

6-20-03

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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DIVISION OF ADMINISTRATIVE HEARINGS

DOUGLAS KIESLING,

EEOC Case No. NONE

Petitioner,

AW

FCHR Case No. 21-02955

v.

DOAH Case No. 03-0139

EJD-CWS

FLORIDA STATE UNIVERSITY,

FCHR Order No. 03-068

Respondent.

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

Preliminary Matters

Petitioner Douglas Kiesling filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1999), alleging that Respondent Florida State University committed an unlawful employment practice on the basis of Petitioner's age (54, based on allegations in the Petition for Relief) when it terminated Petitioner from his position.

The allegations set forth in the complaint were investigated, and, on December 10, 2002, the Executive Director issued his 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 on April 7, 2003, in Tallahassee, Florida, before Administrative Law Judge Ella Jane P. Davis.

Judge Davis issued a Recommended Order of dismissal, dated June 20, 2003.

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.

In our view, the Administrative Law Judge did commit an error of law, albeit harmless, in the test used for determining whether a prima facie case of discrimination was established. The Administrative Law Judge concluded that one of the elements for the test for establishing a prima facie case of age discrimination in a "termination" case such as this one is a showing that Petitioner "lost the position to a younger individual." Recommended Order, ¶ 44.

While this could be an element of a prima facie case of age discrimination, it is not necessarily an element of a prima facie case of age discrimination. A Commission panel ruling on similar conclusions of law stated, "The Commission has long held that the age discrimination prohibitions of the Florida Civil Rights Act of 1992, and its predecessor, the Human Rights Act of 1977, as amended, prohibit discrimination in employment on the basis of any age, birth to death. See, e.g., 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). Therefore, the required showing would not be necessarily that a younger employee received dissimilar treatment, but rather that an employee of a different age received dissimilar treatment." Musgrove v. Gator Human Services, c/o Tiger Success Center, 22 F.A.L.R. 355, at 356 (FCHR 1999)

In modifying the conclusion of law of the Administrative Law Judge as explained, supra, we find: (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 we are substituting is as or more reasonable than the conclusion of law which has been rejected. See, Section 120.57(1)(1), Florida Statutes (2001).

With the indicated modification, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

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

Dismissal

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

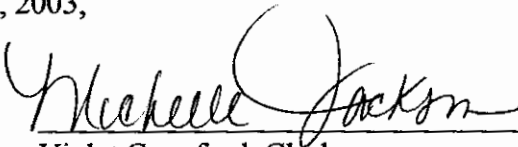
The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this

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 20th day of November, 2003.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Roosevelt Paige, Panel Chairperson;
Commissioner Aletta Shutes; and
Commissioner P. C. Wu

Filed this 20th day of November, 2003,
in Tallahassee, Florida.


for Violet Crawford, Clerk
Commission on Human Relations
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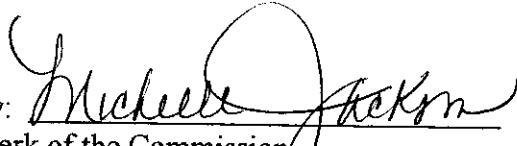
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Ella Jane P. Davis, Administrative Law Judge, DOAH

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 20th day of November, 2003.

By: 
for Clerk of the Commission
Florida Commission on Human Relations