

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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CAROLYN LAWHORN,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

EEOC Case No. 10-1087

FCHR Case No. 2006-01463

DOAH Case No. 06-4818

FCHR Order No. 07-046

DIVISION OF
ADMINISTRATIVE
HEARINGS

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

Preliminary Matters

Petitioner Carolyn Lawhorn 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 Department of Corrections committed an unlawful employment practice on the basis of Petitioner's age (DOB: 7-5-42) by terminating Petitioner from her position as a corrections officer.

The allegations set forth in the complaint were investigated, and, on October 26, 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 March 29, 2007, in Brooksville, Florida, before Administrative Law Judge P. Michael Ruff.

Judge Ruff issued a Recommended Order of dismissal, dated May 30, 2007.

Pursuant to notice, public deliberations were held on August 22, 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

A transcript of the proceeding before the Administrative Law Judge was not filed with the Commission. In the absence of a transcript of the proceeding before the

Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See National Industries, Inc. v. Commission on Human Relations, et al., 527 So. 2d 894, at 897, 898 (Fla. 5th DCA 1988). Accord, Beach-Gutierrez v. Bay Medical Center, FCHR Order No. 05-011 (January 19, 2005), and Waaser v. Streit's Motorsports, FCHR Order No. 04-157 (November 30, 2004).

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.

The Administrative Law Judge concluded that a prima facie case of disparate treatment discrimination may be proven by showing "(1) that the Petitioner is a member of a protected class under Title VII or Chapter 760, Florida Statutes; (2) that an adverse employment action has occurred; (3) that the Petitioner was treated differently than similarly-situated employees who were not members of the protected class; and (4) that sufficient evidence exists to infer a nexus or causal connection between Petitioner's gender or age and the disparate treatment alleged to have occurred." Recommended Order, ¶ 37.

With regard to the last element of the test cited by the Administrative Law Judge, the Commission has indicated that this element is actually what a Petitioner is attempting to show by establishing a prima facie case of discrimination, and that this element should not, itself, be an element of the test for a prima facie case. See, Baxla v. Fleetwood Enterprises, Inc., d/b/a Fleetwood Homes of Florida, Inc., 20 F.A.L.R. 2583, at 2585 (FCHR 1998), citing Pugh v. Walt Disney World, 18 F.A.L.R. 1971, at 1972 (FCHR 1995), and Martinez v. Orange County Fleet Manager, 21 F.A.L.R. 163, at 164 (FCHR 1997). See, also, Curry v. United Parcel Service of America, 24 F.A.L.R. 3166, at 3167 (FCHR 2000). Accord, Kelley v. Waterwise, FCHR Order No. 06-083 (September 18, 2006).

We correct these conclusions of law accordingly.

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)(1), Florida Statutes (2005).

In conclusions of law adopted by a Commission panel, it has been stated that to establish a prima facie case of discrimination in cases involving the discriminatory imposition of discipline, Petitioner, "in addition to being a member of a protected class,

must show either (a) that he did not violate the work rule [in question], or (b) that he engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary measures enforced against him were more severe than those enforced against the other persons who engaged in similar misconduct.” Baxla v. Fleetwood Enterprises, Inc., d/b/a Fleetwood Homes of Florida, Inc., 20 F.A.L.R. 2583, at 2585 (FCHR 1998), citing Lumpkin v. Occidental Chemical Company, 19 F.A.L.R. 1542, at 1547, 1548 (FCHR 1996).

This is probably a more appropriate test for determining the existence of a prima facie case in the instant matter given the Petitioner’s allegations that she was disciplined more severely than members outside her protected classes. See Recommended Order, ¶ 27.

Nevertheless, the test used becomes somewhat insignificant given the Administrative Law Judge’s finding that even if a prima facie case had been established, Respondent articulated a legitimate nondiscriminatory reason for terminating Petitioner, namely that, “within the proper exercise of its discretion, [Respondent] took into account the prior disciplinary record and performance record of the Petitioner in determining, after the latest incident involving negligence and violation of Department rules, that termination was proper” (Recommended Order, ¶ 47), and that “this overcomes the claim of disparate discriminatory treatment based upon age or gender advanced by the Petitioner...” (Id.).

With regard to the test for a prima facie case of age discrimination, the Administrative Law Judge made reference in three places in the Recommended Order (Recommended Order, ¶ 27, ¶ 42, and ¶ 45) to the age “40,” 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.

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 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 a person outside Petitioner’s class would be a person of a “different” age as stated in Recommended Order, ¶ 42, we note, yet again, that the age “40” has no significance in the interpretation of the Florida Civil Rights Act of 1992.

With these comments and corrections, we adopt the Administrative Law Judge’s conclusions of law.

Exceptions

Petitioner filed exceptions to the Recommended Order in a document received by the Commission on June 14, 2007.

With regard to exceptions to Recommended Orders, the Administrative Procedure Act states, "The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Section 120.57(1)(k), Florida Statutes (2006).

A review of Petitioner's exceptions document suggests that all the exceptions set out therein do not comply with this statutory provision in that the document attempts to introduce facts not already found by the Administrative Law Judge.

In addition, parts of the document "except" to indicated findings of fact contained in the Recommended Order, but in the absence of a transcript of the proceeding before the Administrative Law Judge, the Commission is bound by the facts found in the Recommended Order, since there is no way for the Commission to determine the extent to which the facts found are supported by the testimony presented.

As indicated, the Commission's file does not contain a transcript of the proceeding on the merits before the Administrative Law Judge. With regard to findings of fact set out in Recommended Orders, the Administrative Procedure Act states, "The agency may not reject or modify the findings of fact unless the agency first determines from a review of *the entire record*, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law [emphasis added]." Section 120.57(1)(l), Florida Statutes (2005). As stated above, in the absence of a transcript of the proceeding before the Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See, National Industries, Inc., supra. Accord, Jones v. Suwannee County School Board, FCHR Order No. 06-088 (September 11, 2006), Johnson v. Tree of Life, Inc., FCHR Order No 05-087 (July 12, 2005), Beach-Gutierrez, supra, and Waaser, supra.

Further, 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).

Finally, there is no indication on Petitioner's exception document that it was served on Respondent by Petitioner as is required by Fla. Admin. Code R. 28-106.104(2)(f) and (4), and Fla. Admin. Code R. 28-106.110.

Petitioner's exceptions are rejected.

Dismissal

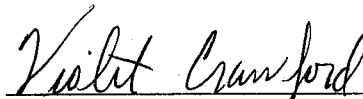
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 24th day of August, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Onelia A. Fajardo

Filed this 24th day of August, 2007,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-708

Copies furnished to:

Carolyn Lawhorn
13141 Lola Drive
Spring Hill, FL 34609

FCHR Order No. 07-046

Page 6

Department of Corrections
c/o Gary Grant, Esq.
2601 Blair Stone Road
Tallahassee, FL 32399

P. Michael Ruff, 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 24th day of August, 2007.

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