

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

CONSTANCE K. GATEWOOD,

EEOC Case No. 15D201600283

Petitioner,

FCHR Case No. 2016-00338

v.

DOAH Case No. 16-5762

THE UNLIMITED PATH, INC.

FCHR Order No. 17-072

Respondent.

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

Preliminary Matters

Petitioner Constance K. Gatewood filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2015), alleging that Respondent The Unlimited Path, Inc., committed unlawful employment practices on the basis of Petitioner's disability by denying Petitioner a reasonable accommodation, and on the bases of Petitioner's age and disability by harassing Petitioner, and demoting Petitioner. Petitioner also alleged that her demotion was the result of Respondent's unlawful retaliation.

The allegations set forth in the complaint were investigated, and, on August 25, 2016, 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 Panama City, Florida, on April 17 and May 4, 2017, before Administrative Law Judge Garnett W. Chisenhall.

Judge Chisenhall issued a Recommended Order of dismissal, dated June 22, 2017.

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.

Regarding the issue of alleged age discrimination, we note that the Administrative Law Judge concluded that Petitioner did not prove a prima facie case of age discrimination, and cited City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4<sup>th</sup> DCA 2008) as clearly supporting authority (with an inferential step between the conclusion and Hogan). The Administrative Law Judge, citing Hogan, concluded that to establish a prima facie case of age discrimination "a plaintiff must prove that: (a) she is at least 40 years of age; (b) she is otherwise qualified for the position sought; (c) she was rejected for the position; and (d) the position was filled by a worker substantially younger than the plaintiff." Recommended Order, endnote 5.

We disagree with the content of elements (a) and (d) of this test as set out by the Administrative Law Judge.

With regard to element (a), 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 Sheriffs 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., 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), 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 (d), 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.

Further with regard to element (d), we note that 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).

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.

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 (2017).

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's Exceptions to ALJ Recommended Order."

Respondent subsequently filed, "Respondent's Corrected Response to Notice of Ex Parte Communication and Petitioner Exceptions."

Petitioner's exception document contains thirty-five exceptions by paragraph number, two exceptions to the Preliminary Statement of the Recommended Order, one exception to the Recommendation of the Recommended Order, and three "FOOTNOTES."

The Administrative Procedure Act establishes the extent to which the Commission can modify or reject a finding of fact or conclusion of law contained in a Recommended Order. It states, "The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and the interpretation of administrative rules over which it has substantive jurisdiction...Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law." Section 120.57(1)(l), Florida Statutes (2017).

Petitioner's exceptions to Recommended Order paragraphs numbered 9, 10, 13, 15, 16, 17, 18, 19, 20, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 43, 44, 47, 48, 50, 52,

56, 58, 69, 70, 73, 75, 76, and 78 except to inferences drawn from the evidence presented, and/or credibility determinations made by the Administrative Law Judge; or except to fact determinations made by the Administrative Law Judge that are immaterial to the outcome of the legal issues presented in the case.

Petitioner's exceptions to Recommended Order paragraphs numbered 9, 10, 13, 15, 16, 17, 18, 19, 20, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 43, 44, 47, 48, 50, 52, 56, 58, 69, 70, 73, 75, 76, and 78 are rejected.

Petitioner's two exceptions to the Preliminary Statement of the Recommended Order except to inferences drawn from the evidence presented, and/or credibility determinations made by the Administrative Law Judge; or except to fact determinations made by the Administrative Law Judge that are immaterial to the outcome of the legal issues presented in the case.

Petitioner's two exceptions to the Preliminary Statement of the Recommended Order are rejected.

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 (2017); 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 three FOOTNOTE exceptions suggests that they do not comply with this statutory provision.

Petitioner's three FOOTNOTE exceptions are rejected.

Regarding Petitioner's exception to the Recommendation of the Recommended Order, 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 exception to the Recommendation of the Recommended Order is rejected.

Dismissal

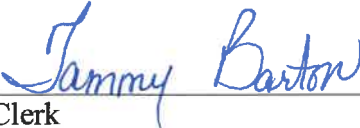
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 day of Sept., 2017.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Derick Daniel, Panel Chairperson;  
Commissioner Jay Pichard; and  
Commissioner Sandra Turner

Filed this 14 day of Sept., 2017,  
in Tallahassee, Florida.

  
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Garnett W. Chisenhall, Administrative Law Judge, DOAH

Stanley Gorsica, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 14 day of September, 2017.

By: Jammy Barton  
Clerk of the Commission  
Florida Commission on Human Relations