

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

DOMINIC A. GRASSO,

EEOC Case No. 15D201400023

Petitioner,

FCHR Case No. 2013-01729

v.

DOAH Case No. 14-2523

AGENCY FOR HEALTH CARE  
ADMINISTRATION,

FCHR Order No. 15-001

Respondent.

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

Preliminary Matters

Petitioner Dominic A. Grasso filed a complaint of discrimination and an amended complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2013), alleging that Respondent Agency for Health Care Administration committed an unlawful employment practice on the basis of Petitioner's age (DOB: 12-27-53) when it failed to grant Petitioner a requested pay increase, and on the basis of retaliation by harassing Petitioner and subjecting Petitioner to different terms and conditions of employment for having filed the age discrimination complaint with the Commission.

The allegations set forth in the complaints were investigated, and, on May 20, 2014, 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 West Palm Beach and Tallahassee, Florida, on September 9, 2014, before Administrative Law Judge Jessica E. Varn.

Judge Varn issued a Recommended Order of dismissal, dated October 27, 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.

The Administrative Law Judge correctly concluded, "The ADEA prohibits an employer from discriminating against an employee who is at least 40 years old on the basis of his/her age." Recommended Order, ¶ 23. However, with regard to the Florida Civil Rights Act of 1992, 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., Chun v. Dillard's, FCHR Order No. 14-029 (August 21, 2014), 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 (4<sup>th</sup> DCA 2008).

In determining that Petitioner failed to establish a prima facie case, one of the reasons put forth by the Administrative Law Judge is that the alleged comparator to Petitioner was in Petitioner's same protected class (over age 40). Recommended Order, ¶ 27. The findings of fact indicate that at the time they requested pay raises, Petitioner was 59 years of age and the comparator was 51 years of age. Recommended Order, ¶ 12. These individuals are not necessarily in the same protected class simply because they are both over the age of 40, which, as indicated above, has no significance in the interpretation of the Florida Civil Rights Act of 1992. It has been concluded that a difference of three years of age is sufficient to establish a prima facie case. See conclusions of law in the Recommended Order of Freeman v. LD Mullins Lumber Company, DOAH Case No. 14-2139, FCHR Case No. 2013-01700 (August 14, 2014).

Finally, the Administrative Law Judge concluded that the counseling session given to Petitioner was not an adverse employment action. Recommended Order, ¶ 32. While we will not disturb this conclusion as made by the Administrative Law Judge within the circumstances of the facts of this case, we note that "verbal counselings" can amount to "adverse employment actions." See McNeil v. HealthPort Technologies, FCHR Order No. 12-026 (June 27, 2012), and cases cited therein.

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 on or about November 10, 2014.

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 (2014); see, also, Taylor v. Universal Studios, FCHR Order No. 14-007 (March 26, 2014), McNeil v. HealthPort Technologies, FCHR Order No. 12-026 (June 27, 2012) and Bartolone v. Best Western Hotels, FCHR Order No. 07-045 (August 24, 2007).

A review of Petitioner's exceptions document suggests that it does not comply with this statutory provision.

It can be said, generally, that Petitioner excepts to the Administrative Law Judge's finding that no unlawful employment practices occurred in this matter.

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). Accord, Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005), Eaves v. IMT-LB Central Florida Portfolio, LLC, FCHR Order No. 11-029 (March 17, 2011) and Taylor, supra.

In addition, it has been stated, "The ultimate question of the existence of discrimination is a question of fact." Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, at 1209 (Fla. 1<sup>st</sup> DCA 1991). Accord, Coley v. Bay County Board of County Commissioners, FCHR Order No. 10-027 (March 17, 2010), Eaves, supra, and Taylor, supra.

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 14<sup>th</sup> day of January, 2015.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;  
Commissioner Onelia Fajardo-Garcia; and  
Commissioner Rebecca Steele

Filed this 14<sup>th</sup> day of January, 2015,  
in Tallahassee, Florida

  
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Commission on Human Relations  
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Jessica E. Varn, 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 16<sup>th</sup> day of January, 2015.

By: Chyanne Castilla  
Clerk of the Commission  
Florida Commission on Human Relations