

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED

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DEANNA L. EFTODA,

Petitioner,

v.

HEALTHSOUTH REHABILITATIVE
HOSPITAL,

Respondent.

EEOC Case No. 15DA500610

FCHR Case No. 2005-01507

DOAH Case No. 06-0594

FCHR Order No. 06-097

DIVISION OF
ADMINISTRATIVE
HEARINGS

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

Preliminary Matters

Petitioner Deanna L. Eftoda 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 HealthSouth Rehabilitative Hospital committed unlawful employment practices on the basis of Petitioner's age (DOB: 8-26-49) and on the basis of retaliation, relating to job assignment, compensation, and, eventually, termination.

The allegations set forth in the complaint were investigated, and, on January 10, 2006, 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 Tallahassee, Florida, on June 6-8, 2006, before Administrative Law Judge Ella Jane P. Davis.

Judge Davis issued a Recommended Order of dismissal, dated September 22, 2006.

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, "(1) that she was a member of a protected age group; (2) that she was subjected to adverse employment action; (3) that she was qualified to do the job; and (4) that she was replaced by, or otherwise lost a position to a younger individual or suffered from disparate treatment because of membership in the protected class." Recommended Order, ¶ 79.

With regard to the fourth element of the test cited by the Administrative Law Judge, 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, 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 error in the test used by the Administrative Law Judge to establish whether a prima facie case of age discrimination existed is harmless, given the Administrative Law Judge's findings that even if a prima facie case of age discrimination had been established, Respondent presented credible reasons for Respondent's pay, overtime and leave policies, and demonstrated that these policies had universal application among its employees regardless of age, and that Petitioner did not demonstrate that Respondent's reasons were pretextual. Recommended Order, ¶ 81.

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).

In addition, we find it unnecessary to adopt the conclusion of law set out in Recommended Order, ¶ 82, which suggests that Petitioner could not prevail in this case because she did not report any alleged age discrimination to Respondent's supervisors prior to filing her Charge of Discrimination with the Commission. We note that in cases alleging the existence of an unlawful hostile work environment, an employer may raise the affirmative defense that the Petitioner "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise." See Hadley v. McDonald's Corporation, FCHR Order No. 04-147 (December 7, 2004). However, we are unaware of any Commission decision in a disparate treatment case, such as the instant case, requiring Petitioner to report the alleged unlawful employment practices to the employer prior to filing a Complaint of Discrimination with the Commission. In any event, given the other conclusions of law explaining that no unlawful age or retaliation-based discrimination occurred in this case, we conclude that the conclusion of law at Recommended Order, ¶ 82, is not dispositive of the case. See, generally, Roche v. J.C. Penney Company, Inc., FCHR Order No. 06-078 (September 18, 2006) and Cox v. University of Florida, FCHR Order No. 04-145 (November 4, 2004), in which Commission panels declined to either accept or reject conclusions of law that were not dispositive of the case given the other conclusions of the Administrative Law Judge.

With these corrections and conclusions, 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 13th day of November, 2006.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Keith Roberts, Panel Chairperson;
Commissioner Dominique B. Saliba, M.D.; and
Commissioner Gilbert M. Singer

Filed this 13th day of November, 2006,
in Tallahassee, Florida.


Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
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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.

Copies furnished to:


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Ella Jane P. Davis, 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 13th day of November, 2006.

By: 
Clerk of the Commission
Florida Commission on Human Relations