STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIMBERLY N. WILLIAMS, Petitioner, vs. SAILORMAN, INC., d/b/a POPEYE'S CHICKEN AND BISCUITS, Respondent.	)	Case No. 02-3995

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 5, 2003, in Sanford, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Linda J. Williams
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Sanford, Florida 32771

For Respondent: Thomas H. Kiggans, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Respondent committed an unlawful employment practice in violation of the Florida Civil Rights Act of 1992 when it terminated Petitioner's employment in December 2001, and if so, what relief is appropriate, if any.

PRELIMINARY STATEMENT

By letter and notice dated July 15, 2002, the Executive Director of the Florida Commission on Human Relations (Commission) informed the parties that there is reasonable cause to believe that an unlawful employment practice occurred in connection with Respondent's termination of Petitioner's employment in December 2001. On August 13, 2002, Petitioner timely filed a Petition for Relief with the Commission pursuant to Section 760.11(4)(b), Florida Statutes.

On October 15, 2002, the Commission referred the matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge to conduct a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes. The hearing was originally scheduled for December 10, 2002, but it was subsequently continued at Petitioner's request to accommodate her final examination schedule at college. The hearing was rescheduled for March 21, 2003.

On March 10, 2003, this case was placed in abeyance at Respondent's request so that it could pursue a declaratory judgment action against the Commission regarding the application of the Florida Civil Rights Act of 1992 to persons under the age of 18. A declaratory judgment action was subsequently filed by Respondent in the Circuit Court for the Second Judicial Circuit where it was assigned to Judge Kevin Davey and designated

Case No. 03-CA-523. By Order dated May 19, 2003, Judge Davey placed the declaratory judgment action in abeyance pending resolution of this case. Thereafter, the final hearing in this case was scheduled for June 5, 2003.

Petitioner was represented at the hearing by her mother, Linda Williams, who is not an attorney. Ms. Williams was authorized at the outset of the hearing to appear as the qualified representative for Petitioner. See Rules 28-106.106 and 28-106.107, Florida Administrative Code.

Respondent was represented at the hearing by Thomas Kiggans, who is not a Florida attorney. Mr. Kiggans was authorized to appear as the qualified representative for Respondent by Order dated March 12, 2003.

At the hearing, Petitioner testified in her own behalf and introduced Exhibits numbered P1 through P3, all of which were received into evidence. Respondent presented the testimony of Abbas Momenzadeh, Respondent's Vice President of Operations; Jean Chang, Respondent's Human Resources Director; and Ms. Williams. Respondent's Exhibits numbered R1 through R13 were received into evidence.

The case style was changed by Order dated June 6, 2003, to designate Kimberly Williams as the Petitioner in her own capacity since she is no longer a minor. The original case

style designated the Petitioner as "Linda J. Williams o/b/o [on behalf of] Kimberly N. Williams."

The one-volume Transcript of the hearing was filed with the Division on June 30, 2003. Respondent requested and the parties were given 20 days from the date that the Transcript was filed with the Division to file their proposed recommended orders (PROs). Petitioner filed a letter summarizing her position on July 11, 2003, and Respondent filed its PRO on July 28, 2003.[1] The parties' post-hearing submittals were given due consideration by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following findings are made:

1. Petitioner is an African-American female. She was born in November 1984, and she is currently 18 years old.

2. Respondent is the largest franchisee of Popeye's Chicken and Biscuits (Popeye's) restaurants in the country. Respondent operates over 160 Popeye's restaurants in seven states, including Florida.

3. Popeye's is a fast-food restaurant which specializes in fried chicken and biscuits.

4. One of the Popeye's restaurants operated by Respondent is located in Sanford, Florida. Respondent acquired the franchise for the Sanford restaurant in mid-September 2000.

5. In December 2000, Petitioner was hired by Respondent as a "crew member" at Popeye's in Sanford. Petitioner was 16 years old when she was hired.

6. The general duties of a crew member include cleaning the interior and exterior of the store, battering and seasoning chicken, frying the chicken, working the cash registers, washing dishes, and other duties assigned by the shift manager.

7. Crew members operate power-driven machinery, such as bakery-type mixers (for making biscuits) and meat marinators (for seasoning the chicken), and they also use slicing machines for preparing coleslaw and cutting chicken.

8. Crew members work as a "team" and, because there are only four to five crew members per shift, each crew member is expected to be able to (and is often required to) perform each of the duties listed above.

9. During the course of her employment, Petitioner typically worked as cashier at the drive-thru window or the counter in the lobby, although she did perform other duties. Petitioner acknowledged at the hearing that she could not perform some of the job duties, such as cooking the chicken, because of her age.

10. Petitioner was often required to walk past the fryers where the chicken was cooked while performing her other duties, and she was thereby exposed to the hot grease which had a tendency to splatter when the chicken was frying.

11. On occasion, Petitioner had to go into the walk-in freezer in the kitchen area of the restaurant. She also carried the hot water heaters used to make tea, and she used the bakery-type mixers and meat slicers.

12. There are dangers inherent in the duties performed by crew members. For example, the grease in the fryers is in excess of 300 degrees, and it often splatters onto the floor making the floor slippery. The floor of the walk-in freezer can also be slippery due to ice.

13. Because of the team approach utilized by Respondent and the nature of Popeye's business, it would be difficult to limit the duties performed by Petitioner (or other minors) to those not involving hazards such as exposure to hot grease or use of dangerous machinery.

14. Petitioner's starting salary was $5.75 per hour. Her salary remained the same during the entire term of her employment at Popeye's.

15. Crew members work either the "day shift" or the "night shift." The day shift begins at 8:00 a.m. and ends at 4:00 p.m.; the night shift begins between 3:00 p.m. and

4:00 p.m. and ends after the restaurant closes, which is often after 11:00 p.m.

16. Petitioner primarily worked the night shift since she was still in high school during the time that she was working for Popeye's, and she worked later than 11:00 p.m. on occasion.

17. Because of the small number of crew members working on each shift, it was highly impractical for minor employees to be provided the 30-minute breaks every four hours as required by the Child Labor Law. This was a particular problem on the night shift since a minor employee such as Petitioner, who began her shift at 3:00 p.m. or 4:00 p.m., would be taking a break between 7:00 p.m. and 8:00 p.m., which was one of the busiest times for the restaurant.

18. Petitioner only worked part-time at Popeye’s. Her employment earning records for June 2001 through December 2001 show that even during the summer months she worked no more than 46 hours during any two-week pay period. Those records also show that Petitioner typically worked significantly fewer hours during the school year.

19. Petitioner's employment earning records show that she worked an average of 29.25 hours per pay period or 14.625 hours per week. That average is a fair measure of the hours typically worked by Petitioner because the median is 29.24 hours per pay period and, even if the periods with the highest and lowest

number of hours are not considered, the average would be 30.02 hours per pay period.[2]

20. In August 2001, Petitioner began to hear "rumors" from her co-workers and shift managers that she "had to be gone" soon. She understood those rumors to mean that she would be "laid off," and she further understood that it was because she was a minor.

21. The "rumors" that Petitioner heard were based upon a new policy adopted by Respondent on August 6, 2001 ("the Policy").

22. The Policy was adopted by Respondent as a direct result of a series of administrative fines it received from the Florida Department of Labor and Employment Security for violations of the Child Labor Law. The violations included minors working more hours per day and/or per week than permitted, minors working in and around hazardous occupations (e.g., cooking with hot grease), and not providing minor employees with the required 30-minute breaks.

23. The Policy was distributed to Respondent's district managers and area managers. Those managers were responsible for distributing the Policy to the store managers who, in turn, were responsible for implementing the policy and conveying the information in the Policy to the "front line" employees, such as Petitioner.

24. Petitioner did not receive a copy of the Policy until after she had been fired. However, Petitioner was informed of the essential substance of the Policy through the "rumors" described above.

25. The Policy states that "[i]t has long been [Respondent's] policy not to hire minors" who are not exempt under the Child Labor Law. The Policy required all minor employees to be "phased out" by December 1, 2001. The purpose of the four-month phase-out period was to enable the employees to find other employment.

26. The Policy did not apply to minors who could provide documentation to Respondent showing that they were legally married, had their disability of non-age removed by a court of competent jurisdiction, were serving or had served in the Armed Forces, and/or have graduated from high school or earned a high school equivalency diploma. These criteria were taken directly from Section 450.012(3), Florida Statutes, which identifies those minors who are not subject to the state's Child Labor Law.

27. Petitioner did not fall within any of these categories.

28. Consistent with the phase-out schedule in the Policy, Petitioner's employment with Respondent was terminated effective December 1, 2001, although her last work day was actually in late November. Petitioner was 17 years old at the time.

29. Petitioner did not look for other employment after she was fired by Respondent.

30. Petitioner attended some type of summer program at Bethune-Cookman College (BCC) in Daytona Beach, Florida, between June 16 and July 27, 2002. Petitioner received an $800.00 stipend from BCC related to that program.

31. Petitioner enrolled in Barry University (Barry) in Miami Shores, Florida, in August 2002. Had she still been employed at Popeye's at the time, she would have quit since she had always planned to attend college after high school and not to have a career working at Popeye's.

32. Had Petitioner continued to work at Popeye's from December 1, 2001, until June 16, 2002, when she started the summer program at BCC in Daytona Beach, she would have earned $2,354.63.[3]

33. Had Petitioner been able to continue working at Popeye's while she was attending the BCC summer program and all of the way through mid-August 2002 when she left for college at Barry, she would have earned an additional $756.84,[4] for a total of $3,111.47.

34. The additional $756.84 that Petitioner would have earned by working at Popeye's from June 16, 2002, through August 2002, is less than the $800.00 stipend that she received from BCC.

35. Petitioner obtained a part-time job through a federal work study program once she enrolled at Barry. She worked in that program from August 2002 to May 2003 when the school year ended. She was paid $5.50 per hour, and she earned approximately $2,250.00 in that program.

36. In May 2003, Petitioner returned to Sanford for "summer vacation." Upon her return, Petitioner began looking for a summer job in Sanford, but as of the date of the hearing, she was not employed. The record does not reflect what type of job that Petitioner was looking for or whether she actually applied for any jobs.

37. Petitioner will continue in the work study program when she returns to Barry in August 2003.

38. But for the Policy, Petitioner would have not been terminated in December 2001. She was a good, hard-working employee and she had no disciplinary problems.

39. Respondent is willing to rehire Petitioner now that she is 18.

40. Petitioner is not interested in working for Respondent. She testified at the hearing that she does not want to go back to work for "a company that has done me like that," which is a reference to Respondent firing her based solely upon her age.

41. There is no evidence that Petitioner was mistreated in any way or subjected to a hostile work environment while she was working at Popeye's, nor is there any evidence that such an environment currently exists or ever existed at Popeye's.

CONCLUSIONS OF LAW

A. Jurisdiction

42. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11(4)(b) and (6), Florida Statutes. (All references to Sections and Chapters are to the 2002 compilation of the Florida Statutes. All references to Rules are to the current version of the Florida Administrative Code.)

B. Unlawful Employment Practice

Generally

43. Section 760.10(1)(a) provides that it is an unlawful employment practice for an employer to:

> [D]ischarge 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,[5] handicap, or marital status.

(Emphasis supplied).

44. Section 760.10(8) provides that it is not an unlawful employment practice for an employer to:

> (a) Take or fail to take any action on the basis of . . . age . . . in those certain instances in which . . . age . . . is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.
>
> * * *
>
> (c) Take or fail to take any action on the basis of age, pursuant to law or regulation governing any employment or training program designed to benefit persons of a particular age group. . . .

45. These provisions are part of the Florida Civil Rights Act of 1992 (Act), whose general purposes are to:

> [S]ecure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.

Section 760.01(2) (emphasis supplied).

46. An unlawful employment practice claim under the Act may be established by direct or circumstantial evidence. Where the claim is based upon circumstantial evidence, it is analyzed under the framework established in McDonnell Douglas Corporation

v. Green, 411 U.S. 792 (1973), as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Where the claim is based upon direct evidence, it is unnecessary to resort to the McDonnell Douglas framework. See Bass v. Board of County Commissioners, 256 F.3d 1095, 1104-05 (11th Cir. 2001) (citing cases).

47. This case involves direct evidence of discrimination. Indeed, it is undisputed that the Policy adopted by Respondent expressly discriminated against persons under the age of 18 (including Petitioner) by terminating their employment, effective December 1, 2001, notwithstanding their work history, abilities, or other attributes.

48. It is also undisputed that the Policy was the sole basis of Respondent's decision to terminate Petitioner's employment. Stated another way, but for the discriminatory Policy, Petitioner's employment would not have been terminated. Thus, Respondent failed to meet its burden of persuasion to refute the direct evidence of discrimination. See Bass, 256 F.3d. at 1104.

49. Nevertheless, Respondent argues that it did not violate the Act when it terminated Petitioner’s employment because, as a matter of law, the Act does not protect minors against age discrimination. Alternatively, Respondent argues

that its decision to fire Petitioner based solely upon her age was not a violation of the Act because Petitioner was prohibited by the state and federal child labor laws from performing some of the job duties of a crew member and, as a result, age was effectively a bona fide occupational qualification (BFOQ) for the position. Each argument will be discussed in turn.

Scope of the Act's Prohibition
Against Age Discrimination

50. The Act was patterned after Title VII of the Civil Rights Act of 1964. As a result, the Act is to be construed in a manner consistent with Title VII. See e.g., 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, 1209 (Fla. 1st DCA 1991).

51. Title VII does not prohibit discrimination based upon age. See 42 U.S.C. Section 2000e-2. There is a separate federal law which expressly addresses age discrimination, the Age Discrimination in Employment Act (ADEA). See 29 U.S.C. Section 621, et seq.

52. Section 623(a)(1) of the ADEA provides that it is unlawful for an employer to:

> [F]ail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or

> privileges of employment, because of such individual's age[.]

53. This provision, like Section 760.10(1)(a), does not place any qualifications on the prohibition against age discrimination. However, Section 631(a) of the ADEA expressly provides that "[t]he prohibitions in this chapter shall be limited to individuals who are at least 40 years of age."

54. The Act does not contain any language similar to that in Section 631(a) of the ADEA. As a result, and notwithstanding the passing comment in Sondel, supra, that "[f]ederal case law interpreting Title VII and the ADEA is applicable to cases arising under the Florida Act,"[6] the federal age discrimination cases relied upon by Respondent are distinguishable.

55. Indeed, most of those cases rely on or refer to Section 621(b) of the ADEA in which congress declared that a purpose of the ADEA was "to promote employment of older persons based on their ability rather than age" (emphasis supplied). See, e.g., Hamilton v. Caterpillar, Inc., 966 F.2d 1226, 1227-28 (7th Cir. 1992) (holding that "reverse age discrimination" claims are not cognizable under the ADEA). There are no similar statements of legislative intent in the Act. Compare Section 112.044(1) (providing legislative intent for the age discrimination prohibitions applicable to governmental employers, and specifically referring to "older workers" as the class

benefited by that statute); Morrow v. Duval County School Board, 514 So. 2d 1086, 1087-88 (Fla. 1987) (stating that the policy underlying Section 112.044 is similar to the policy underlying the ADEA). To the contrary, Section 760.01(2) broadly states that the purpose of the Act is to protect "all individuals" from discrimination.

56. It is significant that the Act does not define "individual" to exclude minors. Nor does the definition of "person" in Section 760.02(6), which includes "individual," exclude minors. And cf. Section 1.01(3) (defining "person" to include "children"). Accordingly, it is concluded that the use of the word "individual" in Sections 760.01(2) and 760.10 includes minors.

57. That conclusion is supported by the principles that the Act is to be "construed according to the fair import of its terms," and that it is to be liberally construed to further its purpose. See Section 760.01(3); Woodham v. Blue Cross & Blue Shield, 829 So. 2d 891, 894 (Fla. 2002) (stating that the Act "is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature"); Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000) (same); Donato v. American Telephone and Telegraph Company, 767 So. 2d 1146, 1148 (Fla. 2000) (noting that the Act provides "greater protection to Florida citizens than is provided under

the federal Civil Rights Act," but rejecting the Commission's broad construction of the phrase "marital status" in the Act).

58. The parties have not cited, nor has the undersigned located any Florida cases directly addressing the significance (or not) of the omission of an age limit on the scope of the Act. Courts in several other states have addressed similar omissions in their anti-discrimination laws, and those courts have held that those laws prohibit age discrimination against a broader class of persons than the ADEA. See Zanni v. Medaphis Physician Services Corporation, 612 N.W. 2d 845 (Mich. App. 2000), appeal denied, 618 N.W. 2d 596 (Mich. 2000); Bergen Commercial Bank v. Sisler, 723 A.2d 944 (N.J. 1999); Ogden v. Bureau of Labor, 699 P.2d 189 (Or. 1985). See also Graffam v. Scott Paper Company, 870 F.Supp. 389, 405 n.27 (D. Me. 1994) (noting that the Maine Human Rights Act does not limit age discrimination claims to a certain range of ages); Chad A. Stewart, Young, Talented, and Fired: The New Jersey Law Against Discrimination and the Right Decision in Bergen Commercial Bank v. Sisler, 84 Minn. Law Review 1689 (June 2000) (analyzing the decision in Bergen, as well as cases from other states involving "reverse age discrimination claims" under state anti-discrimination laws). Those decisions are persuasive in construing the proper scope of the Act. Cf. Donato, 767 So. 2d at 1149-50, 1151-52 (reviewing anti-discrimination statutes and cases from other states in

determining the scope of the prohibition against discrimination based upon "marital status").

59. In this regard, the following portions of the New Jersey Supreme Court's analysis in Bergen Commercial Bank are particularly applicable in this case:

> We hold that the . . . prohibition [in the New Jersey Law Against Discrimination (LAD)] against age discrimination is broad enough to accommodate [the 25-year-old plaintiff's] claim of age discrimination based on youth. At the outset we agree with the Appellate Division that significant language differences between the LAD and ADEA preclude wholesale reliance on federal law in deciding whether younger workers are within the ambit of the act's protection. The result in cases applying the ADEA is necessarily driven by the fact that the ADEA by its terms limits the protected class to workers over forty. Because the LAD contains no such express limitation, our decision rests on our independent assessment of the language and purpose of [the LAD]. . . .
>
> Our examination of [the LAD] reveals no evidence of a legislative intent to exclude younger workers from the LAD's anti-age-discrimination protection. [The LAD] protect[s] "[a]ll persons" from employment discrimination on the basis of age. Neither section, on its face, specifies a qualifying age at which the act's protections vest. . . .
>
> In deciding that the LAD's protections extend to young workers, we are constrained by the principle that the state anti-discrimination laws, as social remedial legislation, are deserving of a liberal construction. In that connection, "this Court has been scrupulous in its insistence

> that the Law Against Discrimination be applied to the full extent of its facial coverage." We also find that a broad construction of the statute is entirely consistent with the underlying purpose of anti-discrimination laws "to discourage the use of categories in employment decisions which ignore the individual characteristics of particular applicants." Thus, we find it entirely consistent with the underlying purposes of the LAD to infer that the Legislature would have intended to protect, for example, a twenty-three-year-old schoolteacher who, despite her outstanding performance in the classroom, was discharged by a local school board because they believed she was too young to teach. Moreover, if we have mistakenly construed the legislative intent, the Legislature remains free to amend the LAD to specify a minimum qualifying age for the law's protection.

Bergen Commercial Bank, 723 A.2d at 957-58 (Citations omitted). Accord Zanni, 612 N.W. 2d at 847 ("[W]e conclude that the plain language of the [Michigan Civil Rights Act (CRA)] provides no basis to limit the protections of the [CRA] to older workers. . . . Unlike the CRA, the ADEA limits the prohibitions against age discrimination 'to individuals who are at least 40 years of age. We decline to read a similar restriction into the CRA when the Legislature apparently chose not to do so.") (citations omitted).

60. It is interesting to note that the New Jersey LAD included a provision stating that "nothing in this act . . . shall be construed . . . to require the employment of any person under the age of 18." Bergen Commercial Bank, 723 A.2d at 957

(quoting N.J. Stat. Ann. 10:5-2.1). That language was apparently included to address concerns about the LAD's potential interference with child labor laws. See Id. at 953 (quoting a study of the New Jersey Commission on Aging that was part of the legislative history for the LAD). There is no similar provision in the Act, and Respondent has not cited any legislative history for the Act which might suggest that the omission of an age limitation in the Act was somehow inadvertent or that the Act was intended only to prohibit age discrimination against older persons (as seems to be the case with Section 112.044) or persons over the age of 18 (as is the case with the New Jersey LAD). Absent such, it is concluded that the Act means what it says and that it protects "all individuals," including minors, from age discrimination.

Bona Fide Occupational Qualification

61. Section 760.11(8)(a) provides that it is not unlawful to take employment action based upon age where age is a BFOQ "reasonably necessary for the performance of the particular employment."

62. This defense is extremely narrow. See O'Loughlin v. Pinchback, 579 So. 2d 788, 792 (Fla. 1st DCA 1991) (citing Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977)). Accord International Union, United Automobile, Aerospace and

Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187, 200-04 (1991).

63. The burden of proving a BFOQ defense is on the Respondent. See Whitehead v. Miracle Hill Nursing and Convalescent Home, Inc., 1994 WL 1028127, at *10 (Order of the Commission issued April 17, 1995).

64. Specifically, Respondent must prove that:

> (1) The qualification is 'reasonably necessary' to the essence of the business operation; and (2a) There was reasonable cause to believe, that is, a factual basis for believing all, or substantially all, of the excluded class would be unable to perform safely and efficiently the duties of the job involved; or (2b) It is impossible or highly impractical to deal with the members of the group on an individualized basis.

Id. (quoting Kelley v. Bechtel Power Corporation, 633 F.Supp 927, 937 (S.D. Fla. 1986). Accord Johnson Controls, supra; Dothard, supra.

65. Respondent's BFOQ defense is that the federal and state child labor laws prohibit minors from performing all of the duties required of crew members. Specifically, Respondent argues that those laws prohibit minors from working around hot grease, cooking chicken, operating power-driven machines, such as meat slicers and bakery-type machines, all of which are part of the "essence" of a crew member's duties and Popeye's business. Furthermore, Respondent argues that the nature of its

business makes it highly impractical for it to accommodate the work-period constraints imposed by the federal and state child labor laws, namely the prohibition on minors working after 11:00 p.m. and the requirement that minors be given a 30-minute break every four hours.

66. Florida's Child Labor Law is codified in Part I of Chapter 450, and is patterned after the Fair Labor Standards Act (FLSA), which is codified in 29 U.S.C. Section 201, et seq.

67. Section 450.061(3) provides that:

> No minor under 18 years of age . . . shall be employed or permitted or suffered to work in any place of employment or at any occupation hazardous or injurious to the life, health, safety, or welfare of such minor, as such places of employment may be determined and declared by the department . . . .

68. Rule 61L-2.005 lists the occupations and places of employment that have been determined to be hazardous to minors in accordance with Section 450.061(3). That rule incorporates by reference the federal regulations which implement the FLSA. It prohibits certain occupations for all minors, see Rule 61L-2.005(2)(a), and prohibits other occupations for minors under the age of 16. See Rule 61L-2.005(2)(b).

69. The regulations prohibiting certain occupations for minors under 16 are not relevant in this proceeding because Petitioner was 16 years old when she was hired and 17 years old

when she was fired, and because Respondent's Policy applies to minors under the age of 18 and not just minors under the age of 16. Thus, Respondent's reliance on the federal regulations, which authorize minors between the ages of 14 and 16 to perform "[k]itchen work and other work involved in preparing and selling food and beverages, including the operation of machines and devices used in the performance of such work," but prohibit them from being involved in "cooking" and "occupations which involve operating . . . power-driven food slicers and grinders, food choppers, and cutters and bakery-type machines," is misplaced. See 29 C.F.R. Section 530.34(a)(7) and (b)(5)-(6). Accord Rule 61L-2.005(2)(b)9.-10. For the same reason, Respondent's reliance on Section 450.061(1)(o), which prohibits minors younger than 15 from "working with meat and vegetable slicing machines," is misplaced.

70. The federal and state child labor laws both establish a minimum age of 18 for occupations involving power-driven bakery-type machines. See 29 C.F.R. Sections 570.62 and 570.120; Section 450.061(2)(i); Rule 61L-2.005(2)(a)10.

71. The federal and state child labor laws both limit the number of hours that minors can work per day and per week, see 29 C.F.R. Section 570.35; Section 450.081. The State law also requires that:

> Minors 17 years of age or younger shall not be employed, permitted, or suffered to work for more than 4 hours continuously without an interval of at least 30 minutes for a meal period; and for the purposes of this law, no period of less than 30 minutes shall be deemed to interrupt a continuous period of work.

Section 450.081(4).

72. The evidence establishes that operating the bakery-type machines used to make biscuits is a part of the job duties of a crew member, that crew members are often required to work after 11:00 p.m., and that it is highly impractical to give crew members 30-minute breaks every four hours because of the small number of crew members on each shift. The evidence further establishes that these duties are part of the "essence" of the duties of crew members and of Respondent's fast-food business. Because the child labor laws prohibit minors from operating bakery machines, working after 11:00 p.m., and working more than four hours without a 30-minute break, it is concluded that minors are not able to perform all of the duties required of crew members and, therefore, Respondent met its burden to prove that being 18 years of age is a BFOQ for crew members.

73. Because Respondent proved its BFOQ defense, it did not commit an unlawful employment practice when it terminated Petitioner's employment based upon her age. See Section 760.11(8)(a). For the same reasons, it is also concluded that

Respondent's decision to fire Petitioner is not an unlawful employment practice based on Section 760.11(8)(c), which permits employers to take employment action based upon laws which, like the child labor laws, are designed to benefit persons of a particular age group.

C. Relief

74. In the event that the Commission (and/or an appellate court) rejects the foregoing conclusion, it becomes necessary to determine what relief, if any, Petitioner is entitled to. Accordingly, in an abundance of caution, that issue is addressed below.

75. It is well-settled that "the basic purpose of Title VII relief is to 'make whole' victims of unlawful employment discrimination." Darnell v. City of Jasper, 730 F.2d 653, 655 (11th Cir. 1984).

76. The purpose of relief under the Act is the same, although the type of relief available to Petitioner in this proceeding is prescribed by Section 760.11(6), which provides in relevant part:

> . . . If the administrative law judge, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay. . . .

77. A successful plaintiff/Petitioner in an employment discrimination action is "presumptively entitled to back pay." See Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1526 (11th Cir. 1991) (superceded by statute on other grounds). Similarly, "reinstatement is a basic element of the appropriate remedy in wrongful employee discharge cases and, except in extraordinary cases, is required." Darnell, 730 F.2d at 655. Accord O'Loughlin, 579 So. 2d at 795 (stating that "a prevailing plaintiff in a wrongful discharge case is entitled to reinstatement absent unusual circumstances").

78. Front pay may also be awarded. See Whitehead, 1994 WL 1028127, at **11, 18-19; Nord v. U.S. Steel Corporation, 758 F.2d 1462, 1473 (11th Cir. 1985).

79. Compensatory and punitive damages are not available in this administrative proceeding. Those remedies are only available in a civil action brought pursuant to Section 760.11(4)(a). See Section 760.11(5) (authorizing the court to award "compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries, and punitive damages" in addition to back pay and affirmative relief).

80. At the hearing, Petitioner indicated that all she was seeking in this proceeding was an award of back pay between December 1, 2001 (when she was terminated), and August 2002

(when she went away to college at Barry). To the extent that Petitioner might have sought to recover back pay for a longer period, see Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1347 (11th Cir. 2000) ("In an age discrimination suit, a successful plaintiff receives back pay from the date of his or her termination to the date of trial."), she has waived such a claim. In any event, since Petitioner's gross earnings from the work study program at Barry were virtually the same as her earnings at Popeye's, back pay would have been cut off in August 2002 at the latest. See Kolb v. Goldring, Inc., 694 F.2d 869, 874 (4th Cir. 1982) (stating that damages from termination were complete and settled when plaintiff started earning more at his new job than he earned at the job from which he was terminated).

81. In response, Respondent argues that Petitioner is not entitled to any back pay since she failed to look for other employment after she was fired. Alternatively, Respondent argues that even if Petitioner is entitled to back pay, it is only through June 16, 2002, when she started attending the summer program at BCC.

82. It is well-settled that a plaintiff in an employment discrimination case is required to mitigate her damages by attempting to obtain other suitable employment, and her failure to do so results in forfeiture of the right to back pay. See, e.g., Ford Motor Company v. E.E.O.C., 458 U.S. 219, 231-32

(1982); Weaver, 922 F.2d at 1527; Miller v. Marsh, 766 F.2d 490, 492 (11th Cir. 1985); Champion Intern. Corp. v. Wideman, 733 So. 2d 559, 561 (Fla. 1st DCA 1999); Prather v. Mold-Ex Rubber Company, DOAH Case No. 01-3645, Recommended Order at 24-25 (Mar. 4, 2002), adopted in toto FCHR Order No. 02-043 (Sept. 5, 2002).

83. Respondent has the burden to prove that Petitioner failed to mitigate her damages by seeking to obtain substantially comparable employment. See Weaver 922 F. 2d at 1527. If Respondent proves "that [Petitioner] has not made reasonable efforts to obtain work, [it] does not also have to establish the availability of substantially comparable employment." Id.

84. Because Petitioner admitted in her testimony at the hearing and in her interrogatory responses received into evidence as Exhibit R1 that she did not look for another job between the time that her employment with Popeye's was terminated and the time that she went away to college at Barry, she is not entitled to any back pay.[7]

85. Petitioner's failure to specifically request reinstatement or front pay does not preclude an award of such relief. See Whitehead, 1994 WL 1028127, at *18; Nord, 758 F.2d at 1473 n.12. Nevertheless, for the reasons that follow, it is

concluded that neither reinstatement nor front pay is appropriate under the circumstances of this case.

86. There is no factual or legal basis that would preclude an award of reinstatement in this case. Indeed, Respondent expressed its willingness to rehire Petitioner now that she is 18, and there was no evidence that there is (or ever has been) a hostile work environment at Popeye's towards Petitioner. Cf. Pollard v. E.I. du Pont de Nemours & Company, 532 U.S. 843, 846 (2001) (stating that front pay is a substitute for reinstatement where "reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination"). To the contrary, Petitioner testified that she was treated well during the course of her employment at Popeye's. Nevertheless, because Petitioner is presently attending college in Miami and she made it clear at the hearing that she is not interested in returning to work for Popeye's in Sanford, an award of reinstatement would serve no real purpose.

87. The Commission has described front pay as "compensation for future economic loss stemming from present discrimination that cannot be remedied by traditional rightful-place relief such as hiring, promotion or reinstatement."

Whitehead, 1994 WL 1028127, at *18 (citation omitted). Accord Pollard, supra.

88. As explained by the Commission in Whitehead, "[s]ome of the factors which can make traditional rightful-place relief inappropriate include the lack of a reasonable prospect that Petitioner can obtain comparable employment, the existence of an employer-employee relationship that is pervaded with hostility, and the existence of only a relatively short period of time for which front pay is to be awarded." Id. at 19 (citing Hybert v. The Hearst Corporation, 900 F.2d 1050 (7th Cir. 1990).

89. Applying those factors to this case, it is concluded that Petitioner is not entitled to an award of front pay since the reinstatement offered by Respondent was not shown to be legally inappropriate. In this regard, Petitioner's decision to reject reinstatement, while understandably based upon her desire to attend college in Miami rather than have a career at Popeye's in Sanford, does not render that remedy legally inappropriate so as to require an award of front pay.

90. Moreover, there was no evidence that Petitioner would be subjected to a hostile work environment if she returned to work at Popeye's. There was also no evidence that Petitioner is unable to obtain comparable employment. To the contrary, the evidence establishes that Petitioner was able to obtain employment through a work study program at Barry, a comparable

salary that she had at Popeye's, and that she will continue that employment when she returns to Barry after her summer vacation.

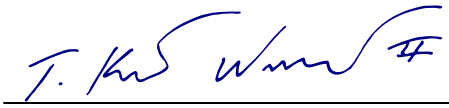
91. In sum, even if it is determined that Respondent committed an unlawful employment practice when it fired Petitioner in December 2001 based solely upon her age, Petitioner is not entitled to any back pay, front pay, or other affirmative relief; and, because Petitioner refused the reinstatement offered by Respondent, she is not entitled to any relief in this proceeding.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order which dismisses Petitioner's unlawful employment practice claim against Respondent.

DONE AND ENTERED this 15th day of August, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of August, 2003.

ENDNOTES

1/ By Order dated July 18, 2003, the filing deadline for parties' PROs was extended by four days, through July 25, 2003. That Order gave Petitioner leave to supplement her post-hearing submittal, but she did not do so.

2/ There is no credible evidence in the record to corroborate Petitioner's testimony that she worked between 20 and 25 hours per week, and Petitioner testified that she had no reason to dispute the accuracy of the earning records introduced by Respondent.

3/ This amount is computed by multiplying the 28 weeks between December 1, 2001, and June 16, 2002, by 14.625 hours per week by $5.75 per hour.

4/ This amount is computed by multiplying the nine additional weeks between June 16, 2002, and August 15, 2002, by 14.625 hours per week by $5.75 per hour.

5/ Age (along with handicap and marital status) were added to the list of proscribed forms of discrimination in 1977. See Donato, 767 So. 2d at 1148 (citing Chapter 77-34a, Section 1, Laws of Florida).

6/ The plaintiff in Sondel was 63 years old. See Sondel, 685 So. 2d 925. As a result, it was unnecessary for the court to address the issue presented in this case -- i.e., whether the Act applies to persons under the age of 40 or whether it only applied to persons over 40 like the ADEA -- and, therefore, the court's passing comment regarding the applicability of federal law cannot be construed as a holding that the scope of the Act is the same as the scope of the ADEA.

7/ Even if Petitioner were entitled to back pay, it would only be for the period between December 1, 2001, and June 16, 2002, because Petitioner failed to establish that she could have (or would have) continued to work at Popeye's in Sanford while she attended the BCC summer program in Daytona Beach. Moreover, Petitioner earned more during the BCC summer program ($800.00) than she would have earned had she continued to work at Popeye's

from June 16, 2002, through the end of the summer ($756.84). See Kolb, 694 F.2d at 874 (stating that damages from termination were complete and settled when plaintiff started earning more at his new job than he earned at the job from which he was terminated). Thus, if the Commission concludes contrary to the determinations above that Petitioner is entitled to back pay, the award should be limited to $2,354.63, plus simple interest calculated at the statutorily-provided rate. See Whitehead, 1994 WL 1028127, at *21. To the extent that the Commission concludes that back pay should be computed for the period of December 1, 2001, through August 2002, the $800.00 stipend from BCC would be a set-off against the award because it was not established that Petitioner could have continued working at Popeye's in Sanford while she attended the BCC summer program in Daytona Beach. See Champion Intern. Corp, 733 So. 2d at 563 (earnings from "moonlighting job" must be deducted from back pay award where plaintiff could not have held both jobs at the same time). Accordingly, the net back pay award to Petitioner would be $2,311.47, plus interest, computed as follows $2,354.63 (12/1/01 - 6/16/02) plus $756.84 (6/16/02 - 8/15/02) minus 800.00 (BCC stipend).

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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.