

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

RAMON SANTIAGO LOPEZ,

EEOC Case No. N/A

Petitioner,

FCHR Case No. 2017-00410

v.

DOAH Case No. 18-0297

WAL-MART STORES EAST, LP,

FCHR Order No. 19-004

Respondent.

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

Preliminary Matters

On January 9, 2017, Petitioner Ramon Santiago Lopez filed a Technical Assistance Questionnaire (TAQ), which was subsequently used as a Complaint of Discrimination, pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2015), alleging that Respondent Wal-Mart committed an unlawful employment practice against Petitioner on the bases of national origin, age, and retaliation for engaging in a protected activity, by terminating his employment.

The allegations set forth in the complaint were investigated, and, on December 15, 2017, the Executive Director issued a determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

On January 16, 2018, Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and, on January 17, 2018, the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

The case was scheduled for hearing on March 28, 2018.

On March 27, 2018, Respondent filed a motion for continuance because Respondent lost its lead counsel on the eve of the hearing. On the same date, the continuance was granted. The hearing was subsequently rescheduled for May 15, 2018.

On May 4, 2018, Respondent filed a Motion for Continuance because Petitioner missed a deposition due to illness.

On May 9, 2018, the continuance was granted, and the hearing was rescheduled.

An evidentiary hearing was held in Jacksonville, Florida, on June 26, 2018, before Administrative Law Judge Lawrence P. Stevenson.

Judge Stevenson issued a Recommended Order of dismissal, dated October 25, 2018.

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.

However, in the Recommended Order, paragraph 50, the Administrative Law Judge states that Complainant is a member of a protected class because he "is over 40 years of age". It should be noted that the distinction of 40 years of age is only a requirement under the Age Discrimination and Employment Act (ADEA), and is not a requirement under 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).

Additionally, in the Recommended Order, paragraph 57, the Administrative Law Judge states that Complainant "at least arguably" established that he engaged in a protected activity when he complained to his supervisor about working conditions at Store 4444. It should be noted that this would only be a protected activity if the complaint was related to a protected class, such as race, national origin, sex, religion, marital status, religion, or disability. See Section 760.10(7), *Florida Statutes*.

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 November 7, 2018.

Petitioner provided extensive explanation of why he generally excepts to the inferences drawn from the evidence presented as set out in the Recommended Order.

The Administrative Procedure Act states that, "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* (2018); 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 the Petitioner's exceptions document suggests that it does not comply with this statutory provision because it does not clearly identify the disputed portion of the recommended order, does not clearly identify the legal basis for each exception, and does not include appropriate and specific citations to the record. Though the Petitioner seems to attempt

to make reference to the record, it is not possible in all instances to determine to where in the record he is referencing.

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

Petitioner's exceptions are rejected.

Dismissal

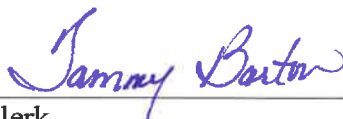
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 17 day of January, 2019.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Latanya Peterson, Panel Chairperson;
Commissioner Jay Pichard; and
Commissioner Gilbert M. Singer

Filed this 17 day of January, 2019,
in Tallahassee, Florida.



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James H. Peterson, III, Administrative Law Judge, DOAH

Sarah Stewart, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 17 day of January, 2019.

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