STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DURRICE GARVIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-3931
	)	
INTERNATIONAL PAPER, d/b/a CHAMPION INTERNATIONAL CORPORATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on December 20, 2002, in Pensacola, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: R. John Westberry, Esquire
Holt & Westberry
1108-A North 12th Avenue
Pensacola, Florida 32501

For Respondent: Thomas R. Brice, Esquire
McGuireWoods LLP
50 North Laura Street, Suite 3300
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment act by discriminating against Petitioner based on his age in violation of Section 760.10(1), Florida Statutes.

PRELIMINARY STATEMENT

On November 5, 1998, Petitioner Durrice Garvin (Petitioner) filed a Charge of Discrimination against Respondent International Paper d/b/a Champion International Corporation (Respondent). The charge alleged that Respondent had discriminated against Petitioner based on his age.

On or about September 10, 2002, the Florida Commission on Human Relations (FCHR) issued a Determination: No Cause.

On October 3, 2002, Petitioner filed a Petition for Relief alleging age discrimination. Specifically, Petitioner alleged that Respondent had treated him less favorably than employees outside his protected class and had ultimately terminated his employment.

FCHR referred the case to the Division of Administrative Hearings on October 10, 2002.

The parties filed unilateral responses to the Initial Order on October 17, 2002. Subsequently, the undersigned issued a Notice of Hearing dated October 24, 2002, scheduling the hearing for December 20, 2002.

During the hearing, Petitioner testified on his own behalf and presented the testimony of one additional witness. Petitioner presented eight exhibits that were accepted into evidence.

Respondent presented the testimony of seven witnesses. Respondent offered 11 exhibits, which were accepted into evidence.

A Transcript of the proceeding was filed on January 22, 2003.

By order dated January 27, 2003, the undersigned granted Petitioner's Motion for Extension of Time to file proposed recommended orders.

By order dated February 4, 2003, the undersigned granted Respondent's Motion for Extension of Time to file proposed recommended orders.

Petitioner filed a Proposed Recommended Order on February 18, 2003. Respondent filed its Proposed Recommended Order on February 28, 2003.

FINDINGS OF FACT

1. Petitioner was born on December 7, 1944. At the time of the hearing, Petitioner was 58 years old.

2. Petitioner began working for Respondent as a pipe fitter in 1974. Respondent terminated Petitioner on August 5, 1998. He was 53 years old at that time.

3. At all times relevant to this proceeding, Petitioner was a member of the Paper, Allied-Industrial, Chemical and Energy Workers International Union Local 1561 (the Union).

4. Based on his seniority, Petitioner became a predictive/preventative lubrication mechanic (PPM mechanic) in the late 1980s. A PPM mechanic is responsible for lubricating equipment, monitoring oil pressure on induced draft (ID) fans, changing oil filters, and repairing equipment in the powerhouse. A PPM mechanic's duties also include performing vibration analysis on equipment in the powerhouse.

5. As a PPM mechanic, Petitioner was required to look at several hundred pieces of equipment per day. These inspections were essentially "walk-by" inspections. Petitioner was not required to record his observations or to keep a maintenance log.

6. If a piece of equipment needed repair and Petitioner was able to perform the work, he would do so. If he was unable to repair the equipment, Petitioner would report the problem to the powerhouse maintenance department to execute the repair.

7. A computer-generated list identified the equipment that needed inspection. Some of the equipment needed to be lubricated daily, some weekly, and some on a monthly basis.

8. Petitioner worked as a PPM mechanic for about three years. In the early 1990s, his PPM mechanic position was awarded to a more senior employee.

9. In March 1991, Respondent terminated Petitioner's employment for falsifying his time card. The union's subsequent

grievance procedure resulted in Petitioner being suspended for six months without pay.

10. In 1994, Petitioner once again became a PPM mechanic. At that time, Petitioner worked the day shift from 7:00 a.m. until 3:30 p.m. He would attend a crew meeting at the beginning of each shift. A crew consisted of pipe fitters and millwrights. After the crew meeting, Respondent expected Petitioner to walk his route to perform his inspections as quickly as reasonably possible.

11. Joseph McCall began working for Respondent on May 8, 1989. He became Petitioner's immediate supervisor on November 1, 1996. Mr. McCall was the supervisor of all PPM mechanics. He supervised Petitioner until Petitioner's termination on August 6, 1998. At the time of Petitioner's termination, Mr. McCall was approximately 30 years old.

12. On or about January 29, 1997, Mr. McCall met with Petitioner to discuss his work performance. Mr. McCall counseled Petitioner to stop doing "government jobs" (personal jobs) during work hours and then requesting overtime to finish his normal duties.

13. Mr. McCall had observed Petitioner doing personal work on company time on at least six occasions. Mr. McCall did not allow employees under his supervision to do "government jobs" on company time. There is no persuasive evidence that Mr. McCall

observed anyone other than Petitioner performing "government jobs" during work hours prior to Petitioner's termination.

14. During the January 29, 1997, meeting, Mr. McCall counseled Petitioner regarding his failure to consistently perform his daily maintenance inspection route first thing in the morning. The morning inspection was important because the overnight swing shift did not have a PPM mechanic on duty.

15. After the January 1997 oral warning, Mr. McCall met with Petitioner again in June 1997 to discuss Petitioner's unacceptable job performance. After the meeting, Mr. McCall issued a written reprimand to Petitioner on June 16, 1997. The reprimand stated that Petitioner's job performance needed to improve immediately. The reprimand outlined Respondent's expectations and Petitioner's performance deficiencies.

16. Specifically, Petitioner had not consistently completed his inspection route first thing in the morning. Mr. McCall counseled Petitioner that this responsibility was the highest priority.

17. Mr. McCall counseled Petitioner that he needed to check equipment, such as the oil filter on the No. 3 power boiler ID fan, more frequently. Petitioner needed to take care of housekeeping items, such as cleaning up oil leaks that occurred on his shift. Additionally, Petitioner needed to collect data more efficiently; pay closer attention to critical

equipment, such as the ID fans; cooperate with his relief; and follow directions issued by his supervisor.

18. Petitioner's work did not improve in response to the June 16, 1997, written reprimand. On September 24, 1997, Mr. McCall witnessed Petitioner sleeping on the job in the corner shop of the powerhouse. As a result of this incident and Petitioner's failure to consistently meet expectations, Petitioner was suspended from work for 17 days. Respondent suspended Petitioner instead of firing him in recognition of his long service with Respondent.

19. In a disciplinary letter dated October 3, 1997, Respondent memorialized the reasons in support of Petitioner's suspension. The letter also set forth the terms and conditions of a "last chance agreement" containing the following conditions of Petitioner's continued employment: (a) Petitioner would remain in the PPM mechanic job; (b) Petitioner would not violate any mill rules; (c) Petitioner would consistently meet the job performance expectations as established; and (d) Petitioner would work cooperatively with Mr. McCall, with co-workers, and employees in the production areas. Petitioner and Mr. McCall signed the letter, which clearly stated that failure to comply with the conditions for continued employment would result in Petitioner's immediate discharge without recourse.

20. One of Petitioner's most important jobs was to monitor the oil pressure differential on the No. 4 power boiler ID fan because a high oil pressure differential on that fan can cause the power boiler and turbine generator to trip, resulting in a loss of production. This piece of equipment was so critical that it could only be shut down during a "cold outage" in which the whole mill shut down.

21. On March 25, 1998, the No. 4 power boiler tripped. The trip was not so severe as to as to shut down the power-generating turbine. After this incident, Mr. McCall counseled Petitioner about his failure to adequately monitor the oil pressure.

22. On June 11, 1998, Petitioner was working on a job when a co-worker, Kenny Waters, requested Petitioner to stop his work in progress and add oil to a pump that Mr. Waters was working on. Petitioner refused the request telling Mr. Waters that he had the ability to add oil to the pump. Petitioner failed to work cooperatively with his co-worker by refusing to add oil to the pump.

23. On June 17, 1998, Mr. McCall was not at work. Therefore, Kenny Caine (aged 47) was acting as "set-up foreman" (temporary foreman) for Mr. McCall. That same day, Randy Dortch (aged 48) was acting as set-up foremen for the maintenance

department and Kip Norton (aged 58) was the powerhouse supervisor.

24. On June 17, 1998, a powerhouse operator informed Mr. Norton that there was a high oil pressure differential on the No. 4 power boiler ID fan. Mr. Norton called Mr. Dortch at 7:10 a.m. to request the services of the PPM mechanic on duty to check the filter on the fan. Mr. Norton was concerned that the filter needed to be changed to alleviate the pressure differential and avoid a possible turbine trip.

25. Petitioner happened to be the PPM mechanic on duty for that area of the mill. After talking to Mr. Dortch, Mr. Norton paged Petitioner. However, Petitioner did not respond to the page. Mr. Norton then called Mr. Caine in an attempt to locate Petitioner.

26. Mr. Dortch located Petitioner in the break room. Mr. Dortch specifically directed Petitioner to go check the oil pressure on the No. 4 power boiler ID fan. Rather than immediately responding to Mr. Dortch's request, Petitioner sat down at the break table, drinking coffee, and reading the paper.

27. Mr. Dortch then contacted Mr. Caine who went to the break room to speak to Petitioner. Petitioner explained to Mr. Caine that the filters on the fan were too small, that they were scheduled for change, and that new filters had been ordered.

28. Mr. Caine went to the production staff to relay Petitioner's explanation that there was no cause for concern about the filters. Mr. Caine then returned to speak with Petitioner, stating that the production department wanted the filters changed despite Petitioner's representation that the equipment was performing normally.

29. Mr. Caine went with Petitioner to the No. 4 power boiler ID fan. Petitioner then proceeded to change the filters.

30. Mr. Caine subsequently counseled Petitioner to respond to every request from an operator for assistance. Mr. Caine reminded Petitioner that he should not have to have a foreman of any sort, production or maintenance, tell him what to do. Mr. Caine mentioned the June 17, 1998, incident to Mr. McCall but did not recommend that Petitioner be disciplined.

31. Petitioner stayed in the break room almost one hour after Mr. Dortch instructed Petitioner to check the oil pressure differential on the No. 4 power boiler ID fan. Petitioner's delay in following directions was insubordinate and a violation of his last chance agreement.

32. Don Wilson was Respondent's engineering and systems manager. Based on Mr. McCall's recommendation, Mr. Wilson (aged 60) made the decision to terminate Petitioner's employment. Mr. Wilson's decision is memorialized in a letter dated August 5, 1998, which states that Petitioner's behavior on

June 11, 1998, and June 17, 1998, violated the conditions of his continued employment.

33. Mr. Wilson's decision was reviewed and approved by Doug Owenby (aged 56), Respondent's plant manager. Stan Shaw (aged 49), Respondent's human resource manager, also reviewed and approved of the decision to terminate Petitioner's employment.

34. When Respondent terminated Petitioner, Respondent replaced him with Doug Anderson, an individual who was approximately in his mid-30s. Roger Brown, also in his mid-30s, and Kenny Caine, aged 47, also performed the job formerly held by Petitioner. In each instance, the PPM mechanic position was awarded based on seniority in accordance with the terms of the Union labor agreement. The labor agreement gave Respondent no discretion in selecting Petitioner's replacement.

35. Petitioner grieved his termination through the Union. Mr. Shaw denied the grievance. Subsequently, the Union voted against taking Petitioner's grievance to arbitration.

36. While he was employed with Respondent or during the grievance process following his termination, Petitioner never complained that he was being discriminated against because of his age to any manager, supervisor or human resources representative. However, at least two of Petitioner's

co-worker's harassed him occasionally by calling him names such as "old mother fucker" and "old square-headed mother fucker."

37. Mr. McCall was aware that some of Petitioner's co-workers were making jokes about his employment situation relative to the last chance agreement. Even so, there is no persuasive evidence that anyone called Petitioner names in front of Mr. McCall or any other person in a position of authority. The greater weight of the evidence indicates that the two co-workers called Petitioner names because he took the PPM mechanics job away from Billy Dortch, an individual that they liked.

38. At some point before he was terminated, Petitioner learned from the Union that Respondent intended to downsize its workforce. Respondent planned to offer some employees early retirement packages. Respondent intended to eliminate other positions through attrition.

39. Most PPM mechanics were close to Petitioner's (aged 53). Some of the PPM mechanics accepted the retirement package but Petitioner informed Mr. McCall that he needed to continue working and would not be interested in a retirement package if Respondent offered him one.

40. The reduction-in-force took place in October and November 1998 due to market conditions during which 150 positions were eliminated. No employees were involuntarily

terminated. Respondent did not consider age as a factor during the reduction-in-force or seek to eliminate older workers through the voluntary retirement packages. Petitioner's termination was unrelated to the downsizing process.

41. The voluntary retirement package offered by Respondent gave each employee who accepted the package at least one week of severance pay per year of service. Employees with more than 15 years of service got two weeks of severance pay per year of service. Therefore, Respondent incurred greater expense allowing employees to chose whether or not to accept the voluntary retirement package based on seniority. The labor agreement with the Union does not require Respondent to offer any severance benefits during a reduction-in-force.

42. At the time of Petitioner's termination, there were 10 other PPM mechanics under Mr. McCall's supervision. All of them were over the age of 40. Five were older than Petitioner. Specifically, Earl Powell was aged 68, Larry Sloan was aged 62, Edward Holland was aged 60, Howard Patrick was aged 57, and Lee Stonewall was aged 54. Mr. McCall never had cause to discipline these five men. None of the PPM mechanics other than Petitioner were terminated.

43. After Petitioner's termination, Mr. McCall did have to issue a verbal warning to Phil Caddel (aged 50) and Clay Bonner

(late 30's). In both incidences, the discipline was for performing "government jobs" on company time.

44. During the time that Mr. McCall supervised Petitioner, he was never asked to serve in a set-up capacity. Instead, Mr. McCall selected Mr. Caine, Mr. Dortch, and Bob Stewart, all younger than Petitioner, to act as substitute foremen when Mr. McCall was not at work.

45. Mr. McCall kept notes on Petitioner's performance. In fact, Mr. McCall kept detailed notes on the performance of a great majority but not all of the employees under his supervision.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569, 120.57(1), and 760.11, Florida Statutes.

47. Pursuant to Section 760.10(1), Florida Statutes, it is unlawful for an employer to discharge employees or to otherwise discriminate against them with respect to compensation, terms, conditions, or privileges of employment because of their age.

48. Decisions construing Title VII, United States Civil Rights Act of 1964, as amended, 42 U.S.C.A. Section 2000e et. seq., and the federal Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C.A. Section 621 et. seq., are

applicable when evaluating a claim brought under the Florida Civil Rights Act of 1992, as amended, Sections 760.01 through 760.11, Florida Statutes. Harper v. Blockbuster Entertainment Corporation, 130 F.3d 1385, 1387 (11th Cir. 1998)(citing Ranger Insurance Company v. Bal Harbour Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989)).

49. Petitioner has the initial burden of proving a prima facie case of age discrimination based on theories of disparate treatment and/or unlawful discharge. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981); McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973).

50. If Petitioner presents a prima facie case of age discrimination, Respondent must articulate a legitimate, nondiscriminatory reason for the challenged employment action. Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997).

51. If Respondent presents one or more such reasons, the presumption of discrimination is eliminated and Petitioner must prove by a preponderance of the evidence that Respondent's reasons for the adverse actions were pretextural. Id.

52. Petitioner may establish a prima facie case of disparate treatment by showing the following: (a) he is a member of the protected age group; (b) he was qualified to do

the job; (c) he was subjected to an adverse employment action, such as discipline for violation of workplace rules; and (d) similarly situated employees, who were younger were treated more favorably. Chapman v. AI Transport, 229 F.3d 1012, 1024 (11th Cir. 2000).

53. Petitioner may establish a prima facie case of unlawful discharge by establishing the following: (a) he is a member of the protected age group; (b) he was qualified to do the job; (c) he was discharged; and (d) after he was discharged, i) he was replaced by or otherwise lost a position to a younger individual; ii) others who were similarly situated but younger remained in similar positions; and iii) similarly situated persons who were younger were treated more favorably. Id.; O'Connor v. Consolidated Coin Caterers Corporation, 517 U.S. 308, 311 (1996); Hazen Paper Company v. Biggins, 507 U.S. 604, 609 (1993).

54. Petitioner has met his prima facie burden in both instances. He was 53 years old and within the statutorily protected age group when he was terminated. His long-term employment and years of experience as a PPM mechanic indicate that he was qualified for the job. He was disciplined for violating workplace rules and eventually discharged. During Petitioner's employment, Mr. McCall selected younger employees

to serve as set-up foremen. After Petitioner's termination, a younger individual replaced Petitioner.

55. On the other hand, Respondent has presented legitimate nondiscriminatory reasons for each of the actions it took against Respondent. First, Mr. McCall properly gave Petitioner an oral reprimand in January 1997 for doing "government jobs" on company time. There is no persuasive evidence that Mr. McCall had observed any other employee under his supervision, older or younger than Petitioner, performing such work before Petitioner was terminated.

56. Second, Mr. McCall properly gave Petitioner a written reprimand in June 1997. This reprimand was warranted, among other reasons, because Petitioner was not completing his routine daily route immediately upon reporting to work in the morning.

57. Third, Mr. McCall observed Petitioner sleeping on the job in September 1997. Respondent properly suspended Petitioner without pay for 17 days due to this incident.

58. Fourth, Petitioner violated the October 1997 last chance agreement on two occasions. On June 11, 1998, Petitioner refused the request of a co-worker for assistance in adding oil to a pump. On June 17, 1998, Petitioner waited over an hour before responding to a request to check the oil filters on the No. 4 power boiler ID fan. The latter incident involved

insubordination, neglect of duty, and failure to cooperate with other employees.

59. Petitioner presented no persuasive evidence that Respondent's reasons for Petitioner's discipline and subsequent discharge were pretextural. Respondent used progressive discipline in an effort to improve Petitioner's performance. Petitioner lost his job only after it became apparent that he refused to comply with the specific expectations spelled out in the written reprimand dated June 16, 1997, and the last chance agreement dated October 3, 1997.

60. The greater weight of the evidence indicates that Respondent did not consider Petitioner's age or show preference to younger employees in taking any of the above-referenced discipline or in terminating his employment. Petitioner's replacement was based on seniority pursuant to the agreement with the labor union. Additionally, Mr. McCall was not aware that two co-workers made disparaging age-based comments to Petitioner. There is no evidence that Respondent's reduction-in-force was intended to discriminate against older employees. Finally, Mr. McCall's decision not to select Petitioner as a set-up foreman is understandable in light of his poor performance record and his inability to cooperate with other employees.

RECOMMENDATION

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

RECOMMENDED:

That FCHR enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 11th day of March, 2003, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
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 11th day of March, 2003.

COPIES FURNISHED:

Thomas R. Brice, Esquire
McGuireWoods LLP
50 North Laura Street, Suite 3300
Jacksonville, Florida 32202

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

R. John Westberry, Esquire
Holt & Westberry
1108-A North 12th Avenue
Pensacola, Florida 32501

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.