STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RANDALL CARTER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-2408
	)	
METRO CORRAL PARTNERS, INC., d/b/a GOLDEN CORRAL,[1/]	)	
	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for final hearing before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), in Orlando, Florida, on June 15, 2004. The appearances were as follows:

APPEARANCES

For Petitioner: Randall Carter, pro se
1102 Alfred Drive
Orlando, Florida 32810

For Respondent: Lorraine Maass Hultman, Esquire
Kunkel, Miller & Hament
Orange Professional Centre
235 North Orange Avenue, Suite 200
Sarasota, Florida 34236

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether Respondent discriminated against Petitioner based upon his race and/or his age, in violation of Section 760.10, Florida Statutes (2004).[2/]

PRELIMINARY STATEMENT

On June 15, 1998, Petitioner Randall Carter filed a charge of discrimination, based on race and age, against Respondent Metro Corral Partners, Inc., d/b/a Golden Corral ("Metro Corral"), with the Florida Commission on Human Relations (the "Commission"). The charge alleged that Mr. Carter, a 39-year-old black male, was not promoted from cook to kitchen manager though he had more experience and seniority than the "much younger black male" who received the promotion in April 1998. The charge further alleged that on June 6, 1998, Mr. Carter overheard two racially offensive comments by white employees at his workplace.

The allegations were investigated by the Commission and on April 10, 2001, the Commission issued a finding of "no cause" as a result of its investigation. Mr. Carter subsequently filed a Petition for Relief (the "Petition") received by the Commission on June 8, 2001. On June 15, 2001, the Petition was forwarded to DOAH for the conduct of a formal hearing.

On July 11, 2001, Respondent filed a Motion to Dismiss alleging that the Petition violated the requirements of Florida Administrative Code 60Y-4.009 (since repealed) and that the Petition was not timely filed. On July 26, 2001, a Recommended Order of Dismissal was entered finding that the Petition was not filed within the 35-day period prescribed in Subsection 760.11(7), Florida Statutes (2004).

On April 17, 2002, the Commission entered an Order Remanding Recommended Order Denying Relief from an Unlawful Employment Practice. By Order dated April 24, 2002, the DOAH file was

reopened in response to the Commission's remand order. On May 16, 2002, Respondent appealed the Commission's remand order to the Fifth District Court of Appeal. By Order dated May 21, 2002, the DOAH file was closed and jurisdiction relinquished to the Commission without prejudice for return of the case to DOAH after the appeal.

On March 4, 2003, the Fifth District Court of Appeal affirmed the Commission's decision without opinion. I-Drive GC., Inc., d/b/a Golden Corral v. Florida Commission on Human Relations, 840 So. 2d 256 (Fla. 5th DCA 2003). The court's Mandate was forwarded to the Commission on March 21, 2003. On April 22, 2004, the Commission remanded the case to DOAH, explaining that the delay was due to the Commission's having filed the case as a closed appellate case. After an audit of the files, the Commission discovered its error and forwarded the case to DOAH. By Order dated May 3, 2004, the DOAH file in the case was reopened.

The hearing was convened on June 15, 2004. Prior to submission of evidence, Respondent moved to dismiss the proceeding on the ground that Mr. Carter was under the age of 40 at the time of the controversy and, thus, arguably not within a protected class for purposes of age discrimination. The motion was denied without prejudice, and the matter proceeded to formal hearing.

At the hearing, Petitioner testified on his own behalf and presented no exhibits. Respondent presented the testimony of

Shelly McCormick and Eric Holm. Respondent's Exhibits 1 through 4 were admitted into evidence.

At the hearing, the parties agreed that their proposed recommended orders would be submitted within 30 days of the filing of the hearing Transcript. The Transcript was filed at DOAH on August 6, 2004. By Order dated September 3, 2004, the parties were granted an extension of the time in which to file proposed recommended orders. Respondent timely filed a Proposed Recommended Order on September 7, 2004. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following findings of fact are made:

1. Respondent, Metro Corral, operates several family-oriented buffet restaurants in the Orlando area under the name "Golden Corral."

2. Petitioner, Randall Carter, is an African-American male born on December 6, 1958. At the time he filed his charge of discrimination with the Commission on June 15, 1998, Mr. Carter was 39 years old.

3. At the hearing, no evidence was presented to show that age was a factor in the decision not to promote Mr. Carter. Several persons Mr. Carter's age or older were promoted to managerial positions in the Golden Corral restaurant that employed Mr. Carter during the time period at issue.

4. In August 1994, Mr. Carter was hired to work as a cook at one of Metro Corral's Orlando restaurants. Mr. Carter worked as a grill cook and a hot bar cook. Like all kitchen employees, he received cross-training outside his regular work areas, so that he could fill in at other positions when needed. Mr. Carter cross-trained in the bakery and the cold food preparation area. Mr. Carter had no prior experience as a restaurant manager.

5. Though Mr. Carter's charge of discrimination alleged that he was not promoted to "Kitchen Manager," the evidence at hearing established that the position in question was "Assistant Manager." The charge of discrimination alleged that Mr. Carter was passed over in favor of William Thompson, "a much younger Black Male."

6. Metro Corral's assistant managers receive extensive training. A potential assistant manager is first assigned to a certified training restaurant, where he or she works for five weeks and learns to train employees for all positions in the restaurant. Next, the assistant manager trainee is assigned to another restaurant for an additional five weeks of training, including computer operations. Finally, the trainee is sent to Raleigh, North Carolina, for two weeks of classroom training and testing.

7. Mr. Carter alleges that he was repeatedly passed over for promotions in favor of employees with less seniority. Shelly McCormick, the director of operations for Metro Corral and the person who performed all the hiring, firing, and promotion

functions in the Orlando restaurants, testified that Mr. Carter was never considered a candidate for promotion.

8. Mr. McCormick was very familiar with Mr. Carter and his job performance. He considered Mr. Carter to be a "mediocre employee" at best. Mr. Carter did his job and was, by and large, not a disciplinary problem. However, Mr. McCormick noted that Mr. Carter did not keep his work area clean, was not always well groomed, and did not display the leadership qualities or exceptional work ethic that Metro Corral sought in potential managers. In fact, Mr. Carter once confronted a fellow employee because the employee was working too hard and "[making] everyone else look bad." Mr. Carter was also unwilling to travel to other restaurants, a requirement of the management training.

9. Seniority was never a consideration in determining potential managers. Mr. McCormick testified that performance, work ethic, and leadership were the qualities under consideration for potential managers.

10. In April 1998, Mr. McCormick made the decision to promote William Thompson, an African-American employee who exhibited strong leadership qualities and a powerful work ethic. At the time of the promotion, Mr. McCormick did not know whether Mr. Thompson was younger than Mr. Carter. No evidence was presented that the promotion was based on anything other than Mr. McCormick's observation of Mr. Thompson's exceptional job performance.

11. Mr. Carter testified that on June 6, 1998, he overheard two statements that he found offensive. Both statements were

allegedly made when a bus full of black people pulled into the restaurant's parking lot. Mr. Carter testified that Keith Pangle, the white general manager, told Mr. Thompson to "drop all the chicken," i.e., cook all the available chicken because a busload of black people had arrived. Mr. Carter also claimed that the lead waitress told someone to cut up all the watermelon, again, because a busload of black people had arrived.

12. Mr. Carter told Mr. Pangle that he found his statement offensive. Mr. Pangle sat down with both Mr. Carter and Mr. Thompson to assure them that he meant nothing offensive. Mr. Pangle apologized and never again said anything on the job that could be construed as racist or otherwise offensive.

13. Mr. Pangle denied having made any reference to the race of the people on the bus. Nonetheless, Mr. McCormick counseled Mr. Pangle against using descriptive terms for customers entering the restaurant.

14. Mr. McCormick testified that Mr. Pangle would have given the order to "drop all the chicken" when a busload of people arrived, regardless of their color. The fryer holds about 20 pieces of chicken and takes about 15 minutes to cook them meaning that in an hour, 80 pieces of chicken can be cooked. If a busload of 100 people comes into the restaurant, the buffet would fall behind if the chicken were not "dropped" immediately. Other hot items that require only two or three minutes to fry do not have to be "dropped" all at once because they can be cooked as quickly as people eat them.

15. Mr. McCormick testified that items such as vegetables, watermelon, and cantaloupe are also time consuming to prepare for the buffet, meaning that "when you see that bus pull up, you've got to get on it."

16. There was no substantial, persuasive evidence to show that the employment decision made by Mr. McCormick was based in whole, or in part, on any intentional discrimination or animus based upon Petitioner's race or age.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004).

18. In accordance with Subsection 760.10(1)(a), Florida Statutes (2004), it is an unlawful employment practice for an employer to "discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status."

19. The Commission and courts in Florida have determined that federal decisional law and statutory law shall be used as guidance when construing the provisions of Chapter 760, Florida Statutes (2004). Flyer Printing Co., Inc. v. Hill, 805 So. 2d 829, 831 n.1 (Fla. 2d DCA 2001); Florida State University v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA

1994); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

20. The United States Supreme Court in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), established the analysis to be used in discrimination cases under Title VII, which method of analysis is persuasive in cases such as this one. In the case of St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), this method of analysis was upheld and was further refined by the Court's holding that the overall burden of persuasion of the existence of discrimination or discriminatory animus by an employer remained on the plaintiff/petitioner.

21. In accordance with this analysis, Petitioner has the burden of establishing, by a preponderance of the evidence, a prima facie case of unlawful discrimination. If a prima facie case is established, the burden shifts to Respondent employer to articulate some legitimate, non-discriminatory reason for the action taken against Petitioner. Once the non-discriminatory reason is offered by the employer, the burden shifts back to Petitioner to demonstrate that the proffered reason is merely a pretext for discrimination. As the Supreme Court stated in St. Mary's Honor Center v. Hicks, supra, before finding discrimination, "the fact finder must believe the Plaintiff's explanation of intentional discrimination." 509 U.S. at 519.

22. In that case the Supreme Court stressed that even if the fact-finder does not believe the proffered reason given by

the employer, the burden remains with Petitioner to demonstrate a discriminatory motive for the adverse employment action. Id.

23. In order for Petitioner herein to establish a prima facie case of failure to promote based upon his race or age, Petitioner must establish: 1) that he is a member of a protected class; 2) that he was qualified for and applied for the position at issue; 3) that despite his qualifications he was rejected for the promotion; and 4) that another employee who was not a member of the protected class and who was no more qualified than Petitioner was promoted to the position sought. See Boatey v. Stone, 24 F.3d 1330 (11th Cir. 1994).

24. Petitioner has not established a prima facie case. He has established that he is a member of a protected class, a racial minority. However, Petitioner did not establish that he applied for the position at issue; he merely complained of having been "passed over." Petitioner did not establish that he possessed the minimal qualifications for the position in dispute. Neither did Petitioner provide evidence that Mr. Thompson was no more qualified or less qualified than he; in fact, the evidence established that Mr. Thompson was more qualified. Further, the evidence established that Mr. Thompson was also a member of the protected class.

25. Accordingly, Petitioner failed to establish a prima facie case for non-promotion based upon racial discrimination. Even assuming arguendo that Petitioner had met his initial burden of establishing a prima facie case of promotional discrimination, Respondent rebutted that presumption. Through the testimony of

Mr. McCormick and the documentary evidence, Respondent persuasively established that Mr. Carter was not considered for promotion because of merit and performance reasons that had nothing to do with his race or the race of the person who received the promotion. Respondent thus showed a legitimate, non-discriminatory reason for the employment decision in question.

26. The McDonnell-Douglas analysis, concerning the burden of going forward with evidence, then shifts the burden back to Petitioner to show that the proffered reason, based upon merit and performance, was merely a pretext for what amounted to racial discrimination. Petitioner offered no evidence of intentional racial discrimination or any evidence tending to establish that Respondent's proffered reason was merely a pretext.

27. In summary, Petitioner failed to establish a prima facie case of racial discrimination in Respondent's promotional decision. He also failed to establish that the proffered reason asserted by Respondent for its employment decision was pretextual and was, instead, a product of racial animus.

28. Petitioner likewise failed to establish a prima facie case of discrimination based on his age. Even if it is assumed that Petitioner, at age 39, was a member of the protected class, there was a complete failure of proof by Petitioner as to any of the other three prongs of the McDonnell-Douglas analysis. Thus, it is unnecessary to reach Respondent's legal argument that Petitioner was not within the protected age category because he was under the age of 40.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 10th day of November, 2004, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of November, 2004.

ENDNOTES

[1/] At the final hearing, Respondent corrected the record as to its name. Respondent had previously been called "I-Drive GC, Inc." in this proceeding based on filings received from the Florida Commission on Human Relations.

[2/] The events at issue in this proceeding occurred in 1998, and the Petition for Relief was filed in 2001. However, because Section 760.10, Florida Statutes (2004), has been unamended since 1992, the current edition of the Florida Statutes is employed for ease of reference.

COPIES FURNISHED:

Randall Carter

1102 Alfred Drive
Orlando, Florida 32810

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Lorraine Maass Hultman, Esquire
Kunkel, Miller & Hament
Orange Professional Centre
235 North Orange Avenue, Suite 200
Sarasota, Florida 34236

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.