STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSE A. DIAZ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-3866
	)	
OHIO DISPOSAL SYSTEMS, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Notice was provided and a formal hearing was held on February 7, 2002, in Pensacola, Florida, and conducted by Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bruce Committe, Esquire
17 South Palafox Place, Suite 322
Pensacola, Florida 32501

For Respondent: H. William Wasden, Esquire
Pierce, Ledyard, Latta,
Wasden & Bowron, P.C.
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STATEMENT OF THE ISSUE

Whether Respondent unlawfully discriminated against Petitioner.

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) on September 5, 1996. On September 17, 2001, FCHR entered a Determination of No Cause. On September 21, 2001, Petitioner filed a Petition for Relief which was forwarded to the Division of Administrative Hearings where it was filed on October 4, 2001.

The matter was set for hearing on December 18, 2001. On December 14, Petitioner requested a continuance. Pursuant to that request the hearing was set for January 15, 2002. Petitioner requested another continuance on January 8, 2002. Pursuant to that request, the case was set for hearing on February 7, 2002, in Pensacola, Florida, and was heard as scheduled.

Petitioner and one other witness testified on behalf of Petitioner. Respondent presented no testimony and offered two group exhibits which were received into evidence.

A Transcript was filed on March 7, 2002. Pursuant to a Joint Motion to Extend the Time to Submit Proposed Orders and a subsequent Motion for Extension of Time filed by the Petitioner, proposed recommended orders became due on March 18, 2002. Both parties timely filed Proposed Recommended Orders which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. For many years Mark Dunning Industries, Inc. (MDI), held the contract for trash removal and processing for Naval Air Station, Pensacola, Florida (NAS Pensacola). In the summer of 1995, the contract for these services, for a period beginning January 1996, were the subject of a bid solicitation.

2. The apparent winner of the bid was Ohio Disposal Systems, Inc (ODSI). This bid was contested by MDI. Ultimately, ODSI prevailed in the bid contest and was selected to perform the contract. Performance was to begin on January 1, 1996, however, ODSI was not informed that it was to be the contractor until early December 1995.

3. Petitioner was born on July 12, 1922. He is a U.S. citizen from Puerto Rico, and of Hispanic origin. Petitioner first came to be employed by MDI in the summer of 1994.

4. Petitioner worked on the "hill," which is an elevated portion of the trash dump on board NAS Pensacola. It was his job to weld broken equipment. He also operated two kinds of equipment: a Bobcat, which is a small front-end loader, and a backhoe with a dozer blade mounted on the front.

5. Petitioner was paid about $16.00 per hour as a welder.

6. Victor Cantrel, Petitioner's friend, commenced employment with MDI in July 1995. He worked on the "hill" and

also drove the Bobcat and the back-hoe. He would utilize this equipment to push trash into a compactor. In trash-handling parlance, he was known as a "hill man." He was not a welder. He worked closely with Petitioner.

7. Mr. Cantrel was born on June 25, 1972, and is Anglo-American. He was paid about $9.00 per hour.

8. The supervisor of Petitioner and Mr. Cantrel, during the latter months of 1995 while they were working for MDI, was Thomas Lucky.

9. The principal of ODSI was Vince Crawford.

10. On or about December 28, 1995, at the end of the workday, Mr. Lucky informed the employees, including Petitioner, Mr. Cantrel, and a number of trash truck drivers, that there was to be a meeting in the company office near the "hill."

11. Present at the meeting in the office, which commenced around 6:30 p.m., was Petitioner, Mr. Cantrel, Mr. Lucky, several truck drivers, Mr. Crawford, and his wife Cathy.

12. Mr. Crawford informed the assembled employees that he was bringing in all new equipment; that because there would be new equipment, the new employees of ODSI would be able to work 40 hours per week; and that due to the requirement to get his company in shape in time to meet the January 1, 1996, deadline, many of the employees of MDI would be offered jobs with ODSI.

13. After revealing these preliminary matters, Mr. Crawford asked a man named Lee what he did at MDI; this man said that he was a truck driver. Mr. Crawford told him that he was hired with the new company. Then he asked Mr. Cantrel what he did; he said he drove the Bobcat. Mr. Crawford said, "Recycle, huh. You are hired." Mr. Cantrel subsequently filed an employment application. However, he knew that after the announcement at the meeting, he was going to work for ODSI.

14. When Mr. Crawford inquired of two more people, they both responded, "truck driver," and Mr. Crawford informed them that they were hired. When he asked Petitioner, Petitioner said, "Welder." Mr. Crawford then said, "We don't need no welders here." This was the first and last encounter Petitioner had with Mr. Crawford.

15. The next day Petitioner arrived at work at the usual time and was informed that he no longer was employed at that facility.

16. On January 2, 1996, Petitioner presented an employment application to the office at ODSI seeking employment as a "Welder and/or Heavy Equip. Opr." He never received a response. No evidence was adduced that at that time there were job openings for a "welder and/or heavy equipment operator." Additionally, according to Petitioner, no one from ODSI informed Petitioner that he was not qualified.

17. No evidence was adduced at the hearing which indicated that Mr. Crawford noticed that Petitioner was 73 years of age, or that he was a Puerto Rican, or that he was of Hispanic origin. The unrebutted evidence demonstrated that Petitioner was not hired, at the time jobs were available, because Mr. Crawford was bringing in new equipment. New equipment does not require frequent welding and, therefore, Mr. Crawford did not need a welder.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over parties and the subject matter in this proceeding. Section 120.57(1), Florida Statutes.

19. The Florida law prohibiting unlawful employment practices is found in Section 760.10, Florida Statutes. This section prohibits discharge or other discriminatory acts against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's age or ethnicity, among other things. Section 760.10(1)(a), Florida Statutes.

20. The Florida Civil Rights Act of 1992, as amended, was patterned after Title VII of the Civil Rights Acts of 1964 and 1991, Title 42 U.S. Code, Section 2000, et seq., as well as the Age Discrimination in Employment Act of 1967 (ADEA), Title 29 U.S. Code, Section 623. Federal case law interpreting Title VII

and the ADEA is applicable to cases arising under the Florida Act. See Florida Department of Community Affairs v. Brant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

21. Title 29 U.S. Code, Section 631(a), provides that persons who are at least over the age of 40 are protected by the ADEA.

22. In a case of alleged discrimination, the employee carries the burden of establishing that an unlawful employment practice has occurred. In this regard the instructive language found in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981), bears repeating. There the Court held that the employee carries the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997). If the employee succeeds, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the failure to hire the potential employee. Should the employer meet this burden, the employee must then prove by a preponderance of evidence that the legitimate reasons offered by the employer were not its true reasons, but were instead a pretext for discrimination.

Burdine, supra. See also Jones v. Bessemer Carraway Medical Center, 137 F.3d 1306 (11th Cir. 1998).

23. To make a prima facie case under the ADEA, Petitioner must show that he was over 40 years of age at time he was refused employment; that adverse employment action was taken against him; that the position he desired was given to a person outside the protected group; and that he was qualified for the position for which he was rejected. Pace v. Southern Railway System, 701 F.2d. 1383 (11th. Cir. 1983).

24. To make a prima facie case based upon discrimination because of ethnicity, Petitioner must show that he was in a protected class at the time he was not offered employment; that adverse employment action was taken against him; that employment was offered to a person outside the protected group; and that he was qualified for the position for which he was rejected. Pace, supra.

25. Petitioner failed to make out a prima facie case. He was in two protected classes because he was 73 years old at the time of the alleged failure to hire, and he was of a national origin different from the person to whom the job was allegedly offered. Adverse employment action was not taken against Petitioner because he was not competing for any job that was available. No one was offered the position of welder because no welder was needed. Therefore, no one was hired for a position

he sought who was outside of the protected class. Petitioner was qualified for the job of "hill man," but that is not the position for which he announced his availability.

26. Even if one assumes that a prima facie case has been established, Respondent met its burden of articulating a legitimate, nondiscriminatory reason for the failure to hire the applicant. Petitioner applied for a job as a welder. There was no employment available for a welder because Respondent brought in all-new equipment for the job. Perhaps, on the evening when Respondent conducted its hurried hiring action, if Petitioner had said, "Welder or hill man," or simply "hill man," he would have obtained employment. But that circumstance would be speculation. What is not speculation is that Respondent had no discriminatory intent.

27. Respondent demonstrated a legitimate, nondiscriminatory reason for the failure to hire the applicant. Petitioner produced no evidence at all which would indicate that the failure to hire was pretextual.

RECOMMENDATION

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

RECOMMENDED:

That a final order be entered finding Respondent committed no unlawful employment practice.

DONE AND ENTERED this 28th day of March, 2002, in Tallahassee, Leon County, Florida.

HARRY L. HOOPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of March, 2002.

COPIES FURNISHED:

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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.