

20-10/20/00

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

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DIVISION OF  
ADMINISTRATIVE  
HEARINGS  
HLH

CHRISTINA D. MCGILL,

EEOC Case No. 15D9800229

Petitioner,

DOAH Case No. 00-2659

v.

FCHR Case No. 98-0229

THE MOORINGS RESTAURANT,

FCHR Order No. 01-017

Respondent.

ORDER FINDING UNLAWFUL EMPLOYMENT PRACTICE OCCURRED  
AND REMANDING MATTER FOR DETERMINATION OF RELIEF

Preliminary Matters

Petitioner Christina D. McGill filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1997), alleging that Respondent The Moorings Restaurant committed an unlawful employment practice on the basis of Petitioner's age (41) when it terminated Petitioner from the position of cook.

Petitioner requested an administrative hearing, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held in Pensacola, Florida, on October 6, 2000, before Administrative Law Judge Harry L. Hooper.

Judge Hooper issued a Recommended Order of dismissal, dated October 20, 2000.

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 and Conclusions of Law

The Administrative Law Judge concluded that Petitioner failed to establish a prima facie case of discrimination, stating that, "[w]hile there is some evidence that comments were made, both on the job and off duty, concerning the fact that Mrs. McGill was older than other employees, and that she had a husband who was younger, there is no evidence of any connection between these comments and Mrs. McGill's termination. Mere speculation as to the cause of the termination is insufficient to make out a prima facie case of discrimination. More importantly, there was no evidence that she was replaced by a person outside the protected group." Recommended Order, ¶ 19.

We hold that the Administrative Law Judge committed error of law in concluding that Petitioner failed to establish a prima facie case of age discrimination.

In a case involving allegations of age discrimination, a Commission panel has indicated, "To establish a prima facie case of discrimination in situations where individuals have lost

their positions, it has been stated that a Petitioner must show, '(1) that he belongs to a group protected by the statute; (2) that he was qualified for the job; (3) that he was terminated; and (4) that after his termination, the employer hired a person not in [P]etitioner's protected class or retained those having comparable or lesser qualifications, not in the protected class.' Arnold v. Department of Health and Rehabilitative Services, 16 F.A.L.R. 576, at 582 (FCHR 1993)." Green v. ATC/VANCOM Management, Inc., 20 F.A.L.R. 314, at 315 (FCHR 1997).

We note that the Administrative Law Judge found that, "It is clear that Mrs. McGill is a member of a protected class based upon her age and that she is qualified to accomplish her job as a cook or as a kitchen manager. Moreover, it is clear that she was subjected to an adverse employment action in that she was terminated." Recommended Order, ¶ 18. Further, the Administrative Law Judge found that Respondent's general manager remarked that "...Mrs. McGill was the oldest person in the kitchen..." suggesting that Respondent retained those having comparable qualifications to Mrs. McGill, not in the protected class. Recommended Order, ¶ 5.

Applying the test for establishing a prima facie case set out in Green, supra, to the facts found by the Administrative Law Judge set out above, we conclude that Petitioner established a prima facie case of age discrimination.

It has been stated that if the "...burden [of establishing a prima facie case] is sustained, the Respondent must articulate some legitimate nondiscriminatory reason for its action. Hart v. Double Envelope Corporation, 15 F.A.L.R. 1664, at 1673 (FCHR 1992)." O'Neill v. Sarasota County School Board, 18 F.A.L.R. 1129, at 1130 (1994). It has also been stated that once evidence of a prima facie case of discrimination has been introduced, "[t]he defendant then knows that its failure to introduce evidence of a nondiscriminatory reason will cause judgment to go against it unless the plaintiff's prima facie case is held to be inadequate in law or fails to convince the factfinder." St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, at 2749 f.n. 3 (1993).

Based on the foregoing, we conclude that Petitioner's establishment of a prima facie case of discrimination, as explained above, coupled with Respondent's failure to appear at the formal hearing of this matter (see, Recommended Order, Appearances section and Preliminary Statement section), results in the ultimate conclusion that Respondent committed an unlawful employment practice on the basis of Petitioner's age when it terminated Petitioner from her position.

We also note that the Administrative Law Judge seems to suggest that as an element of establishing a prima facie case of discrimination a causal connection must be shown between the act complained of and the protected class of age. See, Recommended Order, ¶ 19.

However, the Commission has indicated that this element is actually what a Petitioner is attempting to show by establishing a prima facie case of discrimination, and that this should not, itself, be an element of the test for a prima facie case. See, Baxla v. Fleetwood Enterprises, Inc., d/b/a Fleetwood Homes of Florida, Inc., 20 F.A.L.R. 2583, at 2585 (FCHR 1998), citing Pugh v. Walt Disney World, 18 F.A.L.R. 1971, at 1972 (FCHR 1995), and Martinez v. Orange County Fleet Manager, 21 F.A.L.R. 163, at 164 (FCHR 1997).

Finally, the Administrative Law Judge concluded that to establish a prima facie case of age discrimination under the Age Discrimination in Employment Act, "Petitioner must show that she was over 40 years of age at time of her discharge." Recommended Order, ¶ 17.

We clarify that a Commission panel has concluded, "While the federal Age Discrimination in Employment Act uses the age of 40 as the age at which the Act's protection begins (see 29 U.S.C. § 631), the age of 40 has no significance in interpreting the Florida Civil Rights Act of 1992, or its predecessor, the Human Rights Act of 1977, as amended. The Commission has consistently held that Florida law prohibits discrimination in employment on the basis of any age, birth to death..." Green, supra, at 315.

In modifying the conclusions of law of the Administrative Law Judge as explained, supra, we find: (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 applied run contrary to previous Commission decisions on the issue; and (3) that in making these modifications the conclusions of law we are substituting are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), Florida Statutes (1999).

#### Exceptions

Neither party filed exceptions to the Administrative Law Judge's Recommended Order.

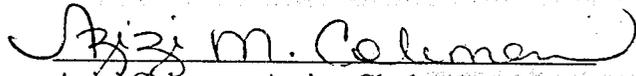
#### Remand

Having found through the application of the appropriate conclusions of law to the facts found by the Administrative Law Judge that Respondent committed an unlawful employment practice in terminating Petitioner from her position, this matter is hereby REMANDED to the Administrative Law Judge for determination of the appropriate relief in this case.

DONE AND ORDERED this 19 day of March, 2001.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Sharon Ofuani, Panel Chairperson;  
Commissioner Juan Montes; and  
Commissioner Aristides Sosa

Filed this 19 day of March, 2001,  
in Tallahassee, Florida.



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