

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

JERRY W. BRATCHER,

EEOC Case No. 15D201100099

Petitioner,

FCHR Case No. 2011-00358

v.

DOAH Case No. 11-2999

CITY OF HIGH SPRINGS,

FCHR Order No. 11-091

Respondent.

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

Preliminary Matters

Petitioner Jerry W. Bratcher filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2010), alleging that Respondent City of High Springs committed unlawful employment practices on the bases of Petitioner's sex (male) and age (not specified in complaint but found by the Recommended Order to be 56) when it laid off Petitioner from employment and when it failed to recall Petitioner to employment.

The allegations set forth in the complaint were investigated, and, on May 10, 2011, 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 Gainesville and Tallahassee, Florida, on August 18, 2011, before Administrative Law Judge F. Scott Boyd.

Judge Boyd issued a Recommended Order of dismissal, dated September 28, 2011.

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 Petitioner is a member of a protected class, being at least forty years of age; 2) the Petitioner is otherwise qualified for the position sought; 3) the Petitioner was rejected for the position; and 4) the position was filled by a worker who was substantially younger than the Petitioner." Recommended Order, ¶ 50.

We disagree with the content of elements (1) and (4) of this test as set out by the Administrative Law Judge. Accord, Brown v. SSA Security, Inc., FCHR Order No. 10-062 (August 10, 2010).

With regard to element (1), 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; see also, Boles v. Santa Rosa County Sheriff's Office, FCHR Order No. 08-013 (February 8, 2008), and cases and analysis set out therein.

Consequently, we yet again note that the age "40" has no significance in the interpretation of the Florida Civil Rights Act of 1992. Accord, e.g., Cox v. Gulf Breeze Resorts Realty, Inc., FCHR Order No. 09-037 (April 13, 2009), Toms v. Marion County School Board, FCHR Order No. 07-060 (November 7, 2007), and Stewart v. Pasco County Board of County Commissioners, d/b/a Pasco County Library System, FCHR Order No. 07-050 (September 25, 2007).

With regard to element (4), while we agree that such a showing could be an element of a prima facie case, we note that 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); accord Lombardi v. Dade County Circuit Court, FCHR Order No. 10-013 (February 16, 2010), Deschambault v. Town of Eatonville, FCHR Order No. 09-039 (May 12, 2009), and Boles, supra. Cf., City of Hollywood, Florida v. Hogan, et al., 986 So. 2d 634 (4th DCA 2008).

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 conclusion that Petitioner established a prima facie case. Recommended Order, ¶ 51.

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 (2011).

We note that the Recommended Order contains recommendations relating to the resolution of Petitioner's allegations of unlawful retaliation contained in the attachment to the Petition for Relief. See filing and Recommended Order, ¶ 58 through ¶ 60.

The Complaint of Discrimination filed by Petitioner with the Commission contains no allegations of unlawful retaliation. See filing.

A Commission Panel has noted, "...failure to include a particular charge in one's complaint filed with the Florida Commission on Human Relations precluded the inclusion of the charge in one's petition for relief." Thompson v. ACS, f/k/a Concera Corporation, FCHR Order No. 04-137 (October 1, 2004); accord, Frazier v. Handi House of Starke, Inc., FCHR Order No. 11-065 (August 2, 2011).

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

Exceptions

Neither of the parties 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 December, 2011.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Mario M. Valle, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Lizzette Romano

Filed this 7th day of December, 2011,
in Tallahassee, Florida.

_____/s/_____
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:

Jerry W. Bratcher
355 Southwest Tiffany Court
Fort White, FL 32038

City of High Springs
c/o Timothy M. Warner, Esq.
Warner Law Firm, P.A.
519 Grace Avenue
Post Office Box 1820
Panama City, FL 32402

City of High Springs
c/o Thomas DePeter, Esq.
23327 Northwest County Road 236, Suite 30
High Springs, FL 32643

F. Scott Boyd, 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 December, 2011.

By: _____/s/_____
Clerk of the Commission
Florida Commission on Human Relations