

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

TANYA CHUN,

EEOC Case No. 15D201300341

Petitioner,

FCHR Case No. 2013-00830

v.

DOAH Case No. 13-3717

DILLARD'S,

FCHR Order No. 14-029

Respondent.

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

Preliminary Matters

Petitioner Tanya Chun filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2011), alleging that Respondent Dillard's committed an unlawful employment practice on the basis of Petitioner's age (DOB: 4-4-57) when it failed to hire Petitioner for positions for which she had applied.

The allegations set forth in the complaint were investigated, and, on August 22, 2013, the Executive Director issued a 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 Tampa and Tallahassee, Florida, on March 11, 2014, before Administrative Law Judge John D. C. Newton, II.

Judge Newton issued a Recommended Order of dismissal, dated June 19, 2014.

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 it must be shown "1) that plaintiff is a member of a protected class, i.e., at least forty years of age; 2) the plaintiff is otherwise qualified for the positions sought; 3) the plaintiff was rejected for the position; 4) the position was filled by a worker who was substantially younger than the plaintiff." Recommended Order, ¶ 41.

We disagree with the content of elements (1) and (4) of this test as set out by the Administrative Law Judge. Accord Collins v. Volusia County Schools, FCHR Order No. 12-029 (June 27, 2012), Bratcher v. City of High Springs, FCHR Order No. 11-091 (December 7, 2011) and 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). But, cf., City of Hollywood, Florida v. Hogan, et al., 986 So. 2d 634 (4th DCA 2008).

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 Qualander v. Avante at Mt. Dora, FCHR Order No. 13-016 (February 26, 2013), Collins, supra, 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. But, cf., Hogan, supra.

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 conclusions that Petitioner established a prima facie case of discrimination, Respondent proved a nondiscriminatory explanation for not hiring Petitioner, and there was no evidence that this explanation was a pretext for unlawful discrimination. Recommended Order, ¶ 42 through ¶ 44.

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 (2013).

With these corrections and 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 Tanya Chun's Exceptions to Recommended Order Following Trial," received by the Commission on July 16, 2014. Respondent filed "Respondent's Responses to Petitioner's Exceptions to Recommended Order," received by the Commission on or about July 28, 2014.

The Administrative Procedure Act states, "The agency shall allow each party 15 days in which to submit written exceptions to the recommended order." Section 120.57(1)(k), Florida Statutes (2013). The Recommended Order, itself, advises the parties, "All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case." See Recommended Order, page 17. Finally, the Florida Administrative Code section dealing with the filing of exceptions to Recommended Orders states, "No additional time shall be added to the time limits for filing exceptions or responses to exceptions when service has been made by mail." Fla. Admin. Code R. 28-106.217(4).

The date of the Recommended Order is June 19, 2014, and, as indicated above, Petitioner's exceptions were received by the Commission on July 16, 2014, 27 days after the date of the Recommended Order.

Petitioner's exceptions are untimely. See Johnson v. Apalachee Mental Health, FCHR Order No. 12-028 (June 27, 2012). Accord, Drayton v. Lowe's Home Centers, Inc., FCHR Order No. 12-015 (April 23, 2012) and Barbagallo v. Ocean Park Condominium Association, FCHR Order No. 11-060 (July 13, 2011).

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 21 day of August, 2014.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Michael Keller, Panel Chairperson;
Commissioner Derick Daniel; and
Commissioner Rebecca Steele

Filed this 21 day of August, 2014,
in Tallahassee, Florida.

Cheyenne Costilla
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John D. C. Newton, II, 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 21 day of August, 2014.

By: Cheyenne Costilla
Clerk of the Commission
Florida Commission on Human Relations