

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

GERALD E. TOMS, JR.,

Petitioner,

v.

MARION COUNTY SCHOOL BOARD,

Respondent.

EEOC Case No. 15D200603640

FCHR Case No. 2006-02044

DOAH Case No. 07-1113

FCHR Order No. 07-060

DIVISION OF
ADMINISTRATIVE
HEARINGS

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

Preliminary Matters

Petitioner Gerald E. Toms, Jr., 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 Marion County School Board committed an unlawful employment practice on the basis of Petitioner's age (DOB: 12-30-52) when it failed to hire Petitioner as a teacher.

The allegations set forth in the complaint were investigated, and, on February 19, 2007, 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 Ocala, Florida, on June 21, 2007, before Administrative Law Judge Lisa Shearer Nelson.

Judge Nelson issued a Recommended Order of dismissal, dated August 17, 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) he was a member of the protected age group of persons between the ages of forty and seventy; 2) he was subjected to adverse employment actions; 3) he was qualified for the position(s) for which he had applied; and (4) lost the position to a younger individual." Recommended Order, ¶ 41.

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 lost the position to a *younger* individual 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, Cabrera v. Hialeah Housing Authority, FCHR Order No. 07-020 (March 15, 2007), 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).

In addition, while the age 70 never had any significance in the interpretation of the Florida Civil Rights Act of 1992, it no longer has any significance in the interpretation of the federal Age Discrimination in Employment Act. See 29 U.S.C. § 631(a).

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 for the positions remaining in question in this case Respondent articulated legitimate, nondiscriminatory reasons for not hiring Petitioner, and that Petitioner failed to rebut these reasons. See Recommended Order, ¶ 47 through ¶ 49.

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 (2007).

Finally, with regard to the Administrative Law Judge's conclusions of law relating to Respondent's request for attorney's fees pursuant to Section 57.105, Florida Statutes, we note that the Commission has concluded that it does not have "final order" authority over the orders of Administrative Law Judges dealing with attorney's fees requests under this statutory section. See Jones v. Suwannee County School Board, FCHR Order No. 06-088 (September 11, 2006).

With these corrections and comments, 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 7th day of November, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

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

Filed this 7th day of November, 2007,
in Tallahassee, Florida.


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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324 South Hyde Park Avenue, Suite 225
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Lisa Shearer Nelson, 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 7th day of November, 2007.

By: 
Clerk of the Commission
Florida Commission on Human Relations