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**200102 TBD.F**  
**'AGENCY FINAL ORDERS'**

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Unofficial Reporter

1/8/2001 - 1/14/2001

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**200102 TBD.F 001**  
**'AGENCY FINAL ORDERS'**

**CAPTION:** *Mcneil v. Orange County*

**CITATION:** 200102 TBD.F 001

**ORDER NO:** 01-006

**DATE:** 1/8/2001

**STATE:** FL

**CASE NO:** 95-2811 (FCHR)  
00-000986 (DOAH)

**CASE TYPE:** Employment Discrimination

age	col	dis	fam	mar	nat	rac	rel	ret	sex	unk
		<input checked="" type="checkbox"/>								

**FILENAME:** 01-006.pdf

**PAGES:** 3

**RESULT:** Final (dismissed)



**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

<b>KYLE MCNEIL,</b>	)	EEOC Case No. 15D961245
<b>Petitioner,</b>	)	FCHR Case No. 95-2811
	)	DOAH Case No. 00-000986
<b>vs.</b>	)	FCHR Order No. 01-006
	)	
<b>ORANGE COUNTY SCHOOL BOARD,</b>	)	
<b>Respondent</b>	)	

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

Preliminary Matters

Petitioner Kyle McNeil 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 School Board of Orange County committed an unlawful employment practice on the basis of Petitioner's handicap by constructively discharging Petitioner from her position.

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

An evidentiary hearing was held by video conference to Orlando, Florida, on May 19, 2000, before Administrative Law Judge Daniel M. Kilbride.

Judge Kilbride issued a Recommended Order of dismissal, dated August 31, 2000.

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. 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.

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.

DONE AND ORDERED this 8th day of January, 2001  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Claretha Brooks; and  
Commissioner Rita Craig; and  
Commissioner Sharon Ofuani;

Filed this 8th day of January, 2001,  
in Tallahassee, Florida

/s/

---

Azizi Coleman, Clerk  
Commission on Human Relations  
4075 Esplanade Way, Room 110  
Tallahassee, FL 32399  
(850) 488-7082

Copies furnished to:

Kyle McNeil  
523 Hicksmore Drive  
Apartment A  
Winter Park, FL 3279

Frank Kruppenbacher, Esq.  
Orange County School Board  
445 West Amelia Street  
Orlando, FL 32801

Daniel M. Kilbride, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

By: /s/  
Azizi Coleman,

---

Clerk of the Commission  
Florida Commission on Human Relations

**200102 TBD.F 002**  
**'AGENCY FINAL ORDERS'**

**CAPTION:** *Brander v. Hillsborough County*

**CITATION:** 200102 TBD.F 002

**ORDER NO:** 01-010

**DATE:** 1/8/2001

**STATE:** FL

**CASE NO:** 20-01788 (FCHR)

00-001782 (DOAH)

**CASE TYPE:** Employment Discrimination

age	col	dis	fam	mar	nat	rac	rel	ret	sex	unk
		<input checked="" type="checkbox"/>								

**FILENAME:** 01-010.pdf

**PAGES:** 2

**RESULT:** Interlocutory (dismissed)



**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

<b>ELIZABETH BRANDER,</b>	)	EEOC Case No. 151A00839
<b>Petitioner,</b>	)	FCHR Case No. 20-01788
	)	DOAH Case No. 00-001782
<b>vs.</b>	)	FCHR Order No. 01-010
	)	
<b>HILLSBOROUGH COUNTY,</b>	)	
<b>Respondent</b>	)	

**ORDER DISMISSING REQUEST FOR RELIEF FROM AN UNLAWFUL  
EMPLOYMENT PRACTICE, WITHOUT PREJUDICE, WITH LEAVE TO RE-FILE  
AT APPROPRIATE TIME**

Preliminary Matters

Petitioner Elizabeth Brander filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1999), alleging that Respondent Hillsborough County committed an unlawful employment practice on the basis of Petitioner's handicap by terminating Petitioner from her position and failing to provide Petitioner reasonable accommodation.

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

Administrative Law Judge J. Lawrence Johnston issued a Recommended Order of Dismissal, without prejudice, dated June 5, 2000, finding that the request for administrative hearing was premature.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order of Dismissal.

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.

The Administrative Law Judge concluded that, "Section 760.11(8), Florida Statutes (1999), provides that no administrative action can commence until either the FCHR determines cause or 180 days passes without a cause determination." Recommended Order of Dismissal.

We concur, and note that 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).  
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 request for administrative hearing is DISMISSED without prejudice, with leave to re-file at a time appropriate under law as set out in the Conclusions of Law section of this Order.

DONE AND ORDERED this 8th day of January, 2001  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Claretha Brooks; and  
Commissioner Rita Craig; and  
Commissioner Sharon Ofuani;

Filed this 8th day of January, 2001,  
in Tallahassee, Florida

/s/

---

Azizi Coleman, Clerk  
Commission on Human Relations  
4075 Esplanade Way, Room 110  
Tallahassee, FL 32399  
(850) 488-7082

Copies furnished to:

Elizabeth Brander  
15806 Spring Crest Circle  
Tampa, FL 3362

Helene E. Marks, Esq.  
419 Pierce Street, Room 114  
Post Office Box 1110  
Tampa, FL 33601

J. Lawrence Johnston, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

By: /s/

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Azizi Coleman,  
Clerk of the Commission  
Florida Commission on Human Relations

**200102 TBD.F 003**  
**'AGENCY FINAL ORDERS'**

**CAPTION:** *Besson v. Wakulla County*

**CITATION:** 200102 TBD.F 003

**ORDER NO:** 00-027

**DATE:** 1/9/2001

**STATE:** FL

99-1522 (FCHR)

**CASE NO:**

00-000410 (DOAH)

**CASE TYPE:** Employment Discrimination

age	col	dis	fam	mar	nat	rac	rel	ret	sex	unk
		<input checked="" type="checkbox"/>						<input checked="" type="checkbox"/>		

**FILENAME:** 00-027.pdf

**PAGES:** 3

**RESULT:** Remand (continue litigation)



**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

<b>ROSALIND BESSON,</b>	)	EEOC Case No. 15D990264
<b>Petitioner,</b>	)	FCHR Case No. 99-1522
	)	DOAH Case No. 00-000410
<b>vs.</b>	)	FCHR Order No. 00-027
	)	
<b>SCHOOL BOARD OF WAKULLA COUNTY,</b>	)	
<b>Respondent</b>	)	

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

Preliminary Matters

Petitioner Rosalind Besson 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 School Board of Wakulla County committed an unlawful employment practice on the basis of Petitioner's disability (unspecified, but alleged to be known by Respondent) and on the basis of retaliation when it failed to hire Petitioner for a position for which she had applied.

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 Diane Cleavinger issued a Recommended Order of Dismissal, dated June 14, 2000. Pursuant to notice, public deliberations were held on December 7, 2000, 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, 325 John Knox Road, Building F, Suite 240, Tallahassee, Florida, 32303-4149. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order of Dismissal.

Conclusions of Law

The Administrative Law Judge concluded that since Petitioner had not filed a "petition for relief," Petitioner's action was untimely because "Petitioner is required to file a petition in order to complete Petitioner's request for a hearing and afford Respondent due process." Recommended Order of Dismissal, page 3. The Administrative Law Judge also concluded that, since no determination had been issued, Petitioner had to request an administrative hearing within 35 days of the expiration of 180 days following the filing of the charge of discrimination. Recommended Order of Dismissal, page 3. The Administrative Law Judge further concluded that, "[a] request for administrative hearing...must be requested no later than 35 days after the determination of reasonable cause by the Commission or the date Petitioner makes an election of rights when no determination has been made by FCHR within 180 days." Recommended Order of Dismissal, page 2. We conclude that these represent errors of law which require the matter to be remanded to the Administrative Law Judge for further proceedings on the request for administrative hearing. The Florida Civil Rights Act of 1992 (Act) states, "In the event that the commission fails to

conciliate or determine whether there is reasonable cause on any complaint under this section within 180 days of the filing of the complaint, an aggrieved person may proceed under subsection (4), as if the commission determined that there was reasonable cause." Section 760.11(8), Florida Statutes (1999). The referred to subsection (4) states, "In the event that the commission determines that there is reasonable cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person may either: (a) Bring a civil action against the person named in the complaint in any court of competent jurisdiction; or (b) Request an administrative hearing under ss. 120.569 and 120.57." Section 760.11(4), Florida Statutes (1999). With regard to civil suits, the Act states, "A civil action brought under this section shall be commenced no later than 1 year after the date of determination of reasonable cause by the commission." Section 760.11(5), Florida Statutes (1999). With regard to administrative proceedings, the Act states, "An administrative hearing pursuant to (4)(b) must be requested no later than 35 days after the date of determination of reasonable cause by the commission." Section 760.11(6), Florida Statutes (1999). In interpreting these statute sections a Commission panel stated, "...we conclude that the plain meaning of the cited statutory provisions is that 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). With regard to the conclusion that the request for administrative hearing must be filed within 35 days of the filing of the election of rights form, a Commission panel considering a similar conclusion, stated, "...there is no such statutory requirement." *Adams v. Orange County School Board*, FCHR Order No. 99-010, May 17, 1999. With regard to the conclusion that a petition for relief must be filed to complete the request for administrative hearing, a Commission panel has stated, "We note that: (1) The statutory sections in question, relating to a 35-day time period, do not refer to the filing of a Petition for Relief, but rather refer to the request for an administrative hearing; and (2) The event which triggers the 35-day time period for filing is the issuance of a 'determination' by the Commission. Section 760.11(6), Florida Statutes (1997). In this case, Petitioner filed a form provided him by the Commission, and checked the box that indicated, '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). [citation omitted.]" We conclude that this amounts to the statutorily referred to request for an administrative hearing and that the request was filed within the time frame set out in *Wilson*, supra, since no determination has been issued by the Commission in this matter." *Adams*, supra. Based on the foregoing, and since no determination has been issued in the instant case, we conclude that the Administrative Law Judge committed an error of law in concluding that the request for administrative hearing was untimely. Finally, we find: (1) that the conclusions of law we are modifying are ones over which the Commission has substantive jurisdiction, namely the interpretation of the time period for filing a request for administrative relief under the Florida Civil Rights Act of 1992 and the determination of the requirements of a request for administrative hearing under the Florida Civil Rights Act of 1992; (2) that the corrections being made by the Commission are as or more reasonable than the conclusions being corrected; and (3) the reason for the corrections is an interpretation of the Florida Civil Rights Act of 1992 by the Administrative Law Judge that runs contrary to previous Commission action. See Section 120.57(1)(l), Florida Statutes (1999).

#### Exceptions

Petitioner filed a document entitled, "Petitioner's Exceptions to Recommended Order," containing 10 numbered paragraphs. Each paragraph, itself, is not an exception, but rather the document excepts to the Administrative Law Judge's conclusion that Petitioner was required to file a "petition," noting that Petitioner filed a charge of discrimination setting forth the facts in dispute and an Election of Rights form indicating a request for hearing, and arguing that this "substantially complied" with the petition-filing requirements. See, Pleading, 9 and 10. For reasons discussed in the Conclusions of Law section of this Order, we accept Petitioner's exceptions.

#### Remand

The Request for Administrative Hearing and Complaint of Discrimination are hereby REMANDED to the Administrative Law Judge for further proceedings consistent with this Order.

DONE AND ORDERED this 9th day of January, 2001  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Aristides Sosa; and  
Commissioner Claretha Brooks; and  
Commissioner Keith Roberts;

Filed this 9th day of January, 2001,  
in Tallahassee, Florida

/s/

---

Azizi Coleman, Clerk  
Commission on Human Relations  
4075 Esplanade Way, Room 110  
Tallahassee, FL 32399  
(850) 488-7082

Copies furnished to:

Gary L. Printy, Esq.  
The Law Office of Gary L. Printy  
1301 Miccosukee Road  
Tallahassee, FL 32308-5068

C. Graham Carothers, Esq.  
Ausley & McMullen  
P. O. Box 391  
Tallahassee, FL 32302

Diane Cleavinger, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

By: /s/

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Azizi Coleman,  
Clerk of the Commission  
Florida Commission on Human Relations

**200102 TBD.F 004**  
**'AGENCY FINAL ORDERS'**

**CAPTION:** *Jackson v. Halifax Health*

**CITATION:** 200102 TBD.F 004

**ORDER NO:** 00-022

**DATE:** 1/9/2001

**STATE:** FL

**CASE NO:** 1997-0063 (FCHR)  
00-001781 (DOAH)

**CASE TYPE:** Employment Discrimination

age	col	dis	fam	mar	nat	rac	rel	ret	sex	unk
						<input checked="" type="checkbox"/>				

**FILENAME:** 00-022.pdf

**PAGES:** 3

**RESULT:** Remand (continue litigation)



**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

<b>SANDRA F. JACKSON,</b>	)	EEOC Case No. 15D971336
<b>Petitioner,</b>	)	FCHR Case No. 97-0063
	)	DOAH Case No. 00-001781
<b>vs.</b>	)	FCHR Order No. 00-022
	)	
<b>HALIFAX MEDICAL CENTER,</b>	)	
<b>Respondent</b>	)	

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

Preliminary Matters

Petitioner Sandra F. Jackson filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1995), alleging that Respondent Halifax Medical Center committed an unlawful employment practice on the basis of Petitioner's race (Black) by harassing and eventually terminating Petitioner. 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 Donald R. Alexander issued a Recommended Order of Dismissal, dated June 14, 2000. Pursuant to notice, public deliberations were held on October 26, 2000, 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, 325 John Knox Road, Building F, Suite 240, Tallahassee, Florida, 32303-4149. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order of Dismissal.

Conclusions of Law

The Administrative Law Judge found that Petitioner filed a Charge of Discrimination on February 26, 1998, alleging that she had been discriminated against on the basis of her race and alleging that the most recent or continuing discrimination took place on April 8, 1996, almost two years earlier. The Administrative Law Judge recommended dismissal of the complaint/charge of discrimination because it was filed more than 365 days after the alleged discriminatory act. See Recommended Order of Dismissal. The Florida Civil Rights Act of 1992 states, "Any person aggrieved by a violation of [the Act] may file a complaint with the commission within 365 days of the alleged violation..." Section 760.11(1), Florida Statutes (1999). We note that, while the Charge of Discrimination transmitted to the Division of Administrative Hearings in this case does reflect that Petitioner signed the complaint on February 26, 1998 (indicating a date of discrimination of April 8, 1996), the documents used to transmit the case from the Commission to the Division of Administrative Hearings reflect a different date for the filing. The initial transmittal memo reflects that the Charge of Discrimination was filed with the Commission on April 24, 1996, and an amended transmittal memo reflects that the Charge of Discrimination was filed with the Commission on April 14, 1996, both within 365 days of the alleged discriminatory act. See Filings. This matter was before the Administrative Law Judge on Respondent's Motion to Dismiss, and the Administrative Law Judge found, "In its

motion, Respondent points out that the Commission had earlier taken the position that the charging document was filed in a timely manner, but no papers have been filed by Petitioner or the Commission to support this view." See Recommended Order of Dismissal. Based on the contents of the initial and amended transmittal memos referenced above, we find that the Administrative Law Judge's finding that neither the Petitioner nor the Commission filed papers to support a finding that the complaint was timely filed is not supported by competent substantial evidence, and find that the record reflects that the complaint in this matter was timely filed.

Exceptions

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

Remand

The Request for Administrative Hearing and Complaint of Discrimination are hereby REMANDED to the Administrative Law Judge for further proceedings consistent with this Order.

DONE AND ORDERED this 9th day of January, 2001  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Aristides Sosa; and  
Commissioner George Farrell; and  
Commissioner Roosevelt Paige;

Filed this 9th day of January, 2001,  
in Tallahassee, Florida

/s/

---

Azizi Coleman, Clerk  
Commission on Human Relations  
4075 Esplanade Way, Room 110  
Tallahassee, FL 32399  
(850) 488-7082

Copies furnished to:

Sandra F. Jackson  
828 White Ct.  
Daytona Beach, FL 3211

William E. Sizemore, Esq.  
John W. Bencivenga, Esq.  
Thompson, Sizemore & Gonzalez, P.A.  
P.O. Box 639  
Tampa, FL 33601

D.R. Alexander, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel



By: /s/  
Azizi Coleman,  
Clerk of the Commission  
Florida Commission on Human Relations

**200102 TBD.F 005**  
**'AGENCY FINAL ORDERS'**

**CAPTION:** *Prentice v. North American Realty*

**CITATION:** 200102 TBD.F 005

**ORDER NO:** 00-021

**DATE:** 1/9/2001

**STATE:** FL

94-9714 (FCHR)

**CASE NO:**

99-000508 (DOAH)

**CASE TYPE:** Employment Discrimination

age	col	dis	fam	mar	nat	rac	rel	ret	sex	unk
		<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>					<input checked="" type="checkbox"/>	

**FILENAME:** 00-021.pdf

**PAGES:** 3

**RESULT:** Remand (continue litigation)



**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

<b>ELAINE J. PRENTICE,</b>	)	EEOC Case No. 150941924
<b>Petitioner,</b>	)	FCHR Case No. 94-9714
	)	DOAH Case No. 99-000508
<b>vs.</b>	)	FCHR Order No. <u>00-021</u>
	)	
<b>NORTH AMERICAN REALTY CORPORATION, D/B/A NORTH AMERICAN ACQUISITION CORPORATION,</b>	)	
<b>Respondent</b>	)	

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

Preliminary Matters

Petitioner E. Prentice 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 North American Realty Corp., d/b/a North American Acquisition Corp., committed an unlawful employment practice on the basis of Petitioner's sex (pregnancy-based discrimination) and marital status when it terminated Petitioner from employment on September 2, 1993. 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 Errol H. Powell issued a Recommended Order of Dismissal, dated May 23, 2000. Pursuant to notice, public deliberations were held on October 26, 2000, 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, 325 John Knox Road, Building F, Suite 240, Tallahassee, Florida, 32303-4149. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order of Dismissal.

Conclusions of Law

The Administrative Law Judge found that Petitioner filed a charge of discrimination on April 4, 1994, that the Commission did not complete its investigation, and that Petitioner executed a document requesting an administrative hearing on August 21, 1998. Recommended Order of Dismissal, 1, 2, and 3. The Administrative Law Judge concluded that Petitioner had 35 days from the completion of the initial 180-day period following the filing of the complaint in which to file a request for administrative hearing (Recommended Order of Dismissal, 12), and that since Petitioner's request for administrative hearing was not filed within this time period Petitioner's administrative action was barred. Recommended Order of Dismissal, 13. In so concluding, the Administrative Law Judge relied on, inter alia, the decision in *Milano v. Moldmaster*, 703 So. 2d 1093 (Fla. 4th DCA 1997). Recommended Order of Dismissal, 9 and 13. We conclude that the Administrative Law Judge's conclusion that Petitioner's request for administrative hearing is untimely is an error of law, and as ordered, infra, that the case

should be remanded to the Administrative Law Judge for further proceedings. The Florida Civil Rights Act of 1992 (Act) states, "In the event that the commission fails to conciliate or determine whether there is reasonable cause on any complaint under this section within 180 days of the filing of the complaint, an aggrieved person may proceed under subsection (4), as if the commission determined that there was reasonable cause." Section 760.11(8), Florida Statutes (1999). The referred to subsection (4) states, "In the event that the commission determines that there is reasonable cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person may either: (a) Bring a civil action against the person named in the complaint in any court of competent jurisdiction; or (b) Request an administrative hearing under ss. 120.569 and 120.57." Section 760.11(4), Florida Statutes (1999). With regard to civil suits, the Act states, "A civil action brought under this section shall be commenced no later than 1 year after the date of determination of reasonable cause by the commission." Section 760.11(5) Florida Statutes (1999). With regard to administrative proceedings, the Act states, "An administrative hearing pursuant to (4)(b) must be requested no later than 35 days after the date of determination of reasonable cause by the commission." Section 760.11(6), Florida Statutes (1999). In interpreting these statute sections a Commission panel stated, "...we conclude that the plain meaning of the cited statutory provisions is that 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). We note that the *Milano* decision, *supra*, cited by the Administrative Law Judge, holds that the one-year limitation for filing a civil suit begins to run at the expiration of the 180-day period in which the Commission is to make a reasonable cause determination. See *Milano*, at 1094. The Commission panel in *Wilson*, *supra*, specifically rejected the contention that *Milano*, *supra*, was controlling of the issue presented in the case before it relating to the time frame for filing a request for administrative hearing. See Order. At oral argument, Respondent contended that the Supreme Court's decision in *Joshua v. City of Gainesville*, 25 Fla. L. Weekly S641 (Fla. August 31, 2000), acted to bar Petitioner's request for administrative hearing. We note that the request for administrative hearing in this matter was filed both more than 4 years after the filing of the initial complaint, and, obviously then, more than four years after the date of harm. Recommended Order of Dismissal, 1 and 3. *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 no determination has been issued in the instant case, 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 request for administrative hearing is untimely. Finally, we find: (1) that the Administrative Law Judge's conclusion of law we are correcting 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) 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 we are substituting is as or more reasonable than the conclusion which has been rejected. See, Section 120.57(1)(l), Florida Statutes (1999).

#### Exceptions

Petitioner filed eight numbered exceptions to the Administrative Law Judge's Recommended Order of Dismissal, in a document entitled, "Exceptions to Judge Powell's Recommended Order to Dismiss filed on May 23, 2000." Exception 1 excepts to the finding that the complaint in this matter was filed on April 4, 1994. The Commission's file reflects competent and substantial evidence to support this finding, namely a complaint form stamped received

by the Commission on April 4, 1994. We reject exception 1. Exceptions 2 through 8 except to the Administrative Law Judge's conclusion that Petitioner had 35 days to file a request for administrative hearing after the expiration of the 180-day period from the filing of the complaint in which the Commission was to make a reasonable cause determination, and that since the request for administrative hearing was filed later than this, it was not timely filed. For reasons discussed in the "Conclusions of Law" section of this Order, we accept exceptions 2 through 8.

Remand

The Request for Administrative Hearing and Complaint of Discrimination are hereby REMANDED to the Administrative Law Judge for further proceedings consistent with this Order.

DONE AND ORDERED this 9th day of January, 2001  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Aristides Sosa; and  
Commissioner George Farrell; and  
Commissioner Roosevelt Paige;

Filed this 9th day of January, 2001,  
in Tallahassee, Florida

/s/

---

Azizi Coleman, Clerk  
Commission on Human Relations  
4075 Esplanade Way, Room 110  
Tallahassee, FL 32399  
(850) 488-7082

Copies furnished to:

Mark J. Berkowitz, P.A.  
524 S. Andrews Avenue  
Suite 200N  
Ft. Lauderdale, FL 3330

Michael W. Casey, III, Esq.  
Scott S. Allen, Esq.  
Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Brammick, P.A.  
200 South Biscayne Boulevard, Suite 3600  
Miami, FL 33131-2338

Errol H. Powell, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

By: /s/

---

Azizi Coleman,  
Clerk of the Commission  
Florida Commission on Human Relations

**200102 TBD.F 006**  
**'AGENCY FINAL ORDERS'**

**CAPTION:** *Johnson v. Chatauqua Offices of Psychotherapy*

**CITATION:** 200102 TBD.F 006

**ORDER NO:** 00-023

**DATE:** 1/9/2001

**STATE:** FL

**CASE NO:** 98-0469 (FCHR)

99-003871 (DOAH)

**CASE TYPE:** Employment Discrimination

age	col	dis	fam	mar	nat	rac	rel	ret	sex	unk
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**FILENAME:** 00-023.pdf

**PAGES:** 3

**RESULT:** Remand (continue litigation)



**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

<b>EARLENE JOHNSON,</b>	)	EEOC Case No. N/A
<b>Petitioner,</b>	)	FCHR Case No. 98-0469
	)	DOAH Case No. 99-003871
<b>vs.</b>	)	FCHR Order No. <u>00-023</u>
	)	
<b>CHATAUQUA OFFICES OF PSYCHOTHERAPY AND EVALUATION,</b>	)	
<b>Respondent</b>	)	

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

Preliminary Matters

Petitioner Earlene Johnson filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1995), alleging that Respondent Chatauqua Office of Psychotherapy and Evaluation committed an unlawful employment practice on the basis of Petitioner's race (Black) and retaliation when it terminated Petitioner from employment. 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 Larry J. Sartin issued a Recommended Order of Dismissal, dated May 24, 2000. Pursuant to notice, public deliberations were held on October 26, 2000, 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, 325 John Knox Road, Building F, Suite 240, Tallahassee, Florida, 32303-4149. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order of Dismissal.

Conclusions of Law

The Administrative Law Judge concluded that the Charge of Discrimination was not filed in this matter until after 365 days from the alleged incidents of discrimination, and therefore, was barred. Recommended Order of Dismissal, 16. The Florida Civil Rights Act of 1992 states, "Any person aggrieved by a violation of [the Act] may file a complaint with the commission within 365 days of the alleged violation..." Section 760.11(1), Florida Statutes (1999). We note that while the Charge of Discrimination transmitted to the Division of Administrative Hearings in this case does reflect that Petitioner signed the complaint on May 4, 1998 (indicating a date of discrimination of December 4, 1996), the documents used to transmit the case from the Commission to the Division of Administrative Hearings reflect a different date for the filing. The transmittal memo reflects that the Charge of Discrimination was filed with the Commission on November 10, 1997, within 365 days of the alleged discriminatory act. See Filing. Based on the foregoing, we conclude that the Administrative Law Judge's finding that, "It is clear...that no Charge of Discrimination was filed by [Petitioner] with the Commission until more than 365 days after the alleged act of discrimination, December 4, 1996" (Recommended Order of Dismissal, 13), is not supported

by competent substantial evidence, and find that the record reflects that the complaint in this matter was timely filed. The Administrative Law Judge also concluded that the request for administrative hearing was not timely filed because it was not filed within 35 days of the initial 180-day period following the filing of the complaint. Recommended Order of Dismissal, 17 through 24. The Administrative Law Judge concluded that Petitioner had 35 days from the completion of the initial 180-day period following the filing of the complaint in which to file a request for administrative hearing (Recommended Order of Dismissal, 21), and that since Petitioner's request for administrative hearing was not filed within this time period Petitioner's administrative action was barred. Recommended Order of Dismissal, 22. In so concluding, the Administrative Law Judge relied on, inter alia, the decision in *Milano v. Moldmaster*, 703 So. 2d 1093 (Fla. 4th DCA 1997). Recommended Order of Dismissal, 23 and 24. We conclude that the Administrative Law Judge's conclusion that Petitioner's request for administrative hearing is untimely is an error of law, and as ordered, infra, that the case should be remanded to the Administrative Law Judge for further proceedings. The Florida Civil Rights Act of 1992 (Act) states, "In the event that the commission fails to conciliate or determine whether there is reasonable cause on any complaint under this section within 180 days of the filing of the complaint, an aggrieved person may proceed under subsection (4), as if the commission determined that there was reasonable cause." Section 760.11(8), Florida Statutes (1999). The referred to subsection (4) states, "In the event that the commission determines that there is reasonable cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person may either: (a) Bring a civil action against the person named in the complaint in any court of competent jurisdiction; or (b) Request an administrative hearing under ss. 120.569 and 120.57." Section 760.11(4), Florida Statutes (1999). With regard to civil suits, the Act states, "A civil action brought under this section shall be commenced no later than 1 year after the date of determination of reasonable cause by the commission." Section 760.11(5), Florida Statutes (1999). With regard to administrative proceedings, the Act states, "An administrative hearing pursuant to (4)(b) must be requested no later than 35 days after the date of determination of reasonable cause by the commission." Section 760.11(6), Florida Statutes (1999). In interpreting these statute sections a Commission panel stated, "...we conclude that the plain meaning of the cited statutory provisions is that 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). We note that the *Milano* decision, supra, cited by the Administrative Law Judge, holds that the one-year limitation for filing a civil suit begins to run at the expiration of the 180-day period in which the Commission is to make a reasonable cause determination. See *Milano*, at 1094. The Commission panel in *Wilson*, supra, specifically rejected the contention that *Milano*, supra, was controlling of the issue presented in the case before it relating to the time frame for filing a request for administrative hearing. See Order. Based on the foregoing, and since no determination has been issued in the instant case, 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 request for administrative hearing is untimely. Finally, we find: (1) that the Administrative Law Judge's conclusion of law we are correcting 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) 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 we are substituting is as or more reasonable than the conclusion which has been rejected. See, Section 120.57(1)(l), Florida Statutes (1999).

#### Exceptions

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

#### Remand



The Request for Administrative Hearing and Complaint of Discrimination are hereby REMANDED to the Administrative Law Judge for further proceedings consistent with this Order.

DONE AND ORDERED this 9th day of January, 2001  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Aristides Sosa; and  
Commissioner George Farrell; and  
Commissioner Roosevelt Paige;

Filed this 9th day of January, 2001,  
in Tallahassee, Florida

/s/

---

Azizi Coleman, Clerk  
Commission on Human Relations  
4075 Esplanade Way, Room 110  
Tallahassee, FL 32399  
(850) 488-7082

Copies furnished to:

Earlene Johnson  
185 Cook Avenue  
DeFuniak Springs, FL 3243

Robert P. Gaines, Esq.  
Beggs & Lane  
Post Office Box 12950  
Pensacola, FL 32576-2950

Larry J. Sartin, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

By: /s/

---

Azizi Coleman,  
Clerk of the Commission  
Florida Commission on Human Relations

**200102 TBD.F 007**  
**'AGENCY FINAL ORDERS'**

**CAPTION:** *Brown v. AHCA*

**CITATION:** 200102 TBD.F 007

**ORDER NO:** 00-024

**DATE:** 1/9/2001

**STATE:** FL

**CASE NO:** 1998-0366 (FCHR)  
99-004039 (DOAH)

**CASE TYPE:** Employment Discrimination

age	col	dis	fam	mar	nat	rac	rel	ret	sex	unk
<input checked="" type="checkbox"/>						<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>	

**FILENAME:** 00-024.pdf

**PAGES:** 3

**RESULT:** Remand (calculate award)



**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

<b>AUSBON BROWN, JR.,</b>	)	EEOC Case No. 15D980057
<b>Petitioner,</b>	)	FCHR Case No. 98-0366
	)	DOAH Case No. 99-004039
<b>vs.</b>	)	FCHR Order No. 00-024
	)	
<b>AGENCY FOR HEALTH CARE ADMINISTRATION,</b>	)	
<b>Respondent</b>	)	

**ORDER FINDING UNLAWFUL EMPLOYMENT PRACTICES OCCURRED AND  
REMANDING MATTER FOR DETERMINATION OF RELIEF**

Preliminary Matters

Petitioner Ausbon Brown, Jr., 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 Agency for Health Care Administration committed an unlawful employment practice on the basis of Petitioner's age (born on April 25, 1943), sex (male) and race (Black) when it failed to hire him for several positions for which he had applied.

The allegations set forth in the complaint were investigated, and, on August 18, 1999, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

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 Daytona Beach, Florida, on February 10, 2000, before Administrative Law Judge Donald R. Alexander.

Judge Alexander issued a Recommended Order of dismissal, dated April 7, 2000.

Pursuant to notice, public deliberations were held on October 26, 2000, 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, 325 John Knox Road, Building F, Suite 240, Tallahassee, Florida, 32303-4149. At these deliberations, the Commission panel determined the action to be taken on the Petition for Relief.

Findings of Facts and Conclusions of Law

The Administrative Law Judge found that four positions were at issue for which Petitioner alleged that he had applied (positions 29618, 67370, 80690, and 66224), but for which Petitioner was not hired. Recommended Order, 5. In each instance, Petitioner alleged that his failure to be hired was on the basis of his race, sex and age. Recommended Order, 1. The Administrative Law Judge found that Petitioner did not apply for position 29618, and that, therefore, the allegations for that claim need not be considered. Recommended Order, 20. While the Administrative Law Judge found that no prima facie case of discrimination had been established with regard to some of the alleged bases, the Administrative Law Judge did find, with regard to each of the three positions remaining in question, that a prima

facie case of discrimination had been established at least as to one or more of the alleged bases. Recommended Order, 21. The Administrative Law Judge also concluded that Respondent rebutted the established prima facie cases of discrimination in that, in each instance, a person who was better qualified than Petitioner was selected, and that there was no credible evidence that Respondent's actions were a pretext for discrimination. Recommended Order, 22. We conclude (by a 2 to 1 vote, Commissioners Farrell and Paige in the majority, Commissioner Sosa in the minority) that the Administrative Law Judge committed an error of law in concluding that there was no evidence that Respondent's actions were a pretext for discrimination, and conclude that a correct application of the law to the facts results in the necessary conclusion that as a matter of law, the fact exists that Respondent unlawfully discriminated against Petitioner in failing to hire Petitioner for the three positions at issue. In conclusions of law adopted by a Commission panel, it has been stated, "The Petitioner may make [a] showing of pretext either directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. [citation omitted.] The employee may demonstrate that the employer's reasons are unworthy of credence by showing (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate [the adverse employment action], or (3) that they were insufficient to motivate [the adverse employment action]." Grandison v. Consolidated Freightways Corporation of Delaware, 15 F.A.L.R. 2268, at 2277 (FCHR 1993). Other factors that can be relevant to a showing of pretext include, "(1) the employer's prior treatment of the plaintiff, (2) the employer's general policy and practice with respect to minority employment, particularly statistics reflecting a general pattern and practice of discrimination, (3) disturbing procedural irregularities, and (4) the use of subjective criteria, especially when used to evaluate candidates that are not objectively equally qualified." Colon-Sanchez v. Marsh, 34 EPD 34,314, 733 F.2d 78 (10th Cir. 1984). The Recommended Order, itself, suggests "disturbing procedural irregularities" with regard to the hiring process for position 67370, where the Administrative Law Judge finds, "Contrary to a suggestion by Petitioner, the competitively advertised position was not filled through the promotion of an existing employee, which would be contrary to personnel rules, but rather it was filled through the reassignment of another employee." Recommended Order, 10. In our view this statement admits the existence of activity "contrary to personnel rules," and as a matter of law amounts to the required showing of pretext. Further, we conclude that this "treatment of the plaintiff" is sufficient to establish pretext as a matter of law with regard to the other two positions remaining in question, positions 80690 and 66224. Having concluded that as a matter of law, the Respondent's articulated legitimate nondiscriminatory reason for not hiring Petitioner is in each instance for the three positions in question (positions 67370, 80690 and 66224) a pretext for unlawful discrimination, we reach the necessary ultimate conclusion that for each of the three positions in question the Respondent unlawfully discriminated against Petitioner in failing to hire him. Finally, we find: (1) that the Administrative Law Judge's conclusion of law we are correcting is within the substantive jurisdiction of the Florida Commission on Human Relations, namely the interpretation of the legal requirements for the establishment of pretext for discrimination under the Florida Civil Rights Act of 1992; (2) the reason the correction is being made is that the conclusion of law as stated by the Administrative Law Judge runs contrary to cited authority on the issue; and (3) that in making this correction the conclusion of law we are substituting is as or more reasonable than the conclusion which has been rejected. See, Section 120.57(1)(l), Florida Statutes (1999).

### Exceptions

Petitioner filed eight pages of exceptions to the Recommended Order in a document entitled, "Petitioner's exceptions to Proposed Recommended Order filed March 14, 2000, for case # 99-4041, FCHR # 98-3107." The Commission's file does not contain a transcript of the proceeding on the merits 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 typically ordered exceptions stricken. See, Ebeh v. Consumer Credit Counseling Service of the Tampa Bay Area, Inc., 16 F.A.L.R. 2149, at 2150 (FCHR 1994), and Lee v. Emmer Development Corporation, 20 F.A.L.R. 3132, at 3134 (FCHR 1998). Nevertheless, we are in concurrence with the exceptions filed by Petitioner (by a 2 to 1 vote, Commissioners Farrell and Paige in the majority, Commissioner Sosa in the minority) to the extent they generally except to the finding that no unlawful employment practice occurred in this case, and to that extent Petitioner's

exceptions are accepted, noting that our action on the exceptions has no impact on the outcome of the matter, given our conclusions set out in the "Findings of Fact and Conclusions of Law" section of this Order. See Wideman v. Champion International Corp., 15 F.A.L.R. 1655 (FCHR 1992), for an example of a case in which a Commission panel considered filed exceptions (albeit denying them) in the absence of a transcript.

Remand

The Petition for Relief and Complaint of Discrimination are REMANDED to the Administrative Law Judge for determination of the appropriate remedy for the Respondent's unlawful failure to hire Petitioner for positions 67370, 80690 and 66224.

DONE AND ORDERED this 9th day of January, 2001  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Aristides Sosa; and  
Commissioner George Farrell; and  
Commissioner Roosevelt Paige;

Filed this 9th day of January, 2001,  
in Tallahassee, Florida

/s/

---

Azizi Coleman, Clerk  
Commission on Human Relations  
4075 Esplanade Way, Room 110  
Tallahassee, FL 32399  
(850) 488-7082

Copies furnished to:

Ausbon Brown, Jr.  
P.O. Box 10946  
Daytona Beach, FL 3212

Michelle Oxman, Esq.  
Office of General Counsel  
Agency for Health Care Administration  
2727 Mahan Drive  
Mail Stop 3  
Tallahassee, FL 32308

D.R. Alexander, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

By: /s/

---

Azizi Coleman,  
Clerk of the Commission  
Florida Commission on Human Relations

**200102 TBD.F 008**  
**'AGENCY FINAL ORDERS'**

**CAPTION:** *Brown v. DCFS*

**CITATION:** 200102 TBD.F 008

**ORDER NO:** 00-026

**DATE:** 1/9/2001

**STATE:** FL

98-0365 (FCHR)

**CASE NO:**

99-004040 (DOAH)

**CASE TYPE:** Employment Discrimination

age	col	dis	fam	mar	nat	rac	rel	ret	sex	unk
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**FILENAME:** 00-026.pdf

**PAGES:** 3

**RESULT:** Final (dismissed)



**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

<b>AUSBON BROWN, JR.,</b>	)	EEOC Case No. 15D980058
<b>Petitioner,</b>	)	FCHR Case No. 98-0365
	)	DOAH Case No. 99-004040
<b>vs.</b>	)	FCHR Order No. 00-026
	)	
<b>DEPARTMENT OF CHILDREN AND FAMILY SERVICES,</b>	)	
<b>Respondent</b>	)	

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

Preliminary Matters

Petitioner Ausbon Brown, Jr., 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 Department of Children and Family Services committed an unlawful employment practice on the basis of Petitioner's age (born April 25, 1943), sex (male), and race (Black) when it failed to hire him for several positions for which he had applied. The allegations set forth in the complaint were investigated, and, on August 18, 1999, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred. 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 Daytona Beach, Florida, on February 24, 2000, before Administrative Law Judge Donald R. Alexander. Judge Alexander issued a Recommended Order of dismissal on April 13, 2000. Pursuant to notice, public deliberations were held on December 7, 2000, 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, 325 John Knox Road, Building F, Suite 240, Tallahassee, Florida, 32303-4149. At these deliberations, the Commission panel determined the action to be taken on the Petition for Relief.

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

### Exceptions

Petitioner filed ten numbered exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner's Exceptions to Proposed Recommended Order for DOAH # 99-4040 and FCHR # 98-0365 issued April 13, 2000." Exceptions 1 through 3 seem to criticize the Administrative Law Judge for statements made in the Recommended Order, rather than excepting to findings of fact or conclusions of law that affect the outcome of the case. In short, they do not appear to be exceptions. Consequently, we reject exceptions 1, 2, and 3. Exception 4 seems to except to the finding in Recommended Order, 7, that, "It can be inferred from the evidence that her request for demotion was due to a legislatively-mandated reorganization in 1997 that eliminated or transferred a number of positions." Specifically, Petitioner excepts, "This statement was not made by Respondent at Final Hearing." See, Pleading, Exception 4. While this may not have been specifically stated at the hearing, it would seem that such an inference would be permissible from the testimony of Respondent's representative, Kristine Davenport, at transcript page 66 and transcript page 81. We reject exception 4. Exceptions 5, 6, 7, 8, and 9, suggest that certain career service rules were not followed in the hiring process for the positions in question. We note that the Administrative Law Judge considered Petitioner's allegations that certain of Respondent's hiring rules had not been followed, yet declined to draw an inference of discrimination therefrom, and did not make a factual finding that the rules alleged to be violated had actually been violated. See, Recommended Order, 21. We reject exceptions 5, 6, 7, 8, and 9. Exception 10 appears to except to the Administrative Law Judge's finding that the age of the successful applicant for position 60287 was unknown, given the information provided in Respondent's response to Petitioner's request for discovery, indicating that this individual was 40. See, Pleading, Exception 10. Even if the record before the Administrative Law Judge did contain evidence as to the age of this individual, (and the documentary evidence admitted in Petitioner's Exhibit 2, Respondent's response to Petitioner's request for discovery, does suggest that the age of the successful candidate for this position is 40) the Administrative Law Judge's finding that this information was not of record would have no impact on the outcome of the case, given the Administrative Law Judge's finding that Respondent articulated legitimate, nondiscriminatory reasons for not hiring Petitioner and that those reasons were not a pretext for discrimination. Petitioner also seems to except to the Administrative Law Judge's finding that the successful applicant for position 012123 was the same age as Petitioner, given Respondent's indication in its response to Petitioner's request for discovery that the age of this individual was unknown. See, Pleading, Exception 10. However, at page 94 of the transcript, Respondent's representative, Carolyn C. Dudley, testifies that the successful applicant for this position was born in 1943, the same year as Petitioner. See, Recommended Order, 1, for a finding that Petitioner was born in 1943. We reject exception 10.

### 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.

### 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.

DONE AND ORDERED this 9th day of January, 2001  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Aristides Sosa; and



Commissioner Clareth Brooks; and  
Commissioner Keith Roberts;

Filed this 9th day of January, 2001,  
in Tallahassee, Florida

*/s/*

---

Azizi Coleman, Clerk  
Commission on Human Relations  
4075 Esplanade Way, Room 110  
Tallahassee, FL 32399  
(850) 488-7082

Copies furnished to:

Ausbon Brown, Jr.  
P.O. Box 10946  
Daytona Beach, FL 3212

Kevin E. Hyde, Esq.  
Latasha A. Garrison, Esq.  
Foley & Lardner  
200 Laura Street  
Jacksonville, FL 32202

D.R. Alexander, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

By: */s/*

---

Azizi Coleman,  
Clerk of the Commission  
Florida Commission on Human Relations

**200102 TBD.F 009**  
**'AGENCY FINAL ORDERS'**

**CAPTION:** *Brown v. DOH*

**CITATION:** 200102 TBD.F 009

**ORDER NO:** 00-025

**DATE:** 1/9/2001

**STATE:** FL

**CASE NO:** 1998-3107 (FCHR)  
99-004041 (DOAH)

**CASE TYPE:** Employment Discrimination

age	col	dis	fam	mar	nat	rac	rel	ret	sex	unk
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**FILENAME:** 00-025.pdf

**PAGES:** 3

**RESULT:** Remand (calculate award)



**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

<b>AUSBON BROWN, JR.,</b>	)	EEOC Case No. 15D980383
<b>Petitioner,</b>	)	FCHR Case No. 98-3107
	)	DOAH Case No. 99-004041
<b>vs.</b>	)	FCHR Order No. 00-025
	)	
<b>DEPARTMENT OF HEALTH,</b>	)	
<b>Respondent</b>	)	

**ORDER FINDING UNLAWFUL EMPLOYMENT PRACTICES OCCURRED AND  
REMANDING MATTER FOR DETERMINATION OF RELIEF**

Preliminary Matters

Petitioner Ausbon Brown, Jr., 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 Department of Health committed an unlawful employment practice on the basis of Petitioner's age (born on April 25, 1943), sex (male) and race (Black) when it failed to hire him for several positions for which he had applied. The allegations set forth in the complaint were investigated, and, on August 18, 1999, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred. 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 by video teleconferencing in Tallahassee, Florida, and Daytona Beach, Florida, on February 14, 2000, before Administrative Law Judge Donald R. Alexander. Judge Alexander issued a Recommended Order of dismissal, dated March 14, 2000. Pursuant to notice, public deliberations were held on October 26, 2000, 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, 325 John Knox Road, Building F, Suite 240, Tallahassee, Florida, 32303-4149. At these deliberations, the Commission panel determined the action to be taken on the Petition for Relief.

Findings of Facts and Conclusions of Law

The Administrative Law Judge found that four positions were at issue for which Petitioner alleged that he had applied (positions 29618, 67370, 80690, and 66224), but for which Petitioner was not hired. Recommended Order, 5. In each instance, Petitioner alleged that his failure to be hired was on the basis of his race, sex and age. Recommended Order, 1. The Administrative Law Judge found that Petitioner did not apply for position 29618, and that, therefore, the allegations for that claim need not be considered. Recommended Order, 20. While the Administrative Law Judge found that no prima facie case of discrimination had been established with regard to some of the alleged bases, the Administrative Law Judge did find, with regard to each of the three positions remaining in question, that a prima facie case of discrimination had been established at least as to one or more of the alleged bases. Recommended Order, 21. The Administrative Law Judge also concluded that Respondent rebutted the established prima facie cases of discrimination in that, in each instance, a person who was better qualified than Petitioner was selected, and that

there was no credible evidence that Respondent's actions were a pretext for discrimination. Recommended Order, 22. We conclude (by a 2 to 1 vote, Commissioners Farrell and Paige in the majority, Commissioner Sosa in the minority) that the Administrative Law Judge committed an error of law in concluding that there was no evidence that Respondent's actions were a pretext for discrimination, and conclude that a correct application of the law to the facts results in the necessary conclusion that as a matter of law, the fact exists that Respondent unlawfully discriminated against Petitioner in failing to hire Petitioner for the three positions at issue. In conclusions of law adopted by a Commission panel, it has been stated, "The Petitioner may make [a] showing of pretext either directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. [citation omitted.] The employee may demonstrate that the employer's reasons are unworthy of credence by showing (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate [the adverse employment action], or (3) that they were insufficient to motivate [the adverse employment action]." Grandison v. Consolidated Freightways Corporation of Delaware, 15 F.A.L.R. 2268, at 2277 (FCHR 1993). Other factors that can be relevant to a showing of pretext include, "(1) the employer's prior treatment of the plaintiff, (2) the employer's general policy and practice with respect to minority employment, particularly statistics reflecting a general pattern and practice of discrimination, (3) disturbing procedural irregularities, and (4) the use of subjective criteria, especially when used to evaluate candidates that are not objectively equally qualified." Colon-Sanchez v. Marsh, 34 EPD 34,314, 733 F.2d 78 (10th Cir. 1984). The Recommended Order, itself, suggests "disturbing procedural irregularities" with regard to the hiring process for position 67370, where the Administrative Law Judge finds, "Contrary to a suggestion by Petitioner, the competitively advertised position was not filled through the promotion of an existing employee, which would be contrary to personnel rules, but rather it was filled through the reassignment of another employee." Recommended Order, 10. In our view this statement admits the existence of activity "contrary to personnel rules," and as a matter of law amounts to the required showing of pretext. Further, we conclude that this "treatment of the plaintiff" is sufficient to establish pretext as a matter of law with regard to the other two positions remaining in question, positions 80690 and 66224. Having concluded that as a matter of law, the Respondent's articulated legitimate nondiscriminatory reason for not hiring Petitioner is in each instance for the three positions in question (positions 67370, 80690 and 66224) a pretext for unlawful discrimination, we reach the necessary ultimate conclusion that for each of the three positions in question the Respondent unlawfully discriminated against Petitioner in failing to hire him. Finally, we find: (1) that the Administrative Law Judge's conclusion of law we are correcting is within the substantive jurisdiction of the Florida Commission on Human Relations, namely the interpretation of the legal requirements for the establishment of pretext for discrimination under the Florida Civil Rights Act of 1992; (2) the reason the correction is being made is that the conclusion of law as stated by the Administrative Law Judge runs contrary to cited authority on the issue; and (3) that in making this correction the conclusion of law we are substituting is as or more reasonable than the conclusion which has been rejected. See, Section 120.57(1)(l), Florida Statutes (1999).

#### Exceptions

Petitioner filed eight pages of exceptions to the Recommended Order in a document entitled, "Petitioner's exceptions to Proposed Recommended Order filed March 14, 2000, for case # 99-4041, FCHR # 98-3107." The Commission's file does not contain a transcript of the proceeding on the merits 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 typically ordered exceptions stricken. See, Ebeh v. Consumer Credit Counseling Service of the Tampa Bay Area, Inc., 16 F.A.L.R. 2149, at 2150 (FCHR 1994), and Lee v. Emmer Development Corporation, 20 F.A.L.R. 3132, at 3134 (FCHR 1998). Nevertheless, we are in concurrence with the exceptions filed by Petitioner (by a 2 to 1 vote, Commissioners Farrell and Paige in the majority, Commissioner Sosa in the minority) to the extent they generally except to the finding that no unlawful employment practice occurred in this case, and to that extent Petitioner's exceptions are accepted, noting that our action on the exceptions has no impact on the outcome of the matter, given our conclusions set out in the "Findings of Fact and Conclusions of Law" section of this Order. See Wideman v.

Champion International Corp., 15 F.A.L.R. 1655 (FCHR 1992), for an example of a case in which a Commission panel considered filed exceptions (albeit denying them) in the absence of a transcript.

Remand

The Petition for Relief and Complaint of Discrimination are REMANDED to the Administrative Law Judge for determination of the appropriate remedy for the Respondent's unlawful failure to hire Petitioner for positions 67370, 80690 and 66224.

DONE AND ORDERED this 9th day of January, 2001  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Aristides Sosa; and  
Commissioner George Farrell; and  
Commissioner Roosevelt Paige;

Filed this 9th day of January, 2001,  
in Tallahassee, Florida

/s/

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Azizi Coleman, Clerk  
Commission on Human Relations  
4075 Esplanade Way, Room 110  
Tallahassee, FL 32399  
(850) 488-7082

Copies furnished to:

Ausbon Brown, Jr.  
P.O. Box 10946  
Daytona Beach, FL 3212

Stephen W. Foxwell, Esq.  
Department of Health  
Office of General Counsel  
2020 Capital Circle SE, Bin #A02  
Tallahassee, FL 32399-1703

D.R. Alexander, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

By: /s/

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Azizi Coleman,  
Clerk of the Commission  
Florida Commission on Human Relations

APPENDIX



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