

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TONEY R. FERRELL,

Petitioner,

vs.

Case No. 17-6384

FLORIDA AGRICULTURAL AND
MECHANICAL UNIVERSITY BOARD OF
TRUSTEES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, on February 15, 2018, Administrative Law Judge Yolonda Y. Green, of the Division of Administrative Hearings ("Division"), conducted a final hearing in this matter in Tallahassee, Florida, pursuant to section 120.57(1), Florida Statutes (2017).

APPEARANCES

For Petitioner: Toney R. Ferrell, pro se
Apartment P101
2125 Jackson Bluff Road
Tallahassee, Florida 32303

For Respondent: David C. Self, II, Esquire
Florida A & M University
300 Lee Hall
1601 Martin Luther King Jr. Boulevard
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STATEMENT OF THE ISSUE

Whether Respondent subjected Petitioner to an unlawful employment practice on the basis of his age in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner, Toney Ferrell ("Mr. Ferrell" or "Petitioner"), filed a Complaint of Employment Discrimination with the Florida Commission on Human Relations ("FCHR") on April 17, 2017. The complaint alleged that Respondent, Florida Agricultural and Mechanical University Board of Trustees ("Florida A & M University" or "Respondent"), had discriminated against him on the basis of age. Following its investigation of the allegations, FCHR issued a determination of "No Reasonable Cause" regarding Petitioner's complaint on October 17, 2017.

On November 20, 2017, Petitioner filed a Petition for Relief requesting an administrative hearing regarding FCHR's "No Cause" determination pursuant to section 760.11(7). FCHR referred the matter to the Division on the same date.

On November 21, 2017, this matter was assigned to Administrative Law Judge Suzanne Van Wyk. On January 16, 2018, this matter was transferred to the undersigned.

This matter was scheduled for final hearing on February 15, 2018, and the final hearing was convened as scheduled. At

hearing, Petitioner offered two exhibits, which were not admitted. Mr. Ferrell testified on his own behalf.

Respondent offered the testimony of two witnesses: Dr. Agatha Onwunli, Florida A & M University registrar, and Brandice Koonce, an employee in the Florida A & M University office of human resources. Respondent offered Exhibits A, B, and D, which were admitted.

The proceeding was recorded by a court reporter and Respondent ordered a copy of the transcript. A one-volume Transcript of the final hearing was filed with the Division on February 10, 2018. The parties timely filed Proposed Recommended Orders ("PROs"), which have been carefully considered in the preparation of this Recommended Order.

All statutory citations are to Florida Statutes (2016), unless otherwise indicated.

FINDINGS OF FACT

The following Findings of Fact are based on exhibits admitted into evidence, testimony offered by witnesses, and admitted facts set forth in the pre-hearing stipulation.

1. Mr. Ferrell is a 65-year-old male, who is employed at Florida A & M University as a registrar officer. Mr. Ferrell has worked in the registrar's office in various positions since 2003.

2. Florida A & M University is a university located in Tallahassee, Florida. At all times material to this matter, Florida A & M University employed more than 15 full-time employees.

3. Mr. Ferrell alleged that four employees, Lefevere Jordan, Cornelius McGlockton, Dyamond V. Smith, and Antonio Witherspoon were treated more favorably than he was treated because they are younger than he is. Specifically, he asserted that Mr. Jordan received a pay raise; Mr. McGlockton and Mr. Witherspoon received a promotion; and Ms. Smith was hired at a higher pay rate for the same position that he holds (registrar officer).

4. Mr. Ferrell's job responsibilities as a registrar officer include maintaining the state course numbering system, maintaining the university course catalog, scheduling classes, and scheduling events. During the time that Mr. Ferrell has been employed by Florida A & M University, he has never been disciplined for poor work performance or otherwise.

5. Mr. Ferrell testified that in 2012 or 2013, Dr. Onwunli promised him and Mr. Jordan a \$5,000 raise. Dr. Onwunli denied she made the promise. The undersigned finds Mr. Ferrell more persuasive on that fact.

6. Regarding Mr. Witherspoon, he is currently classified as a registration coordinator. His job responsibilities include

supervising three employees, transferring credits, and project management. The coordinator position was advertised on May 20, 2016. Mr. Witherspoon applied for the position and was hired. Mr. Ferrell did not apply for the coordinator position.

7. Similar to Mr. Ferrell, Mr. McGlockton is classified as a registrar officer. His job responsibilities include processing enrollment verifications and maintaining the electronic online catalog. Mr. McGlockton has website experience and successfully completed training for managing the electronic catalog system in 2015.

8. Ms. Smith is also classified as a registrar officer. Her job responsibilities include processing test credits, maintaining the Ad Astra system, and assisting with the academic advisement module. On February 16, 2017, the registrar officer position was advertised. Ms. Smith applied for and was hired for the position. However, Mr. Ferrell did not apply for the position posted in February 2017.

9. At hearing, Mr. Ferrell acknowledged that he did not apply for the coordinator or the registrar officer positions. He explained that he did not believe he was qualified for the coordinator position because he does not possess a master's degree. However, despite not having a master's degree, the position qualifications included "a bachelor's degree in an appropriate area of specialization and two years of progressive

experience in an academic environment.” Regarding the registrar officer position, understandably, he testified that he did not apply because his position carried the same title. There was no evidence offered at the hearing to demonstrate that Mr. Ferrell did not meet the qualifications for the advertised positions.

10. Dr. Agatha Onwunli is the University Registrar at Florida A & M University. She supervises 20 employees, including Mr. Ferrell. Her job responsibilities include making hiring and promotion decisions, and training employees who work in the registrar’s office. As described supra in these findings of fact, several registrar officers perform different tasks and she makes hiring decisions based on the needs of the office.

11. Mr. Ferrell alleges Florida A & M University unlawfully discriminated against him on the basis of age.

12. The crux of this case rests with the age of the other employees that are relied upon for comparison. Mr. Ferrell offered testimony regarding Mr. Jordan, Mr. Witherspoon, Mr. McGlockton, and Ms. Smith to prove a similarly situated employee outside his protected class, based on age, was treated more favorably than he was treated.

13. Mr. Ferrell testified that the employees could not be his age for various reasons. However, there was no evidence presented at hearing regarding the age of the four employees offered as comparators.

14. In his PRO, Mr. Ferrell attached exhibits that reflect the age of Mr. Jordan, Mr. Witherspoon, and Ms. Smith. However, the exhibits were not offered during the hearing and as a result, they are not evidence of record. A finding of fact may only be based exclusively on evidence of record.^{1/} Thus, the undersigned may not consider the exhibits offered post-hearing to make a finding of fact regarding the age of Mr. Jordan, Mr. Witherspoon, and Ms. Smith.

15. The undersigned finds that there was not sufficient evidence presented at the final hearing regarding the age of Mr. Jordan, Mr. Witherspoon, Mr. McGlockton, and Ms. Smith.

CONCLUSIONS OF LAW

16. Pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017), the Division has jurisdiction over the subject matter and parties to this proceeding.

17. Section 760.10(1)(a) makes it unlawful for an employer to take adverse action against an individual because of that employee's age.

18. The civil rights act defines "employer" as "any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." § 760.02(7), Fla. Stat.

19. Florida A & M University meets the definition of employer.

20. Petitioner filed a complaint alleging Respondent discriminated against him on the basis of his age.

21. Section 760.11(1) provides, in pertinent part, that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [FCHR] within 365 days of the alleged violation." Petitioner timely filed his complaint.

22. Section 760.11(7) provides that upon a determination by the FCHR that there is no reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause." Following the FCHR determination of no cause, Petitioner timely filed his Petition of Relief requesting a final hearing.

23. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Fla. State Univ.

v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

24. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

Discrimination on the Basis of Age

25. To establish a prima facie case of age discrimination, the undersigned recognizes that Florida judicial case law on age discrimination clearly establishes that:

The plaintiff must first make a prima facie showing of discriminatory treatment. He or she does that by proving: 1) the 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. (emphasis added).

City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008). However, the FCHR has determined, citing its own Orders as authority, that:

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). 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.

Johnny L. Torrence v. Hendrick Honda Daytona, Case

No. 14-5506 (DOAH Feb. 26, 2015; FCHR May 21, 2015).

26. If Petitioner is able to prove his prima facie case by a preponderance of the evidence, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its employment decision. Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 255; Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). An employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Dep't of Corr. v. Chandler, supra. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d at 1564; Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

27. If the employer produces evidence that the decision was non-discriminatory, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 516-518. In order to satisfy this final step of the process, Petitioner must "show[] directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the

employment decision is not worthy of belief." Dep't of Corr. v. Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-256). "[A] reason cannot be a pretext for discrimination 'unless it is shown both that the reason was false, and that discrimination was the real reason.'" Fla. State Univ. v. Sondel, 685 So. 2d at 927 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 515); see also Jiminez v. Mary Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995). The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." Holifield v. Reno, 115 F.3d at 1565.

28. In a proceeding under the Civil Rights Act, "[w]e are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999). As established by the Eleventh Circuit Court of Appeals, "[t]he employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). Moreover, "[t]he employer's stated legitimate reason . . . does not have

to be a reason that the judge or jurors would act on or approve." Dep't of Corr. v. Chandler, 582 So. 2d at 1187.

29. In determining whether Respondent's actions were pretextual, the undersigned "must evaluate whether the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'" Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519, 1538 (11th Cir. 1997).

30. At all times material to this matter, Petitioner was 65 years old, and, as such, was a member of a protected class.

31. As established above, Petitioner met the qualifications for the position of registrar officer and registrar/admissions coordinator.

32. Petitioner did not present sufficient evidence to establish a prima facie case that persons of a different age were treated more favorably than he was treated.

33. Mr. Ferrell asserted that Mr. Jordan, Mr. Witherspoon, Mr. McGlockton, and Ms. Smith were younger employees who received more favorable treatment than he did (i.e., promotion, higher pay rate, or a pay raise). However, there was no evidence offered at the hearing to prove the actual age of the alleged younger employees.^{2/}

Conclusion

34. Petitioner did not meet his burden to show by a preponderance of the evidence that Respondent discriminated against him on the basis of his age.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Discrimination Complaint and Petition for Relief consistent with the Findings of Fact and Conclusions of Law of this Recommended Order.

DONE AND ENTERED this 5th day of April, 2018, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of April, 2018.

ENDNOTES

^{1/} See § 120.57(1)(j), Fla. Stat. (2017) (findings of fact shall be based exclusively on the evidence of record.)

^{2/} If Mr. Ferrell had presented evidence at the final hearing regarding the age of the comparator employees, the outcome of this matter may have been different.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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.