STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

IAN H. WILLIAMS,	EEOC Case No. 15D201700213
Petitioner,	FCHR Case No. 2017-00299
v.	DOAH Case No. 17-3261
FIRST COMMERCE CREDIT UNION,	FCHR Order No. 17-082
Respondent.	

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FINAL ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

Petitioner Ian H. Williams filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2016), alleging that Respondent First Commerce Credit Union committed unlawful employment practices on the bases of Petitioner's race (Black) and sex (male) by failing to interview and hire Petitioner for a Teller position for which Petitioner had applied.

The allegations set forth in the complaint were investigated, and, on May 3, 2017, 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 August 15, 2017, before Administrative Law Judge R. Bruce McKibben.

Judge McKibben issued a Recommended Order of dismissal, dated August 29, 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

A transcript of the proceeding before the Administrative Law Judge was not filed with the Commission. In the absence of a transcript of the proceeding before the Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See National Industries, Inc. v. Commission on Human Relations, et al., 527 So. 2d 894, at 897, 898 (Fla. 5th DCA 1988). Accord, Coleman v.

Daytona Beach, Ocean Center Parking Garage, FCHR Order No. 14-034 (September 10, 2014), Gantz, et al. v. Zion's Hope, Inc., d/b/a Holy Land Experience, FCHR Order No. 11-048 (June 6, 2011), and Hall v. Villages of West Oaks HOA, FCHR Order No. 08-007 (January 14, 2008).

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, "Further, even if he had timely asserted a discrimination claim based on age, he could not prove a prima facie case on that basis, either. In order to qualify for an age-based claim of discrimination, the complainant must be at least 40 years of age. [Citation omitted.] Mr. Williams is only 29 years old." Recommended Order, ¶ 23.

We disagree with the conclusion of law that a complainant must be at least 40 years of age to bring an age discrimination action under the Florida Civil Rights Act of 1992. Accord Gatewood v. The Unlimited Path, Inc., FCHR Order No. 17-072 (September 14, 2017), 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).

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) and Miami-Dade County v. Eghbal, 54 So. 3d 525 (3rd DCA 2011).

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.

This error in the test used by the Administrative Law Judge to establish whether a prima facie case of age discrimination existed is harmless, given the Administrative Law Judge's conclusion that Petitioner's age discrimination claim was untimely. See Recommended Order, ¶ 11 and ¶ 23.

In modifying this conclusion of law of the Administrative Law Judge, we conclude: (1) that the conclusion of law being modified is a conclusion of law over which the Commission has substantive jurisdiction, namely a conclusion 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 modification is being made by the Commission is that the conclusion of law as stated runs contrary to previous Commission decisions on the issue; and (3) that in making this modification the conclusion of law being substituted is as or more reasonable than the conclusion of law which has been rejected. See, Section 120.57(1)(l), Florida Statutes (2017).

With this correction and comment, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order, received by the Commission on or about September 1, 2017.

The exceptions document contains 10 numbered exceptions.

Exceptions numbered 3, 5, and 7, are not really exceptions to the Recommended Order.

Exceptions numbered 3, 5, and 7, are rejected.

Exception numbered 2, excepts to the Administrative Law Judge's awarding of attorney's fees to the Respondent under Section 57.105, Florida Statutes.

We note that awards pursuant to this statutory section are within the purview of the Administrative Law Judge and that the Commission does not have "final order" authority over awards made pursuant to this statutory section. See, Otto v. Duval County Public Schools, FCHR Order No. 13-021 (March 11, 2013) and Michael v. Delta Health Group, FCHR Order No. 08-017 (February 26, 2008) and cases cited therein.

Exception numbered 2 is rejected.

Exceptions numbered 1, 4, 6, 8, 9 and 10, take issue with inferences drawn by the Administrative Law Judge from the evidence presented.

As indicated, above, no transcript of the proceeding before the Administrative Law Judge was filed with the Commission.

In the absence of a transcript of the proceeding before the Administrative Law Judge, the Commission is bound by the facts found in the Recommended Order, since there is no way for the Commission to determine the extent to which the facts found are supported by the testimony presented. See, e.g., Gainey v. Winn Dixie Stores, Inc.,

FCHR Order No. 07-054 (October 12, 2007), Herring v. Department of Corrections, FCHR Order No. 12-004 (February 21, 2012) and Holloman v. Lee Wesley Restaurants, d/b/a Burger King, FCHR Order No. 14-041 (October 9, 2014).

With regard to findings of fact set out in Recommended Orders, the Administrative Procedure Act states, "The agency may not reject or modify the 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 on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law [emphasis added]." Section 120.57(1)(l), Florida Statutes (2017). As indicated, above, in the absence of a transcript of the proceeding before the Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See, National Industries, Inc., supra. Accord, Hall, supra, Jones v. Suwannee County School Board, FCHR Order No. 06-088 (September 11, 2006), Johnson v. Tree of Life, Inc., FCHR Order No 05-087 (July 12, 2005), Coleman, supra, and Gantz, supra.

Further, 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) and Eaves v. IMT-LB Central Florida Portfolio, LLC, FCHR Order No. 11-029 (March 17, 2011).

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. 1st DCA 1991). Accord, Coley v. Bay County Board of County Commissioners, FCHR Order No. 10-027 (March 17, 2010) and Eaves, supra.

Finally, Exception numbered 1 seems to take issue that no finding of discrimination was made on the bases of age and religion, even though the initial complaint contained no allegations of age and religious discrimination.

A Commission Panel has stated, "...the Petition for Relief may not contain allegations that were not initially contained in the complaint of discrimination. See, Bratcher v. City of High Springs, FCHR Order No. 11-091 (December 7, 2011), and cases cited therein." Breville v. Florida Department of Economic Opportunity, FCHR Order No. 13-030 (May 1, 2013); see, also, Titus v. Miami-Dade County, FCHR Order No. 17-025 (March 30, 2017).

Exceptions numbered 1, 4, 6, 8, 9 and 10, 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 2 day of November, 2017.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Rebecca Steele, Panel Chairperson;
Commissioner Donna Elam; and
Commissioner Jay Pichard

Filed this 2 day of November, 2017,
in Tallahassee, Florida.

Tammy Barton
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Commission on Human Relations
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R. Bruce McKibben, 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 2 day of November, 2017.

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