

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED
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DIVISION OF ADMINISTRATIVE HEARINGS

LINDA MARCHINKO,

EEOC Case No. NONE

Petitioner,

FCHR Case No. 2005-00251

v.

DOAH Case No. 05-2062

THE WITTEMANN COMPANY, LLC,

FCHR Order No. 06-005

Respondent.

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

Preliminary Matters

Petitioner Linda Marchinko filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2001), alleging that Respondent The Wittemann Company, LLC, committed an unlawful employment practice on the basis of Petitioner's age (DOB: 10-14-47) by terminating Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on May 3, 2005, 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 on August 24, 2005, in Bunnell, Florida, before Administrative Law Judge Barbara J. Staros.

Judge Staros issued a Recommended Order of dismissal, dated November 1, 2005.

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 note that the Administrative Law Judge concluded that one of the elements Petitioner must show to establish a prima facie case of discrimination is that "she lost the position to a younger person." Recommended Order, ¶ 18.

With regard to the need to establish that Petitioner lost the position to a "younger" person, we note that it has been stated, "Commission panels have long concluded that the Florida Civil Rights Act of 1992 and its predecessor law the Human Rights Act of 1977, as amended, prohibited age discrimination in employment on the basis of any age "birth to death." See Green v. ATC/VANCOM Management, Inc., 20 F.A.L.R. 314 (1997), and Simms v. Niagara Lockport Industries, Inc., 8 F.A.L.R. 3588 (FCHR 1986). A Commission panel has indicated that one of the elements in determining a prima facie case of age discrimination is that Petitioner is treated differently than similarly situated individuals of a "different" age, as opposed to a "younger" age. See Musgrove v. Gator Human Services, c/o Tiger Success Center, et al., 22 F.A.L.R. 355, at 356 (FCHR 1999). The Commission has concluded that, unlike the federal Age Discrimination in Employment Act (ADEA), the age 40 has no significance in the interpretation of the Florida Civil Rights Act of 1992. See Green, supra, at 315." Williams v. Sailorman, Inc., d/b/a Popeye's Chicken and Biscuits, FCHR Order No. 04-037 (June 2, 2004). Accord, Coffy v. Porky's Barbecue Restaurant, FCHR Order No. 05-053 (May 18, 2005), Johnson v. Tree of Life, Inc., FCHR Order No. 05-087 (July 12, 2005), and Bean v. Department of Transportation, FCHR Order No. 05-107 (September 23, 2005).

In addition, the Administrative Law Judge concluded that the individual Petitioner compared herself to was 39 years of age at the time she was hired by Respondent, and that therefore she was not a member of the protected age group at the time she was hired, and that thereby Petitioner satisfied the above-stated element of the prima facie case. Recommended Order, ¶ 19.

We again note that the age 40 has no significance under the Florida Civil Rights Act of 1992 (see discussion, above), and, we note that the Commission has specifically concluded that in order to demonstrate a prima facie case of discrimination it is not necessary that Petitioners within the federally-created protected age group demonstrate that they were treated less-favorably than someone outside that group. See Simms, supra. Again, as stated above, it is sufficient for Petitioners to show that they were treated less favorably than similarly-situated individuals of a "different" age.

These errors of law are harmless given the Administrative Law Judge's conclusion that Respondent articulated a legitimate, nondiscriminatory reason for its employment decision regarding Petitioner (Recommended Order, ¶ 21), and that Petitioner presented no evidence establishing that Respondent's reasons were pretextual (Recommended Order, ¶ 25).

In correcting the conclusions of law of the Administrative Law Judge as explained, supra, we find: (1) that the conclusions of law being corrected are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions of law stating what must be demonstrated to establish a prima facie case of unlawful discrimination under the Florida Civil Rights Act of 1992; (2) that the reason the corrections are being made by the Commission is that the conclusions of law as stated run contrary to previous Commission decisions on the issue; and (3) that in making these corrections the conclusions of law we are substituting are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(1), Florida Statutes (2005).

With these corrections, 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.

DONE AND ORDERED this 6th day of January, 2006.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Billy Whitefox Stall; and
Commissioner Mario M. Valle

Filed this 6th day of January, 2006,
in Tallahassee, Florida.



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Barbara J. Staros, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 6th day of January, 2006.

By: 

Clerk of the Commission
Florida Commission on Human Relations