

**STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS**

ADA PELT-WASHINGTON,)	EEOC Case No. 15DA400668
Petitioner,)	FCHR Case No. 23-00562
)	DOAH Case No. 04-001136
vs.)	FCHR Order No. 04-126
)	
BMA STARKE,)	
Respondent)	

**ORDER REMANDING PETITION FOR RELIEF FROM AN UNLAWFUL
EMPLOYMENT PRACTICE**

On November 19, 2002, Petitioner filed a complaint of discrimination pursuant to Florida Civil Rights Act of 1992, Sections 760.01-760.11, Florida Statutes (2001), alleging that the Respondent committed an unlawful employment practice when she was denied promotions and equal pay, was subjected to a hostile working environment and, ultimately, constructively terminated because of her race, color, religion and in retaliation. The Petitioner filed an Election of Rights form signed by her attorney on February 9, 2004, and received by the Florida Commission on Human Relations (“Commission”) on February 10, 2004, in which the following option was checked:

(b) More than 180 days have elapsed since I filed my charge of discrimination. I wish to withdraw my charge and file a Petition for Relief to proceed with an administrative hearing as provided for under Florida Statutes Section 760.11(4)(b) and (8).

On February 16, 2004, the Commission sent a letter to Petitioner’s attorney confirming its receipt of the Election of Rights form on February 10, 2004. Enclosed with the letter was a blank petition for relief form. The letter stated the form should be completed and returned to the Commission within 20 days. Following February 16, 2004, the Commission and Petitioner had discussions about the original complaint not being dual-filed with the EEOC. The Commission advised the Petitioner’s attorney on March 18, 2004, that it had dual filed the claim with the EEOC and provided the EEOC complaint number. On March 29, 2004, Petitioner’s attorney signed a second Election of Rights form that was received by the Commission on March 31, 2004, with the same option checked.

On April 1, 2004, the Commission sent a second letter confirming receipt of Petitioner’s second Election of Rights form dated March 29, 2004, and informing the Petitioner that the Commission was forwarding the Election of Rights to the Division of Administrative Hearings (DOAH) for case assignment. Enclosed was another Petition for Relief form and the letter further instructed the Petitioner to forward her original Petition to DOAH with a copy to the Commission.

On April 1, 2004, the Commission also forwarded a packet to DOAH, entitled “Transmittal of Petition,” that included its April 1st letter to Petitioner’s attorney, a copy of the original Charge of Discrimination filed with the Commission (incorrectly date-stamped December 2, 2002) and a copy of the second Election of Rights, dated March 29, 2004, that had been signed by Petitioner’s attorney. The “Transmittal of Petition” included the following statement:

“Please be advised that the Florida Commission on Human Relations has received an Election of Rights Form from an Unlawful Employment Practice by ADA PELT-WASHINGTON. Pursuant to Section 120.57, Florida Statutes and Rule 60Y-4.016(1), Florida Administrative Code, the Commission requests the Division of Administrative Hearings to assign this matter to an administrative law judge and conduct all necessary proceedings required under the law and submit recommended findings to the Commission. Copies of all relevant pleadings and papers heretofore filed in this proceeding are attached to this notice.”

The record reflects that the ALJ issued an initial order in the case, noticed it for hearing and rejected a Motion by the Respondent for a continuance.

On June 15, 2004, Respondent filed a “Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment” over which oral argument was heard by telephonic conference call on June 23 and 25, 2004. Following the initial oral argument on June 23, Petitioner filed a written response to the Motion and its Petition for Relief (not on the Commission form) on June 24, 2004. A final oral argument was held on the Respondent’s Motion and Petitioner’s Responses on June 25, 2004.

Judge Ella Jane P. Davis issued a Recommended Order of Dismissal dated July 29, 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

Judge Davis found that the original complaint was filed with the Commission on November 19, 2002. The ALJ further found that the filing made on March 18, 2004, by the Commission with the EEOC, was virtually identical in all respects to the Charge filed with the Commission on November 19, 2002. The only difference was that the date of alleged most recent discrimination was given as March 23, 2002. The Commission failed to act within 180 days of the original complaint and the Petitioner filed an Election of Remedies form on February 16, 2004 and on March 31, 2004, both times electing option (b): to proceed with an administrative hearing.

After acknowledging receipt of the original Election, the Commission instructed the Petitioner to fill out an attached Petition for Relief form within 20 days and file it with the Commission. When it acknowledged receipt of the second Election, the Commission noted that the Petitioner had failed to complete its Petition for Relief form. The Commission attached a second form and informed the Petitioner that it was simultaneously transmitting the Election to DOAH for case assignment. The Petitioner was instructed to file a completed Petition for Relief form with DOAH and send a copy to the Commission. Petitioner failed to follow the instructions until after the Respondent filed its Motion to Dismiss or, in the Alternative, a Motion for Summary Judgment, dated June 15, 2004. Petitioner did ultimately file her Petition (not on the Commission’s form) with DOAH on June 24, 2004.

We adopt the Administrative Law Judge’s Findings of Fact.

Conclusions of Law

Judge Davis concluded that the Petitioner had failed to request an administrative hearing within the 35-day time limit imposed by the Legislature and that the case should be dismissed as jurisdictionally time-barred. We conclude that this is an error of law and, as ordered, *infra*, that the case should be remanded to the Administrative Law Judge for further proceedings on the request for an administrative hearing.

The ALJ based her conclusions on several grounds. The first issue considered was that, without a Commission determination, the Petitioner must file for an administrative hearing within 35 days following the passage of 180

days from the date of filing her complaint. Although the ALJ indicated that “for a very long time, the case law uniformly held that someone in the Petitioner’s situation (when the Commission has failed to issue a determination-ed.) has 35 days, from the one hundred and eightieth day, in which to file her Petition for Relief with the Commission,” the Commission has consistently held that a Petitioner may file a request for an administrative hearing either 1) at any time after the conclusion of the initial 180-day period following the filing of the complaint when no determination by the Commission has been issued or 2) no later that 35-days after the date of a determination by the Commission. See, *Wilson v. Scotty’s, Inc.*, FCHR Order No. 98-032, filed December 30, 1998; *Adams v. Orange County School Board*, FCHR Order No. 99-010, filed May 17, 1999; *Prentice v. NA Realty Corp.*, FCHR Order No. 00-021, filed January 6, 2000; *Lynell Campbell-Metcalf v. Department of Education*, FCHR Order No. 01-043, filed November 30, 2001; *Saunders v. Hangar Prosthetics & Orthotics, Inc.*, FCHR Order No. 02-006, filed March 20, 2002; and *Miller v. Leesburg Medical Center*, FCHR Order No. 02-101, filed January 2, 2003.

The second issue seems to be that the Petitioner failed to follow instructions by the Commission to fill out its Petition for Relief form in a timely manner. The statute in question refers to requesting an administrative hearing for which the Commission has created several forms to ease the complainant’s procedural hurdles. However, the forms and procedures adopted by Commission Rule 60Y-2.009, Florida Administrative Code (F.A.C.), explicitly state that “[U]se of the FCHR forms described in this section is not obligatory, and any complaint or Petition for Relief...which meets the requirements of the rules of the Commission will be accepted.” Rule 60Y-5.008, F.A.C., provides for “Petitions for Relief” where the Commission has issued a determination and clearly states that such Petition shall be filed within 35 days of the determination unless, for good cause shown upon motion filed within the 35 day period, the Executive Director grants an extension. There is no specific rule on requests for an administrative hearing filed when the Commission has not issued a determination.

Since the Commission transmitted the Petitioner’s Second Election of Remedies, dated March 29, 2004, as a request for an administrative hearing and instructed the Petitioner to file the Commission’s suggested Petition for Relief form directly with the Division, the Petitioner’s request was timely submitted and not jurisdictionally time-barred. There has been no finding by the ALJ, nor allegation by the Respondent, that the notice was not adequate. Further, any deficiencies in pleading could have been corrected by the Petitioner responding to a request for a More Definite Statement (*Adams, supra*) or an Order to Show Cause (*Campbell-Metcalf, supra*). The filing made by Petitioner on June 24, 2004, although without leave of the ALJ, seems to have met this burden.

We modify the conclusions of law accordingly.

In modifying these conclusions of law of the Administrative Law Judge, we conclude:

(1) that the conclusions of law being modified are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions of law stating what must be demonstrated to establish a timely request for an administrative hearing under the Florida Civil Rights Act of 1992; (2) that the reason the modification is being made by the Commission is that the conclusions of law as stated are contrary to previous Commission decisions on the issue; and (3) that in making these modifications the conclusions of law we are substituting are as or more

reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2001).

Exceptions

Neither party submitted exceptions.

Remand

The Request for Relief and Complaint of Discrimination are remanded to the Administrative Law Judge for further proceedings consistent with the provisions of this order.

DONE AND ORDERED this 21st day of October, 2004
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Dominique B. Saliba; and
Commissioner Rita Craig; and
Commissioner Roosevelt Paige;

Filed this 21st day of October, 2004,
in Tallahassee, Florida

/s/

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By: /s/

Violet Crawford,
Clerk of the Commission
Florida Commission on Human Relations