STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TIMOTHY L. CAHILL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-1689
	)	
K. S. L. FAIRWAYS GROUP, L.P.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was held pursuant to notice in the above-style case by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings, on February 5 and 6, 2002, in Pensacola, Florida.

APPEARANCES

For Petitioner: John C. Barrett, Esquire
5 Calle Traviesa
Pensacola Beach, Florida 32561

For Respondent: David S. Shankman, Esquire
P.O. Box 172907
Tampa, Florida 33672-0907

STATEMENT OF THE ISSUE

Whether Respondent discriminated in its hiring and employment practices against Petitioner based upon his age.

PRELIMINARY STATEMENT

On August 5, 1996, Petitioner filed with the Florida Commission of Human Relations (Commission) an administrative

charge of age discrimination against Respondent alleging violations of the provisions of Sections 760.01-760.11, Florida Statutes, which prohibit discrimination in employment. The Commission investigated the complaint and determined there was cause. Notice was provided to the parties of the Commission's determination by letter dated and filed January 16, 2001. On March 3, 2001, a Notice of Dismissal was entered by the Commission; however, the Commission determined thereafter that the record did reflect that a petition for relief was filed on February 14, 2001, prior to the expiration of the 35-day period, and the Commission re-instated the case. The Commission transmitted the case to the Division of Administrative Hearings on May 1, 2001, and the case was noticed for hearing on August 15 and 16, 2001. These hearing dates were continued until October 9 and 10, 2001, and, thereafter, continued until February 5 and 6, 2002.

At the hearing, Petitioner testified in his own behalf and called John Fell, Sam Herrel, Bill Balou, Leah Head, and Tamara Bass. Respondent called Joey Garon to testify. Petitioner introduced Exhibits 1 thru 17A, 18, 19, and 24. The parties introduced Joint Exhibits 22 and 23. Respondent introduced Respondent's Exhibits 1 and 2. Respondent's Exhibit 1 was the deposition of Sam Herrell that was to be filed after hearing. It was not filed, and, therefore, not considered.

The two-volume transcript was filed on March 4, 2002. Both parties filed proposed findings and post hearing briefs that were read and considered.

FINDINGS OF FACT

1. Petitioner, Timothy Cahill, is a 1976 graduate of the University of Iowa with a degree in education. He spent ten years working as a manager for Hy-Vee Foods, Inc. (Hy-Vee), one of the larger privately held food and grocery chain stores in the country. Petitioner was also a skilled, competitive golfer.

2. After working for Hy-Vee for ten years, Petitioner decided to change careers and pursue a career as a golf professional. In 1986, he began working as an assistant golf professional at a private golf club in Omaha, Nebraska. The following year, he was hired as an assistant golf pro at Tiger Point Golf and Country Club in Gulf Breeze, Florida, which was owned by Jerry Pate, a well-known playing professional and golf course architect.

3. Petitioner worked at Tiger Point for two years completing the Professional Golf Association's (PGA) Golf School Business School curriculum, the player's ability test, oral comprehensives, and apprenticeship program. This certified him as a PGA "Class A" Professional (Class A Professional).

4. Petitioner was employed as the Head Golf Professional at Musgrove Country Club an 18-hole facility in Jasper, Alabama, from 1989-1992. There was an average of 15,000 rounds of golf played at this club annually when he resigned to take a position at Oxmoor Valley.

5. Petitioner was employed in 1992 as the property manager and director of golf at Oxmoor Valley, the first of the Robert Trent Jones Golf Trail courses in Alabama. In this position he coordinated and developed a $2.1 million budget for the facility in Birmingham, Alabama. This course was a 36-hole course that immediately drew 83,000 rounds of golf a year.

6. In 1994, Petitioner was recruited to return to Tiger Point, which had been purchased by K.S.L. Fairways Group (KSL), as the "Director of Golf/Head Golf Professional." He managed golf operations at Tiger Point.

7. At this time, Petitioner was 39 years old. He reported directly to the property manager at Tiger Point, Lance Guidry. The property manager's office was in the club's clubhouse, and Guidry was primarily responsible for club operations including food and beverage, coordinating course maintenance, and golf operations.

8. Petitioner was primarily involved with operations of the golf store, where his office was located, scheduling golfing events, and golfing operations. He eventually oversaw the golf

operations at affiliated courses as head golf professional. This permitted young golf professionals to apprentice under him, and he was a resource person for managing their operations.

9. During all times material to Petitioner's complaint, KSL owned and operated Tiger Point and 27 other golf courses and clubs around the country. At the time Petitioner was hired, KSL owned two smaller, 18-hole courses in the panhandle of Florida: Scenic Hills in Pensacola and Shalimar Point in Shalimar/Ft. Walton Beach. Shortly after August 1995, KSL purchased a fourth 18-hole course named Hidden Creek in Navarre.

11. KSL is subject to the Florida Civil Rights Act.

12. Tiger Point was typical of KSL's operation. It was a country club; however, it was open to public play. In this regard, it was a drawing card to visitors enjoying golfing junkets to the region. Tiger Point drew over twice as many package rounds as the other clubs owned by KSL in the region. It was the primary draw, and Petitioner, as mentioned above, functioned as the PGA golf professional for the other clubs.

13. This meant that the golf professionals at the other facilities could apprentice under him as a Class A Professional, and earn credit towards becoming Class A Professionals. This was a drawing card for these professionals, who were mostly young, former college golfers attempting to make careers as touring or club professionals.

14. Joey Garon was the District Manager for club operations in the panhandle. When Petitioner was hired, Garon was physically located at the Scenic Hills golf course where he was also the property manager. In January 1995, Garon moved to Tiger Point, transferred Guidry to Shalimar Point, and took over as the property manager at Tiger Point.

15. On March 29, 1995, Garon performed an evaluation of Petitioner's performance of his duties as Head Golf Pro. See Petitioner's Exhibit 5. Garon rated him highly; the sales from his golf store were among the highest in KSL. He was well respected by members, young professionals who worked under him, and guests at the facility.

16. Property managers averaged $45,000 per year, and the Tiger Point Property Manager made $50,000 a year. Garon had additional duties and made more. Petitioner was making $40,000 in the early fall of 1995.

17. In the late summer of 1995, Hurricane Erin stuck the Florida panhandle and did serious damage to the area, including Tiger Point. Damage was done to the club, to the course, and to facilities in the area such as hotels and motels. Power was lost in many areas for two to three weeks. Traffic was restricted to Santa Rosa Island. Less than two months later, Hurricane Opal struck the same region causing greater damage.

Because of the nature of Tiger Point's business, these storms seriously impacted business.

18. Various cost-cutting measures were instituted and some assets were sold to reduce losses. A review of all the positions in the panhandle was conducted. Personnel expense on hourly employees was reduced by sending non-essential personnel home early. Garon and the President of KSL, Eric Affeldt, decided to reduce Petitioner's salary by 25 percent, from $40,000 to $30,000. Petitioner was told in November that his salary would be reduced in this manner, and if he did not like it, he could leave.

19. At the same time, his assistant club professional, Sam Harrell, was discharged. Garon explained to Petitioner that Harrell was being fired because "new blood was needed," "Harrell did not fit the image," and "new faces" and "younger legs" were needed. Harrell was in his late 30's. No evidence was received that other salaried employees at Tiger Point or the other clubs were discharged or had their salaries reduced although there were salaried employees at the other KSL facilities whose profits had been impacted adversely by the storms.

20. Petitioner accepted the salary cut because the holidays were coming up; he had a family to feed; and there was no way he could quit so abruptly.

21. Sam Harrell was permitted to stay on at the facility at give golf lessons, however, as an independent contractor.

22. In December 1995, while on a golfing trip to a KSL course in South Florida, Garon advised Petitioner that Eric Affeldt had decided to restore his former salary. Petitioner was not offered his lost salary. Garon stated at hearing that the reason this was done was that it was the right thing to do; his testimony in this latter regard is not credible.

23. Nothing was mentioned to Petitioner at this time or at any other time about plans to eliminate or consolidate positions within the company because of the bad earnings.

24. Two weeks after Petitioner's pay was cut, KSL transferred Patrick Barrett to Tiger Point as the property manager and increased his salary to $50,000 year. Garon stayed on as Regional Manager until June of 1996. His pay was charged to Tiger Point for 60 days after he departed and assumed duties at a new KSL facility.

25. On the morning of March 26, 1996, there was a staff meeting at Tiger Point chaired by Barrett. Barrett mentioned that there might be personnel reductions; however, after the meeting, Petitioner specifically asked Barrett about him and his staff. Barrett stated that they had done well and had added to the facilities' bottom line. Petitioner had worked to increase dues-paying club memberships as a means to offset financial

losses from the loss of tourists' dollars. That afternoon, Garon announced to Petitioner that Petitioner was terminated immediately. KSL wrote a letter that indicates that Petitioner's discharge was in no way performance related.

26. Garon testified at hearing that Petitioner had indicated in early 1995, before the storms and before the financial problems, that he did not want a club management position based upon his experience with these positions in Alabama. This was Garon's rationale for not offering the property manager's position to Petitioner, and promoting Barrett. It is not credible that Garon held an honest belief that Petitioner would not accept the position of property manager at an increase of $10,000 a year in salary as an alternative to discharge.

27. Petitioner stated that he did not want to be in management in two off-hand remarks to an abstract inquiry about his interest in a management position. Petitioner's comments were irrelevant to the post-storm situation facing Petitioner.

28. It is not controverted that Barrett is younger than Petitioner.

29. Garon testified that Barrett performed the duties of Director of Golf and Property Manager. This is not supported by the facts. The testimony of those who were in a position to observe golf operations before and after Petitioner's discharge

indicated that Barrett was seldom in the golf store and had nothing to do with the day-to-day duties of the Director of Golf. He did not run the store; he did not organize events; he did not supervise the employees directly. The budget for 1996 had been prepared by Petitioner before his discharge.

30. The duties previously performed by Petitioner were performed by a succession of younger, less qualified employees all of whom were paid substantially less than Petitioner. From March 26 until June 3, 1996, John Fell performed the duties. Fell was 29 or 30 years old. He ran the golf shop, he conducted tournaments, and he supervised the other employees. When he resigned in June, John Ferrel was brought in. Ferrel was approximately the same age as Fell. Ferrel handled golfing play; and Gary James was retail coordinator, ordering and selling merchandize. These men did what Petitioner had done at Tiger Point.

31. Leah Head transferred to Tiger Point in late 1996. She was in her late 20’s or early 30’s. She started at $25,000 as the head golf pro, but when she realized that she was to be responsible for all of the shop and golf, she demanded and got a salary of $30,000. Her performance evaluation indicates that she was performing the duties of Director of Golf to include improving sales and service, managing inventory, golf operations, tournaments, conducting employee/department

meetings, setting goals for the department, and taking responsibility for poor staff performance. She was unaware that Barrett was calling himself “Director of Golf,” and considered him the general manager of the property.

32. Head and others testified there was no essential difference between the titles Director of Golf and Head Golf Professional. The facts reveal that Petitioner’s duties were performed by younger persons, in some instances, transferred to Tiger Point for that purpose. Barrett did not really assume responsibility for the golf, and was Director of Golf in name only as reflected in Head’s designation of duties on her performance evaluation by Barrett.

33. Tamara Bass testified regarding her experience at Tiger Point. Bass was in her 20’s. She had begun at Tiger Point a month before Petitioner’s discharge. His discharge adversely impacted her plans for obtaining her Class A Professional’s certification. She spoke with Barrett about this, and Barrett stated to her that he was interviewing to replace Petitioner with someone younger, cheaper and less experienced. Within several months, Head was hired.

34. Following his discharge, Petitioner sought employment in the Panhandle area. He owned a house adjoining the Tiger Point course, his wife was employed at a local hospital, and his school age children were in local schools. It was not practical

to uproot the family at this juncture. His job search was not helped by the fact that KSL owned several of the courses in the area; however, he did find employment, and eventually reached the salary he was making when discharged by KSL. However, he was without meaningful employment for several months; he was under-employed for several months, and it was several years before he reached the salary he was making when he was discharged, and, then, had to commute 86 miles to work.

35. Petitioner received unemployment from April until October 12, 1996, in the amount of $11,141. He would have made $19,994 at Tiger Point during that period, his expenses were estimated (See Exhibit 16) and are disallowed. His economic loss was $8,853 for this period.

36. From October 13, 1996 until December 1996, Petitioner made $7,296 at Ft. Walton Beach Golf Club. He worked 66 days, and commuted each working day 76 miles. At $.31/mile he had $1,555 in travel expenses. His meals were included in his compensation at Tiger Point, and he had to pay for his meals at Ft. Walton Beach Golf Club. His lunch was $3.00 each working day for a total of $198. He would have earned $9,228 at Tiger Point. Petitioner’s economic loss for this period was $3,685.

37. From January until October 1997, Petitioner made $24,320 at Ft. Walton Beach Golf Club. He would have made $30,760 at Tiger Point. His economic loss for the period was

$6,440. From November until December 1997, Petitioner made $7,668 at Ft. Walton Beach Golf Club. He would have made $9,228 at Tiger Point. His lost wages for November and December are $1,560. His expenses to commute to Ft. Walton Beach for the year were based upon a 50-week year, working six days a week, and commuting 76 miles each day at $.31/mile. This was a total of $7,068. His meals for 298 days at $3.00 a day were $894. His total economic loss for 1997 was $15,962.

38. From January until April 25, 1998, Petitioner made $12,780 at Ft. Walton Beach Golf Club. He would have made $15,380 at Tiger Point. He commuted a total of 96 days, 76 miles each day at a cost of $.31/mile. This was a total of $2,261.61. His meals for 96 days at $3.00/ day were $288. His total economic loss for the period was $5,149.61.

39. From May until December 1998, Petitioner made $29,536 at Glen Lakes Golf and Country Club. He would have made $24,608 at Tiger Point. He commuted a total of 192 days, 86 miles each day at a cost of $.31/mile. This is a total of $5,118.72. His total economic loss for the period was $190.72.

40. For 1999, Petitioner made $48,000 at Glen Lakes Golf and Country Club. He would have made $40,000 at Tiger Point. He commuted a total of 275 days, 86 miles a day at $.31/mile. This was a total of $7,331.50. For the first time since his discharge, Petitioner exceeded his prior salary by $668.50.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. This order is entered pursuant to Chapters 120 and 760, Florida Statutes.

42. It is well settled that the Florida Civil Rights Act of 1992 is patterned after similar federal statutes, including the Age Discrimination in Employment Act (ADEA). Federal case law is instructive in considering these cases.

43. Petitioner bears the ultimate burden of proving by a preponderance of the evidence that age was a determining factor in the employer's decision to terminate the employment relationship.

Direct Evidence of Discrimination:

44. Petitioner presented direct evidence of age discrimination. First, KSL reduced Petitioner salary by 25 percent. There were business reasons for reducing employee expenses, but Petitioner was the only employee whose salary was reduced in this manner. He was given the option of accepting $30,000 instead of $40,000, or leaving. Although this was later rescinded, it is direct evidence of age discrimination.

45. Second, after Petitioner's discharge, his replacement, Barrett, advised Tamara Bass, who questioned the lack of a qualified Class A Professional upon her golfing professional

apprenticeship program, that he was interviewing to replace Petitioner with someone “younger, cheaper, and less experienced.”

McDonnell-Douglas Indirect Analysis:

46. In McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973), the United States Supreme Court set out a methodology for indirect proof of discrimination. It would require Petitioner to show that (1) he is a member of a protected class; (2) he was qualified to do the job he held at the time of termination; (3) he was discharged; and (4) he was replaced with someone outside the protected class.

47. It was proven and not controverted that Petitioner is a member of a protected class; he was qualified to do his job and that of property coordinator; and he was replaced by someone who was outside the protected class. Respondent argued that Petitioner was not discharged, but his position was eliminated and combined with that of the property manager. The evidence indicated that this may have been the case with titles; however, Barrett assumed no meaningful duties in golf operations, and before the year was over, Petitioner's duties were being performed by Head, who demanded and received compensation for performing them. Barrett indicated on her performance evaluation that she was performing the duties of the Director of

Golf. Prior to Head performing these duties, they were performed by Fell and Ferrell.

48. Petitioner proved each element required to show discrimination indirectly.

49. When Petitioner presents a prima facie case, the employer must offer a legitimate, non-discriminatory reason for the employment action. The employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. This is a light burden that requires only the articulation of a legitimate business rationale for its action. Once the employer presents such evidence, the plaintiff bears the ultimate burden of demonstrating that the employer's proffered reasons are pretextual.

50. In this case, Respondent offers two reasons for its actions. First, it based its need to reduce employee expenses upon the economic damage to its business occasioned by the two hurricanes. This is clearly a legitimate motivation. Second, it defended not offering the consolidated position of property manager/golf operations to Petitioner, who was well qualified to perform these combined duties, based upon Petitioner's prior expressions that he did not want a management job.

51. Management must have an honest belief in the reason it states for its action. Management in this case did not have an honest belief that, faced with the loss of his job, Petitioner would not accept the position of property manager for an increase in salary of $10,000 a year. It is not credible that management would take a comment about not wanting to work in management before the storms and before the need for economic cut backs as an indication Petitioner would prefer losing his job over assuming greater responsibilities for more money. It is not credible that as primary golfing operations manager not only for Tiger Point, but for the region, these problems and options were not discussed with Petitioner. The trier of fact can only rationally conclude that management did not have an honest belief that presented with the option of losing employment, Petitioner would not have elected to perform the combined duties of property manager and chief of golf operations for a salary of $50,000 a year; and, therefore, this rationale was pretextual.

52. Petitioner is entitled to compensation for his documented economic losses caused by his discharge. Detailed findings regarding Petitioner’s economic losses have been made. Credits for unemployment compensation and for his salary at other clubs have been computed, those losses or expenses that were based upon estimates were rejected. Commuting expenses

after he exceeded the amount he had been making plus his expenses to make that salary are rejected.

53. Petitioner is entitled to his attorney's fees. This case took two full days to present because of relatively complex issues. The witnesses were widely dispersed, and the financial recovery is relatively significant. Although no evidence was received regarding this issue, jurisdiction is retained to consider this matter should the Commission adopt this order and conclude that Respondent discriminated against Petitioner.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusion of law, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter its final order finding that Respondent engaged in age discrimination, directing Respondent to pay Petitioner the amount of Petitioner's economic losses and directing Respondent to cease and desist from discriminatory employment practices in its businesses.

DONE AND ENTERED this 30th day of April, 2002, in Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2002.

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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.