

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED

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LUCY CABRERA,

EEOC Case No. NONE

Petitioner,

FCHR Case No. 2005-01103

v.

DOAH Case No. 05-2974

HIALEAH HOUSING AUTHORITY,

FCHR Order No. 07-020

Respondent.

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

Preliminary Matters

Petitioner Lucy Cabrera filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2003), alleging that Respondent Hialeah Housing Authority committed an unlawful employment practice on the basis of Petitioner's age (DOB: 12-13-45) when it terminated Petitioner's employment.

The allegations set forth in the complaint were investigated, and, on June 29, 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 by video teleconference at sites in Tallahassee and Miami, Florida, on August 8, 2006, before Administrative Law Judge Patricia M. Hart.

Judge Hart issued a Recommended Order of dismissal, dated January 8, 2007.

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 to establish a prima facie case of age discrimination, Petitioner must show that, "(1) she was at least 40 years of age; (2) she suffered an adverse employment action; (3) she was qualified to do the job; and (4) she was replaced by someone substantially younger." Recommended Order, ¶ 35.

With regard to the first and fourth elements of the test cited by the Administrative Law Judge, we find error. While we agree that a showing that Petitioner was replaced by a *younger* person could be an element of a prima facie case, 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, Eftoda v. HealthSouth Rehabilitative Hospital, FCHR Order No. 06-097 (November 13, 2006), Downs v. Shear Express, Inc., FCHR Order No. 06-036 (May 24, 2006), and Coffy v. Porky's Barbeque Restaurant, FCHR Order No. 05-053 (May 18, 2005).

We modify accordingly the Administrative Law Judge's conclusions of law regarding the test for the establishment of a prima facie case of age discrimination.

The errors in the test used by the Administrative Law Judge to establish whether a prima facie case of age discrimination existed are harmless, given the Administrative Law Judge's findings that Petitioner established a prima facie case of discrimination, but that Respondent established a legitimate, nondiscriminatory reason for Petitioner's termination, and the evidence presented by Petitioner was not sufficient to establish that this reason was a pretext for unlawful discrimination. Recommended Order, ¶ 37.

In modifying these conclusions of law of the Administrative Law Judge, we conclude: (1) that the conclusions of law being modified are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions of law stating what must be demonstrated to establish a prima facie case of unlawful discrimination under the Florida Civil Rights Act of 1992; (2) that the reason the modifications 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 modifications the conclusions of law being substituted are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), 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

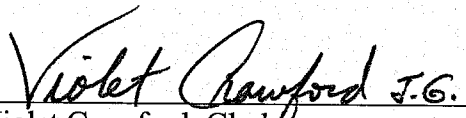
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 15th day of March, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Billy Whitefox Stall

Filed this 15th day of March, 2007,
in Tallahassee, Florida.


Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-7082

Copies furnished to:

Lucy Cabrera
c/o Joel A. Bello, Esq.
Joel Bello, P.A.
3780 West Flagler Street
Miami, FL 33134-1602

Hialeah Housing Authority
c/o J. Frost Walter, III, Esq.
Law Offices of Citrin & Walker
100 West Sunrise Avenue
Coral Gables, FL 33133

Patricia M. Hart, 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 15th day of March, 2007.

By: Violet Crawford J.G.
Clerk of the Commission
Florida Commission on Human Relations