

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

FILED  
07 OCT 31 AM 10:30

LARRY MCCRARY,

EEOC Case No. 15DA600560

Petitioner,

FCHR Case No. 2006-01469

v.

DOAH Case No. 06-3880

REICHHOLD, INC.,

FCHR Order No. 07-059

Respondent.

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

Preliminary Matters

Petitioner Larry McCrary filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2005), alleging that Respondent Reichhold, Inc., committed an unlawful employment practice on the basis of Petitioner's race (Black) and on the basis of Petitioner's age (DOB: 2-15-52) by terminating Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on September 13, 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 on April 5, 2007, in Pensacola, Florida, before Administrative Law Judge Diane Cleavinger.

Judge Cleavinger issued a Recommended Order of dismissal, dated August 2, 2007.

Pursuant to notice, public deliberations were held on October 25, 2007, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel 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.

With regard to the test for a prima facie case of age discrimination, the Administrative Law Judge made reference that Petitioner was a member of a protected class in that he was over 40-years-of-age (Recommended Order, ¶ 72), the age threshold at which protection begins under the federal Age Discrimination in Employment Act. See 29 U.S.C. Sections 621, 623, and 631. Further, in concluding that Petitioner failed to establish a prima facie case of age discrimination, the Administrative Law Judge noted that Petitioner had not identified any "younger" employee who had been treated more favorably. See Recommended Order, ¶ 74 and ¶ 76.

Commission panels have concluded that one of the elements for establishing a prima facie case of age discrimination under the Florida Civil Rights Act of 1992 is a showing that individuals similarly-situated to Petitioner of a "different" age, as opposed to a "younger" age, were treated more favorably, and Commission panels have noted that the age "40" has no significance in the interpretation of the Florida Civil Rights Act of 1992. See, e.g., Downs v. Shear Express, Inc., FCHR Order No. 06-036 (May 24, 2006), and cases and analysis set out therein.

While, in our view, no error has been made in the application of the law in this case, especially given the Administrative Law Judge's recognition that even if a prima facie case of age discrimination had been established, Respondent articulated a legitimate, non-pretextual reason for the termination of Petitioner (see Recommended Order, ¶ 77), we note, yet again, that the age "40" has no significance in the interpretation of the Florida Civil Rights Act of 1992, and that to establish a prima facie case of age discrimination there must be a showing that a person of a "different" age, as opposed to a "younger" age, was treated more favorably.

With these comments, we adopt the Administrative Law Judge's conclusions of law.

#### Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner's Exceptions to Recommended Order," received by the Commission on August 15, 2007.

The exceptions document contains six numbered exceptions to the Recommended Order. In each instance, the numbered exception takes issue with the facts found and/or inferences drawn from the evidence presented.

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999).

Petitioner's exceptions are rejected.

Dismissal

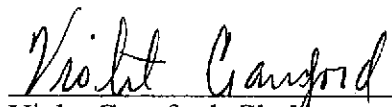
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 29<sup>th</sup> day of October, 2007.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;  
Commissioner Anice R. Prosser; and  
Commissioner Billy Whitefox Stall

Filed this 29<sup>th</sup> day of October, 2007,  
in Tallahassee, Florida.

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

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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c/o R. John Westberry, Esq.  
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and Stewart, P.C.  
2301 Sugar Bush Road, Suite 600  
Raleigh, NC 27612

Diane Cleavinger, 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 29<sup>th</sup> day of October, 2007.

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