

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

JOHNNY ELLIS, JR.,

EEOC Case No. 15D201400404

Petitioner,

FCHR Case No. 2014-00631

v.

DOAH Case No. 14-5355

AMERICAN ALUMINUM,

FCHR Order No. 15-059

Respondent.

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

Preliminary Matters

Petitioner Johnny Ellis, Jr., filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2013), alleging that Respondent American Aluminum committed unlawful employment practices on the bases of Petitioner's age (DOB: 6-30-67), race (African American) and retaliation by suspending and subsequently terminating Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on October 6, 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 in Tallahassee, Florida, on May 1, 2015, before Administrative Law Judge James H. Peterson, III.

Judge Peterson issued a Recommended Order of dismissal, dated July 14, 2015.

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 group of persons between the ages of 40 and 70; 2) he was subject to an adverse employment action; 3) a substantially younger person filled the position from which he was discharged; and 4) he was qualified to do the job." Recommended Order, ¶ 51.

We disagree with the content of elements (1) and (3) of this test as set out by the Administrative Law Judge. Accord Torrence v. Hendrick Honda Daytona, FCHR Order No. 15-027 (May 21, 2015), Chun v. Dillard's, FCHR Order No. 14-029 (August 21, 2014), 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., Grasso v. Agency for Health Care Administration, FCHR Order No. 15-001 (January 14, 2015), 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).

Further, since 1986, even the federal Age Discrimination in Employment Act no longer has an upper applicable age limit of age 70. See 29 U.S.C. § 631(a).

With regard to element (3), 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 even if Petitioner had established a prima facie case of discrimination, Respondent produced evidence of a legitimate nondiscriminatory reason for terminating Petitioner’s employment, and there was no evidence that this explanation was a pretext for unlawful discrimination. Recommended Order, ¶ 59 and ¶ 60.

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 (2015).

Finally, we note that in determining that a prima facie case of race and age discrimination had not been established by Petitioner the Administrative Law Judge concluded, among other things, that Petitioner did not establish that he was qualified for the position in question. Recommended Order, ¶ 45, ¶ 50 and ¶ 51.

A Commission panel has noted, “For the purposes of establishing a prima facie case of discrimination, the Commission has accepted a showing that Petitioner is minimally qualified for the position.” Potasek v. The Florida State University, 18 F.A.L.R. 1952, at 1953 (FCHR 1995). Another Commission panel has indicated, “Petitioners being only minimally qualified...does not mean they failed to establish a prima facie case. Only a total lack of qualification would prevent the establishment of a prima facie case.” Little, et al. v. Monsanto Company, 15 F.A.L.R. 621, at 622 (FCHR 1992). In a “termination” case similar to the instant case, a Commission panel concluded that for the purpose of establishing a prima facie case of discrimination Petitioner demonstrated that “she was at least minimally qualified for the position in question by virtue of having been hired for the position.” Kesselman v. Department of Transportation, 20 F.A.L.R. 166, at 169 (FCHR 1996); accord, Simpson v. Auto Nation / Courtesy Chevrolet, FCHR Order No. 11-088 (November 3, 2011), Hogg v. Arena Sports Cafe, FCHR Order No. 10-049 (May 25, 2010), Jones v. Spherion Staffing, FCHR Order

No. 09-056 (July 1, 2009), Hamilton v. The Talking Phone Book, FCHR Order No. 08-002 (January 14, 2008), Ricks v. City of Gainesville, FCHR Order No. 05-018 (February 22, 2005), and Brown v. Volusia County School Board, FCHR Order No. 04-160 (December 23, 2004).

We further note that, while based on the foregoing we would conclude that Petitioner in the instant case was “qualified” for the position in question for purposes of establishing a prima facie case, the conclusion of whether Petitioner was qualified for the position in question in the instant case is not dispositive of the case. The Administrative Law Judge further concluded that a prima facie case of race discrimination was not established since there was no showing that Respondent treated similarly situated employees who were not members of Petitioner’s protected class more favorably (Recommended Order, ¶ 49) and, as indicated above with regard to both Petitioner’s race and age discrimination allegations, even if Petitioner had established a prima facie case of discrimination, Respondent produced evidence of a legitimate nondiscriminatory reason for terminating Petitioner’s employment, and there was no evidence that this explanation was a pretext for unlawful discrimination (Recommended Order, ¶ 59 and ¶ 60).

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 17 day of Sept., 2015.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Michael Keller, Panel Chairperson;
Commissioner J. Jeff Graber; and
Commissioner Rebecca Steele

Filed this 17 day of Sept., 2015,
in Tallahassee, Florida.

Jammy Barton

Clerk

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James H. Peterson, III, 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 _____ day of _____, 2015.

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