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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOR THE SECOND DISTRICT

APPEAL NO.: 2D01-5371 DOAH NO.: 01-1015 FCHR NO.: 2100538

JESSE TOCA,

DSM-CLOS

APPELLANT,

V.

EXP.COM, INC., nka EXP SYSTEMS, INC.; and, MARK BENNING,

APPELLEES.

ON APPEAL FROM A FINAL ORDER ENTERED ON NOVEMBER 28, 2001,
BY THE FLORIDA COMMISSION ON HUMAN RELATIONS,
DISMISSING APPELLANT'S PETITION FOR RELIEF FROM AN UNLAWFUL
EMPLOYMENT PRACTICE AND COMPLAINT OF RELIGIOUS DISCRIMINATION
UNDER THE FLORIDA CIVIL RIGHTS ACT OF 1992, AS AMENDED.

APPELLANT'S INITIAL BRIEF

DATED: THURSDAY, DECEMBER 5, 2002.

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APPELLANT

TABLE OF CONTENTS

COVER PAGE

<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF CITATIONS</u>	ii - iii
<u>STATEMENT OF THE CASE AND FACTS</u>	1 - 7
STATEMENT OF THE CASE	1
BASIS FOR INVOKING THIS COURT'S JURISDICTION	1
PRINCIPLES GOVERNING REVIEWABILITY OF FINAL AGENCY ACTION	2 - 3
STATEMENT OF THE FACTS PETITIONER RELIES UPON FOR RELIEF	3 - 6
QUESTIONS BEFORE THE COURT	7
<u>SUMMARY ARGUMENT</u>	7 - 8
<u>ARGUMENT</u>	9 - 14
ISSUE I -- THE FLORIDA COMMISSION ON HUMAN RELATIONS MADE A REVERSIBLE ERROR BY ACCEPTING THE DIVISION OF ADMINISTRATIVE HEARINGS' SUMMARY RECOMMENDED ORDER OF DISMISSAL, IN THE FACE OF A GENUINE ISSUE OF MATERIAL FACT.	9 - 10
ISSUE II -- THE DIVISION OF ADMINISTRATIVE HEARINGS WRONGFULLY DENIED APPELLANT'S MOTION FOR ALLOCATION OF FUNDS TO TAKE DISCOVERY DEPOSITIONS AND TO OBTAIN THE TRANSCRIPTS THEREOF, WITHOUT AFFORDING HIM A HEARING OR BALANCING HIS FUNDAMENTAL INTEREST IN DUE PROCESS OF LAW WITH COMPETING INTERESTS.	10 - 14
<u>CONCLUSION</u>	15
<u>STATEMENT OF SERVICE</u>	16
<u>STATEMENT OF FONT AND TYPE SIZE USED</u>	16

TABLE OF CITATIONS

FLORIDA CONSTITUTION

Article V, Section 4(b)(2), Florida Constitution 1

FLORIDA STATUTES

* Section 57.081(1), Florida Statutes (2002) 11

Section 120.52(1)(b), Florida Statutes (2002) 2

Section 120.52(7), Florida Statutes (2002) 2

* Section 120.68(1), Florida Statutes (2002) 1 - 2

* The Florida Civil Rights Act of 1992, as amended,
codified at Sections 760.01-760.11, Florida Statutes (1999) 3

FLORIDA CASES

* *Cocoa Properties, Inc. v. Commonwealth Land Title*,
590 So. 2d 989 (Fla. 2nd. DCA 1991) 10

Fox v. Smith,
508 So. 2d 1280 (Fla. 3rd. DCA 1987) 1

* *Holl v. Talcott*,
191 So. 2d 40, 43 (Fla. 1966) 9

* *Perry v. Munger*,
730 So. 2d 393 (Fla. 2nd. DCA 1999) 9

Prime Orlando Properties v. Department of Business Regulation,
502 So. 2d 456 (Fla. 1st. DCA 1986) 2

* *Snyder v. Cheezem Dev. Corp.*,
373 So. 2d 719, 720 (Fla. 2nd. DCA 1979) 9

State v. Hamilton,
448 So. 2d 1007, 1008-09 (Fla. 1984) 14

Walter v Walter,
464 So. 2d 538 (Fla. 1985) 9 - 10

* Denotes principal authorities relied upon for relief.

UNITED STATES SUPREME COURT CASES

- * *Griffin v. Illinois*,
351 U. S. 12 (1956) 11
- * *Mathews v. Eldridge*,
424 U. S. 319, 335 (1976) 12 - 13, 15

FEDERAL APPELLATE COURT CASES

- United States v. Tate*,
419 F. 2d 131, 132 (6th. Cir. 1969) 14
- United States v. Theriault*,
440 F. 2d 713, 716 (5th. Cir 1973) 14

OTHER AUTHORITIES

- State v. Scott*,
479 S. W. 2d 438, 442 (Mo. En banc 1972) 14

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APPELLANT'S INITIAL BRIEF

STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF THE CASE.

This appeal is before this Court based on the Florida Commission on Human Relations' (hereafter, "FCHR") November 28, 2001 final order dismissing Appellant's Complaint of Religious Discrimination. (RIII-000339-000342).

BASIS FOR INVOKING THIS COURT'S JURISDICTION.

Appellant has filed a timely Notice of Appeal to this Court, from the entry of said final order. (RIII-000343-000346). Therefore, this Court has jurisdiction to consider and act upon this authorized and timely-filed appeal. See Article V, Section 4(b)(2), Florida Constitution; Section 120.68(1), Florida Statutes (2002); *Fox v. Smith*, 508 So. 2d 1280 (Fla. 3rd. DCA 1987).

PRINCIPLES GOVERNING REVIEWABILITY OF FINAL AGENCY ACTION.

A party may seek judicial review under Section 120.68(1), Florida Statutes (2002), by showing that:

1. The action is final.
2. The agency, in this instance, the FCHR, is subject to the Florida Administrative Procedure Act.
3. The Appellant was a party to the action before said agency.
4. The Appellant was adversely affected by the agency's action.

Appellant will take each of the foregoing elements in turn.

There is no question that the FCHR's November 28, 2001 order entitled "Final Order Dismissing Petition for Relief from an Unlawful Employment Practice" is a final order for the purposes of appealability as a matter of right. See Section 120.52(7), Florida Statutes (2002); *Prime Orlando Properties v. Department of Business Regulation*, 502 So. 2d 456 (Fla. 1st. DCA 1986).

In addition, there is no question that the FCHR is an "agency" under the Florida Administrative Procedure Act. See Section 120.52(1)(b), Florida Statutes (2002).

Further, there is no question that Appellant was a party in the proceedings before the FCHR, because he is the actual complainant in his Complaint of Religious

Discrimination under the Florida Civil Rights Act of 1992.
(RI-000001-000103).

Finally, there is no question that Appellant was adversely affected by the FCHR's November 28, 2001 final order (RIII-000339-000342) dismissing his Complaint of Religious Discrimination under the Florida Civil Rights Act of 1992 (RI-000001-000103). This is so, because Appellant was denied all relief he requested, including compensatory damages, for the religious discrimination that was perpetrated against him, by the Appellees, EXP.Com, Inc., and, Mark Benning, individually. (R000001-000103).

STATEMENT OF THE FACTS PETITIONER RELIES UPON FOR RELIEF.

The following are the relevant facts on appeal, that have been established as a matter of record:

On November 28, 2000, Appellant filed his timely Complaint of Religious Discrimination pursuant to the Florida Civil Rights Act of 1992, with the FCHR.
(RI-000001-000103).

On March 5, 2001, the FCHR decided that it did not have jurisdiction to consider and act upon the merits of Appellant's Complaint of Religious Discrimination.
(RI-000125-000128).

On March 8, 2001, Appellant filed his authorized and timely Petition for Relief from Unlawful Employment Practice, wherein he challenged the FCHR's March 5, 2001

determination of no jurisdiction. (RI-000129-000133). The FCHR transmitted said petition to the Division of Administrative Hearings (hereafter, "DOAH"), the next day. (RI-000134-000135).

On March 13, 2001, DOAH entered an initial order on Appellant's petition. (RI-000136-000137). Appellant responded to that order on that date. (RI-000138-000140).

On March 20, 2001, Appellant filed his motion for the entry of findings of fact and conclusions of law, and for a recommended order in his favor, with DOAH. (RII-000145-000202).

Also, on March 20, 2001, the Appellees filed their motion for summary hearing, with DOAH. (RII-000205-000210).

On March 21, 2001, Appellant filed his Notice of Opposition to Summary Hearing and to the Appellees' motion for summary hearing. (RII-000209-000210).

On March 22, 2001, DOAH entered an order on the Appellees' motion for summary hearing, requiring response from Appellant. (RII-000213-000215).

Appellant responded to DOAH's March 22, 2001 order (R000213-000215), by filing each and every one of the following documents on March 26, 2001 with said lower tribunal, to show the existence of issues of material fact:

1. Appellant's Statement Contradicting the Appellees' Affidavit and requesting judicial notice, with supporting

memorandum of law. (RII-000216-000235).

2. Appellant's Motion to Strike the Appellees' Affidavit and Objection to Admissibility of the Affidavit and all documents attached thereto, based on incompetent evidence, hearsay and want of authenticity. (RII-000236-000242).

3. Appellant's Response to DOAH's March 22, 2001 order treating Appellees' motion for summary hearing as a motion to dismiss petition for unlawful employment practice, with supporting memorandum of law. (RII-000235-000272).

4. Appellant's motion to disqualify Mark Benning and to strike all documents filed by Mark Benning on behalf of EXP.Com, Inc. (RII-000273-000277).

5. Appellant's motion to compel Mark Benning to demonstrate his fitness as a Qualified Representative at an Adversarial Evidentiary Hearing. (RII-000278-000283).

6. Appellant's motion for allocation of funds to take discovery depositions and to obtain the transcripts thereof, with supporting memorandum of law. (RII-000284-000289).

On March 28, 2001, DOAH denied Appellant's motion for allocation of funds to take discovery depositions and to obtain the transcripts thereof. (RII-000290-000291). Appellant took an interlocutory appeal from said order the next day. (RII-000292-000294). Appellant perfected said interlocutory appeal, by filing a Petition for Review from

said nonfinal order with a supporting appendix, in this appellate court. (RIII-000301-000314). ¹

On May 29, 2001, DOAH entered its Recommended Order of Dismissal of Appellant's Petition for Relief from an Unlawful Employment Practice. (RIII-000325-000327).

On June 6, 2001, Appellant filed his timely Exceptions to the Recommended Order entered by DOAH on May 29, 2001, with the FCHR. (RIII-000329-000335).

On November 1, 2001, the FCHR held its deliberation hearing on Appellant's filed exceptions to DOAH's Recommended Order of Dismissal. (RIII-000339-000342). By 2-1 vote, the FCHR's three (3) member deliberation panel decided to overrule Appellant's objections to DOAH's Recommended Order of Dismissal. Id.

On November 28, 2001, the FCHR entered a final order dismissing Appellant's Petition for Relief from an Unlawful Employment Practice. (RIII-000339-000342).

On December 7, 2001, Appellant filed his authorized and timely Notice of Appeal to this Court, from the entry of said final order. (RIII-000343-000346).

¹ This appellate court dismissed Appellant's Petition for Review (RIII-000328) and Appellant's Motion for Clarification of said denial (RIII-000336).

QUESTIONS BEFORE THIS COURT.

The questions before this Court are as follows:

1. Does the record on appeal before this Court disclose the existence of any issue of material fact ?
2. Does the record on appeal before this Court disclose that DOAH wrongfully refused to allocate funds for the Appellant to take discovery depositions and to obtain transcripts thereof, without affording him a hearing or balancing Appellant's interests in obtaining due process of law with any competing interests ?

SUMMARY OF ARGUMENT

ISSUE I-- The record on appeal before this Court discloses the existence of a genuine issue of material fact, as to whether or not:

1. Appellant was an employee of the Appellees.
2. Appellant applied to the Appellees for employment.
3. The Appellees are an employment agency.

(RII-000145-000202; RII-000205-000208; RII-000213-000215; RII-000216-000289; RII-000290-000291; RIII-000325-000327; RIII-000329-000335; RIII-000339-000342; RIII-000343-00346).

DOAH wrongfully entered a Recommend Order of Dismissal without affording Appellant a full and fair evidentiary hearing, and the FCHR wrongfully sustained said Recommended Order, over Appellant's objections, in the way of Appellant's timely-filed Exceptions to said Recommended

Order. (RII-000145-000202; RII-000205-000208;
RII-000213-000215; RII-000216-000289; RII-000290-000291;
RIII-000325-000327; RIII-000329-000335; RIII-000339-000342;
RIII-000343-000346). Therefore, this Court should reverse the
FCHR's final order and remand this case to the FCHR with
instructions to refer this case to DOAH for a full and fair
evidentiary hearing on Appellant's Petition for Relief from
an Unlawful Employment Practice.

Alternatively, the record before this Court discloses
the existence of the slightest doubt that there is an issue
or a possible issue of material fact. See the record, cited
above. This precludes the entry of summary judgment,
including the entry of the summary recommended order of
dismissal entered in this case.

ISSUE II-- DOAH wrongfully denied Appellant's motion
for allocation of funds to take discovery depositions and to
obtain the transcripts thereof, without affording him a
hearing thereon, or balancing Appellant's interests in
obtaining due process of law with any competing interests.
(RII-000284-000289; RII-000290-000291). This Court should,
on remand, direct DOAH to hold a full and fair hearing on
said motion, and balance Appellant's due process interests
with competing interests.

ARGUMENT

ISSUE I

THE FLORIDA COMMISSION ON HUMAN RELATIONS MADE A REVERSIBLE ERROR BY ACCEPTING THE DIVISION OF ADMINISTRATIVE HEARINGS' SUMMARY RECOMMENDED ORDER OF DISMISSAL, IN THE FACE OF A GENUINE ISSUE OF MATERIAL FACT.

This issue presents a pure question of law and should be reviewed on appeal *de novo*. See *Walter v. Walter*, 464 So. 2d 538 (Fla. 1985). This issue was preserved. See (RII-000145-000202; RII-000205-000208; RII-000213-000215; RII-000216-000289; RII-000290-000291; RIII-000325-000327; RIII-000329-000335; RIII-000339-000342; RIII-000343-000346).

In *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966), the Florida Supreme Court explicitly declared, that:

"[T]he party moving for summary judgment has the burden to prove conclusively the nonexistence of any genuine issue of material fact."

Id at 43. (Emphasis added).

The record cited above does not show that the Appellees, Exp. Com, Inc.; and, Mark Benning, Individually, conclusively proved the nonexistence of any genuine issue of material fact, before DOAH or the FCHR. See *Perry v. Munger*, 730 So. 2d 393 (Fla. 2nd. DCA 1999) (party moving for summary judgment must conclusively show that the nonmoving party cannot prevail under any possible view of the case).

Further, in *Snyder v. Cheezem Dev. Corp.*, 373 So. 2d 719, 720 (Fla. 2nd. DCA 1979), this Court held that:

"If the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue of fact might exist, summary judgment is improper."

Id at 720. (Emphasis added).

The record which is now before this Court, as cited on page 9 above, certainly reflects the existence of a genuine issue of material fact, or at a minimum, the possibility of an issue of material fact or the slightest doubt that such issue might exist. Id. Therefore, this Court is required by its own long-standing precedents, to reverse the FCHR's final order, and remand this case to the FCHR with instructions to further remand this case to DOAH for an evidentiary hearing on Appellant's Petition for Relief from an Unlawful Employment Practice. See *Cocoa Properties, Inc. v. Commonwealth Land Title*, 590 So. 2d 989 (Fla. 2nd. DCA 1991).

ISSUE II

THE DIVISION OF ADMINISTRATIVE HEARINGS WRONGFULLY DENIED APPELLANT'S MOTION FOR ALLOCATION OF FUNDS TO TAKE DISCOVERY DEPOSITIONS AND TO OBTAIN THE TRANSCRIPTS THEREOF, WITHOUT AFFORDING HIM A HEARING OR BALANCING HIS FUNDAMENTAL INTEREST IN DUE PROCESS OF LAW WITH COMPETING INTERESTS.

This issue presents a pure question of law and should be reviewed on appeal de novo. See *Walter v Walter*, 464 So. 2d 538 (Fla. 1985). This issue was preserved. (RII-000284-000289; RII-000290-000291).

Section 57.081(1), Florida Statutes (2002) states that:

"(1) Any indigent person, except a prisoner as defined in s. 57.085, who is a party or intervenor in any judicial or administrative agency proceeding or who initiates such proceeding shall receive the services of the courts, sheriffs, and clerks, with respect to such proceedings, without charge. Such services are limited to filing fees service of process; certified copies of orders or final judgments; a single photocopy of any court pleading, record, or instrument filed with the clerk; examining fees; court-appointed counsel fees; subpoena fees and services; service charges for collecting and disbursing funds; and any other cost or service arising out of the pending litigation.

Id. (Emphasis added).

It is clear from a plain reading of the foregoing statutory provision that DOAH is required to allocate sufficient funds to a party like the Appellant herein, who has been declared indigent, so that he may fully enjoy all of his rights to substantive and procedural due process under the law. This would include, without limitation, the right to take discovery depositions pursuant to the Florida Rules of Civil Procedure.

It is also clear that the United States Supreme Court has long recognized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." See *Griffin v. Illinois*, 351 U. S. 12 (1956). All persons must stand on an equal footing before the bar of justice of every American court. Id. This includes, without limitation, equality before the bar of justice at DOAH.

Financial assistance in taking discovery depositions and obtaining the transcripts thereof is constitutionally required as a basic tool of an adequate adjudication of Appellant's claims before DOAH. This is the inescapable conclusion any reasonable person can and would reach in applying the three-prong test enunciated by the United States Supreme Court in *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976). This is the test that is used by courts in determining the "specific dictates of due process." *Id.* 424 U. S. at 335.

The three-part *Mathews* test is as follows:

1. The first is the private interest that will be affected by governmental action.
2. The second is the governmental interest that will be affected if the safeguard is to be provided.
3. The third is the probable value of additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. *Id.*

As for the first part of the *Mathews* test, Appellant's private interest in not being discriminated against by an employer or employment agency such as the Appellees, **EXP.com, Inc.**, and **Mark Benning**, will be rather adversely affected by Appellant's financial inability to take depositions and to obtain the transcripts thereof, because

Appellant would be unable to adequately develop admissible evidence to prove his claims against the Appellees. Thus, Appellant's rights to take discovery depositions would be rendered nugatory because of his sheer inability to afford the services of a court reporter as well as the rental of a conference room. This will result in Appellant being effectively cheated of his rights to present his case before DOAH.

Applying the second part of the *Mathews* test, the governmental interest that will be affected by allocating funds so that Appellant can take discovery depositions and obtain transcripts thereof would be the financial impact upon the public's money. This impact, while important, is relatively insignificant when balanced against the public's much weightier vital interest in making sure that administrative agencies that adjudicate claims afford procedural due process to the rich and the poor alike.

The third part of the *Mathews* test requires assessing the probable value of a tribunal, such as DOAH, allocating funds for an indigent party to a proceeding, such as Appellant herein, to take discovery depositions and to obtain the transcripts thereof. To be sure, the value of discovery depositions is clear: It ensures that Appellant can adequately develop all of the essential facts-----and all available leads to admissible evidence. This value, in

turn, insures that there is a complete and thorough presentation of all relevant facts to the presiding administrative law judge, upon which he or she can base a decision, in the way of a Recommended Order to the FCHR, with respect to Appellant's Complaint of Religious Discrimination.

Finally, in analyzing whether Appellant is entitled to relief, in the way of the allocation of funds for the purposes of taking discovery depositions and obtaining transcripts of the depositions, this Court must bear in mind that if Appellant was financially independent, he could take the Appellees' or anyone else's depositions without much, if any, ado. And so, penalizing an impoverished party, such as the Appellant herein, by requiring him to abandon his rights to take discovery depositions guaranteed under the Florida Rules of Civil Procedure, would quite obviously constitute invidious discrimination. See *United States v. Tate*, 419 F. 2d 131, 132 (6th. Cir. 1969); *United States v. Theriault*, 440 F. 2d 713, 716 (5th. Cir 1973); *State v. Hamilton*, 448 So. 2d 1007, 1008-09 (Fla. 1984); *State v. Scott*, 479 S. W. 2d 438, 442 (Mo. En banc 1972) (wherein the court stated, that: "It is of no moment that pretrial inspection is not constitutionally assured. We are not limited to the constitutional minima; rather we strive for practices which will best promote the quest for truth.").

CONCLUSION

Based on the facts, law and reasons set forth above, this Court should:

1. Reverse the final order entered on November 28, 2001, by the Florida Commission on Human Relations, dismissing Appellant's Petition for Relief from an Unlawful Employment Practice and Complaint of Religious Discrimination.

2. Remand this case to the Florida Commission on Human Relations, with instructions to said agency to remand this case to the Division of Administrative Hearings, for a full and fair evidentiary hearing on Appellant's Petition for Relief from an Unlawful Employment Practice and Complaint of Religious Discrimination.

3. Instruct the Division of Administrative Hearings, on remand, to hold a full and fair hearing on Appellant's motion for allocation of funds to take discovery depositions and to obtain the transcripts thereof.

4. Instruct the Division of Administrative Hearings, on remand, to decide Appellant's motion for allocation of funds to take discovery depositions and to obtain the transcripts thereof, based on the facts in the record and the application of the three-part federal constitutional due process standard enunciated by the United States Supreme Court in *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976).

STATEMENT OF SERVICE

A copy of the foregoing document, entitled "Appellant's Initial Brief," was furnished by United States mail on December 5, 2002, to:

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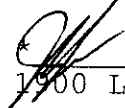
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STATEMENT OF FONT AND TYPE SIZE USED

This document was prepared using Courier New-12 Point.

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* This document was hand-signed under coercion/duress. Appellant does not waive any of his rights or privileges under the law. Appellant hereby expressly preserves and reserves all of his rights and privileges under the law.

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