Commission on Human Relation, less than 15 employees

Number: INFORMAL

Date: February 06, 2013

Mr. Gilbert M. Singer, Chair
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301-4857

Dear Chair Singer:

You have asked this office for assistance in determining whether the Florida Commission on Human Relations (commission) may issue a "no cause determination" in cases where it is undisputed that the employer has less than 15 employees.

Rule 60Y-5.006(10), Florida Administrative Code, promulgated by the commission to carry out its statutorily prescribed duties provides:

"The Executive Director, on behalf of the Commission, shall dismiss a complaint upon one or more of the following grounds:

(10) There is no jurisdiction over the respondent or subject matter of the complaint."

By its rule, the commission appears to recognize a distinction between its jurisdiction over a person who is the subject of a complaint and its subject matter jurisdiction, but states that the absence of jurisdiction over either mandates dismissal of a complaint. In an instance such as you have posed where it is uncontested that a person who is the subject of a discrimination complaint does not have 15 or more employees and, therefore, does not fall within the statutorily defined "employer" for purposes of the act, the commission by its rule must dismiss the complaint. As a statutorily created administrative entity, the commission has no inherent power and may exercise only such authority as is expressly or by necessary implication conferred by law.[1]

In light of the decision in *Arbaugh v. Y&H Corp., d/b/a The Moonlight Café*,[2] however, you also question whether the definition of "employer" in section 760.02(7), Florida Statutes, is determinative of the commission's jurisdiction over a person alleged to have violated Florida's Civil Rights Act. In *Arbaugh*, the United States Supreme Court found that the employee-numerosity requirement for establishing a business's "employer" status under the Federal Civil Rights Act[3] was an element of the employee's claim for relief and not a jurisdictional requirement that could be questioned at any stage of the litigation. In *Arbaugh*, the respondent's status as an "employer" was found to have been conceded due to the fact that it was not challenged prior to or during the trial on the merits.[4] The Court found that the employee-numerosity requirement in the federal act did not operate to bar or confer subject matter jurisdiction of federal courts over civil rights claims, but rather was an element of proof in the claimant's case.

It has been recognized that since the Florida Civil Rights Act is patterned after Title VII of the Federal Civil Rights Act, federal case law regarding Title VII may be applied in state civil rights cases.[5] The *Arbaugh* case has been cited in a Florida federal court proceeding for the proposition that the fifteen-employee numerosity requirement is an element of a petitioner's claim for relief and not a jurisdictional issue.[6] There would appear to be a distinction, however, between the situation in *Arbaugh* wherein the question centered on the jurisdiction of a federal court to hear a civil rights case and the present one questioning the commission's exercise of its statutorily prescribed powers and duties. Moreover, unlike the situation in *Arbaugh*, you indicate by your question that it is undisputed that the person who is the subject of the complaint has fewer than 15 employees.

You have provided information about a case currently pending before the commission in which the claimant, in his claim of discrimination under state law, asserted that the employer had 15 employees.[7] Upon this complaint, the commission found cause to proceed and referred the matter to the Division of Administrative Hearings for further action. The business which was the subject of the complaint filed a motion to dismiss, stating that it did not fall within the statutory definition of an "employer," since it had less than 15 employees. The motion was denied, since the petitioner had not at that time had an opportunity to present evidence to prove that the respondent was an "employer" subject to the act.[8] After a final hearing, at which the petitioner had the opportunity to establish the number of employees, but failed to do so, the hearing officer determined that the employer did not have 15 employees and recommended that the action be dismissed.[9] The commission questions whether it may accept the recommended order in light of the *Arbaugh* decision and dismiss the action.

Part I, Chapter 760, Florida Statutes, the Florida Civil Rights Act (act),[10] creates the Florida Commission on Human Relations. The commission is authorized "[t]o receive, initiate, investigate, seek to conciliate, hold hearings on, and act upon complaints alleging any discriminatory practice, as defined by the Florida Civil Rights Act of 1992."[11] It also has the authority to adopt rules to carry out the purposes of the act.[12]

The act sets forth those activities which are unlawful employment practices by an "employer."[13] For purpose of the act, "[e]mployer" is defined as "any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person."[14] Any person aggrieved by a violation of the act may file a complaint with the commission within 365 days of the violation.[15] A complaint must contain "a short and plain statement of the facts describing the violation and the relief sought." The commission, "within 5 days of the complaint being filed, shall by registered mail send a copy of the complaint to the *person* who allegedly committed the violation."[16] (e.s.)

It would appear, therefore, that at the time the complaint is filed, there is no presumption that the "person" against whom the complaint has been filed is an "employer" for purposes of the act and the complainant has the burden of proving that the person named in the complaint is an "employer" responsible for the alleged discrimination.[17] The *Arbaugh* court recognized that the numerosity of employees is an element of the case which must be proven by the petitioner and it would not be inconsistent for the commission to dismiss a complaint when it is determined that a person who is the subject of a civil rights complaint has fewer than 15 employees.

I trust that these informal comments will be helpful to you in resolving the questions you have raised.

Sincerely,

Lagran Saunders
Assistant Attorney General

ALS/tsrh

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[1] *See State, Department of Environmental Regulation v. Falls Chase Special Taxing District*, 424 So. 2d 787, 793 (Fla. 1st DCA 1982), *petition for review denied*, 436 So. 2d 98 (Fla. 1983), stating:

"An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction."

[2] 546 U.S. 500 (2006).

[3] Title VII of the Federal Civil Rights Act, 42 U.S.C. s. 2000e, *et. seq.*

[4] Only after a jury trial resulting in a verdict for the complainant did the "employer" move to dismiss the entire action for lack of federal subject-matter jurisdiction, asserting for the first time that it had fewer than 15 employees. The previously rendered judgment was vacated and the federal complaint was dismissed with prejudice as to the federal claim (although the complainant's state claims were dismissed without prejudice). *Supra* n.2 at 500-501.

[5] *See Maldonado v. Publix Supermarkets*, 939 So. 2d 290, 293 (Fla. 4th DCA 2006).

[6] *In re Elisabeth A. Fierro*, 2007 WL 1113257 (M.D. Fla. 2007), not reported in F.Supp.2d.

[7] The employee also filed a complaint with the United States Equal Employment Opportunity Commission, stating that the employer had under 15 employees. *See* Charge of Discrimination by Malvin Prince, 4/1/2012, No. 511-2012-01256.

[8] Order Denying Respondents' Motion to Dismiss, September 24, 2012, Case No. 12-2815, State of Fla. Div. of Administrative Hearings.

[9] Recommended Order, November 28, 2012, Case No. 12-2815, State of Fla. Div. of Administrative Hearings.

[10] Section 760.01, Fla. Stat.

[11] Section 760.06(5), Fla. Stat. *See also* subsection (6), authorizing the commission to issue

subpoenas, administer oaths or affirmations, and compel attendance and testimony of witnesses pursuant to any investigation or hearing.

[12] Section 760.06(12), Fla. Stat.

[13] Section 760.10, Fla. Stat.

[14] Section 760.02(7), Fla. Stat.

[15] Section 760.11(1), Fla. Stat.

[16] *Id.*

[17] *See, e.g., Enzor v. Tallahassee Contractors, LLC*, Case No. 08-1227 (Fla. DOAH May 20, 2008; FCHR Order No. 08-045, July 8, 2008); *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1340-1341 (11th Cir. 1999).