
DIVISION OF
ADMINISTRATIVE
HEARINGS

ALFRED FLOWERS,

EEOC Case No. NONE

Petitioner,

FCHR Case No. 22-026078

v.

DOAH Case No. 03-2654

TRUE GREEN CHEMLAWN,
Respondent.

FCHR Order No. 04-065

Dmk-Clos

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

Petitioner, ALFRED FLOWERS, filed a complaint of discrimination pursuant to Florida Civil Rights Act of 1992, Sections 760.01-760.11, Florida Statutes, alleging that the Respondent, TRUE GREEN CHEMLAWN, committed an unlawful employment practice by terminating him due to his race (black) and, later amended to include, disability. The allegations set forth in the complaint were investigated and on May 19, 2003, the Executive Director issued his determination that there was no reasonable cause to believe that a discriminatory act occurred. The Petitioner filed a Petition for Relief on July 14, 2003.

Administrative Law Judge Daniel M. Kilbride issued a Recommended Order of Dismissal dated September 19, 2003.

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 and Conclusions of Law

The Commission's file does not contain a transcript of the proceeding before the Administrative Law Judge. In the absence of a transcript of the proceeding before the Administrative Law Judge, his Recommended Order is the only evidence for the Commission to consider. National Industries, Inc. vs. Commission on Human Relations, et al., 527 So. 2d 894, at 898 (Fla. 5th DCA 1988).

It is undisputed that the Commission issued its Determination: No Cause and mailed a copy of its Notice of Determination to the Petitioner on May 19, 2003, with a copy of the Petition for Relief and a clear statement that the Petition for Relief must be filed within 35 days of the date of the Notice and Determination. The 35th day following the date of determination was June 23, 2003. It is also undisputed that the Petition for Relief was received, via facsimile, by the Commission on July 14, 2003, or 55 days from the date of determination.

The ALJ issued an Order to Show Cause why the case shouldn't be dismissed for failure to file the Petition for Relief within the mandatory 35 day period and ordered the Petitioner to respond, in writing, to the Respondent's Motion to Dismiss within 7 days.

The Order further stated that the failure of the Petitioner to timely respond would result in the entry of an order of dismissal. The Petitioner failed to respond timely and the Recommended Order of Dismissal was issued on September 19, 2003.

We adopt the Administrative Law Judge's findings of fact and conclusions of law.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order of Dismissal in a letter received by the ALJ 14 days after the Recommended Order of Dismissal was issued and 25 days after the Order to Show Cause was issued. The Commission is treating the letter as filing Exceptions to the Recommended Order of Dismissal.

The Petitioner was given an opportunity to show cause before the Judge as to why the cause should not be dismissed for failure to file timely. If he had afforded himself of that opportunity, he would have established a record upon which the Commission could take action. Therefore, the Commission's file does not contain a transcript of the proceeding before the Administrative Law Judge. In the absence of a transcript of the proceeding before the Administrative Law Judge, his Recommended Order is the only evidence for the Commission to consider. National Industries, Inc. vs. Commission on Human Relations, et al., 527 So.2d 894, at 898 (Fla. 5th DCA 1988).

Even if we accepted his letter (exceptions) for purposes of review and gave full credit to his statements as to why the Petition was not filed within the 35 day period, we would still adopt the Recommended Order of Dismissal. The Petitioner states that he was informed on May 19th of the Commission's Determination of No Cause; specifically referring to a phone conversation with the Commission's investigator at 3:45 p.m. on that day. He further states that he was in conflict with his attorney over the representation regarding the handling of both his worker's compensation and discrimination cases and believes that he was "mislead with ineffective counsel..."

In order to overcome the failure to timely file a Petition, the Petitioner must provide creditable evidence that the failure to file his petition was a result of equitable circumstances that prevented a timely filing ("equitable tolling"). "Generally, the [equitable] tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Machules v. Department of Administration, 523 So.2d 1132, at 1134 (Fla. 1988). The court also stated, "equitable tolling, unlike estoppel, does not require active deception or employer misconduct, but focuses rather on the employee with a reasonably prudent regard for his rights." Id. at 1133.

It should also be noted, however, that a series of recent cases have rejected the application of an excusable neglect standard in overcoming the failure to file timely a petition for an administrative hearing. See, Cann v. DCFS, 813 So.2d 237 (Fla. 2nd DCA 2002) in which the petitioner's attorney delivered the request to the post office one day prior to due date but it was not delivered (received by the agency) until one day after the due date; also Whiting v. FDLE, 849 So.2d 1149 (Fla. 5th DCA 2003) in which the Petitioner attempted to fax his request to PERC on the due date but was unsuccessful and completed the fax on the next morning; and Patz v. DOH, 864 So.2d 79 (Fla. 3rd DCA 2003) in which Respondent obtained a "default judgment" despite a late filed request for a

hearing in which the Petitioner stated that he did "not delay for a protracted length of time...[that the filing] was before the Department's motion for default, and because the Department was not prejudiced by the untimely filing."

In the instant case, the Petitioner was represented by an attorney, had full notice of the time in which a filing must be made and failed to file in a timely manner. Any issues between the Petitioner and his attorney do not create equitable circumstances for which tolling of the mandated time periods are required.

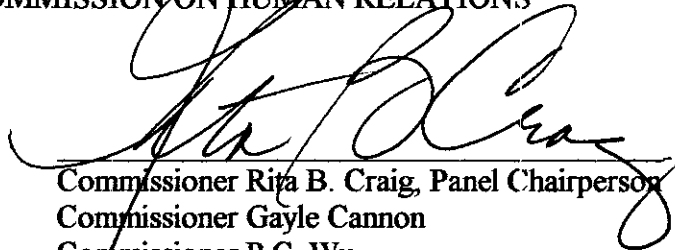
Based on the foregoing, Petitioner's exceptions are not accepted.

Dismissal

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

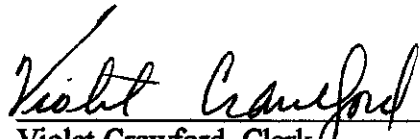
The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida 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 B. Craig, Panel Chairperson
Commissioner Gayle Cannon
Commissioner P.C. Wu

Filed this 25th day of JUNE, 2004
in Tallahassee, Florida.



Violet Crawford, Clerk
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Honorable Daniel M. Kilbride, Administrative Law Judge (DOAH)

Jim Tait, 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: Kiaht Crawford
Clerk of the Commission
Florida Commission on Human Relations