

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PERRY HESLEP,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	Case No. 02-4809
PAYROLL MANAGEMENT, INC.,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for Administrative Hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Shalimar, Florida, on February 25, 2003. The appearances were as follows:

APPEARANCES

For Petitioner: No appearance

For Respondent: Michael William Mead, Jr., Esquire  
Post Office Box 1329  
Fort Walton Beach, Florida 32549

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner, Perry Heslep, has suffered discrimination in his employment by being terminated because of his age.

### PRELIMINARY STATEMENT

This cause arose on May 13, 2002, when the Petitioner filed a complaint of employment discrimination with the Florida Commission on Human Relations (Commission). The complaint alleged that the Petitioner had been discriminated against by the Respondent in violation of Sections 760.01 through 760.11, Florida Statutes (2002).

In essence, the Petitioner has alleged that the Respondent committed an unlawful employment practice by terminating him allegedly because of his age. The allegations in the complaint were investigated and on November 5, 2002, the Commission issued a determination of "cause" to believe that a discriminatory act occurred. The Petitioner then filed a Petition for Relief and was granted a formal proceeding and evidentiary hearing. The hearing was held at the Okaloosa County Courthouse Annex in Shalimar, Florida, pursuant to notice, before the undersigned administrative law judge, on February 25, 2003.

The cause came on for hearing as noticed. Upon convening the hearing it was determined that the Petitioner had failed to appear. A substantial period of time, in excess of one-half an hour elapsed and the Petitioner failed to make any appearance. The Petitioner has the burden of proof and a Recommended Order of Dismissal could be entered based upon the Petitioner's failure to appear without justification, of which there has been

none filed or communicated to the judge. Nevertheless, the Respondent elected and requested to put on its case-in-chief in order to preserve its evidentiary position on the record and to advocate dismissal predicated on evidence. Accordingly, the Respondent was permitted to put on its case. The hearing was duly noticed, the notice was transmitted to the Petitioner's last known address of record and the Respondent had all its witnesses in attendance.

Upon concluding the taking of evidence, the Respondent requested that a transcript of the hearing be made and filed with the Division of Administrative Hearings and requested a period of 30 days in which to submit a Proposed Recommended Order. Those requests were granted and a Proposed Recommended Order by the Respondent was timely filed and has been considered in the rendition of this recommended order.<sup>1/</sup>

#### FINDINGS OF FACT

1. The Petitioner, Perry Heslep, was two weeks away from his 38th birthday when he was hired by the Respondent, Payroll Management, Inc. (PMI) as an investigator. He was hired on January 27, 2001. When he was removed from his job as investigator he was only 39 years of age, less than two years older than his age when hired.

2. The duties of an investigator consist of sitting in a vehicle and attempting to observe and film individuals who might

be defrauding the workers' compensation fund. Such an investigator, as Mr. Heslep, filmed such individuals on videotape so that it can be ascertained whether they truly have physical impairments justifying worker's compensation awards.

3. The only physical attributes an investigator must have to work for PMI are the ability to drive a car and the ability to hold a small, light-weight video camera.

4. A PMI investigator, who is 64 years of age, 25 years older than the Petitioner was when he was terminated as an investigator, and who had the same duties as Mr. Heslep, plus additional duties, had no trouble with the physical requirements of being an investigator. The physical demands on a PMI investigator were not such that an individual who was 39 years of age would have any trouble fulfilling those duties. In fact, Mr. Heslep had no physical problems related to age which would keep him from fulfilling his duties as an investigator for the Respondent PMI.

5. When he was removed from his role as an investigator, Mr. Heslep was only 39 years of age. This made him younger than the average age of PMI employees. Today the average age of PMI's investigators is 40.7 years of age, which is older than Mr. Heslep was when he was terminated as an investigator.

6. Statistically, PMI investigators that were Mr. Heslep's age or older, are more likely to keep their jobs than those

younger than Mr. Heslep. There is no statistical evidence indicating that PMI discriminated against employees based upon age.

7. The fact that Mr. Heslep was hired only two weeks before his 38th birthday indicates that his termination when he was only 39 years of age by PMI was not discrimination based upon age. The younger employee that was hired the same day that Mr. Heslep was terminated as an investigator, was scheduled to begin working for PMI as an investigator, regardless of whether Mr. Heslep remained an investigator or not. Mr. Heslep was thus not replaced by a younger employee.

8. There were no employment decisions made by PMI that would indicate a pattern of discrimination based on age. There was no mention of Mr. Heslep's age by Mr. Heslep, anyone representing him or anyone at PMI, when he was hired, while he was employed, when he was terminated, at his unemployment compensation hearings or at any other time prior to filing of the complaint of employment discrimination leading to this proceeding. There is no direct evidence of discrimination against the Petitioner or any other employee at PMI based on age.

9. PMI has made special efforts to recruit and hire investigators that were significantly older than the Petitioner, both before and after the Petitioner was employed by PMI.

10. The Petitioner was unable to drive a company vehicle, unlike other PMI investigators, because PMI's insurer would not allow someone convicted of DUI to drive a company vehicle. Mr. Heslep's DUI conviction was significant since he would frequently be late or miss work entirely because of mechanical problems attendant to using his personal vehicle. He was routinely late for work and routinely left work early to meet his children after school.

11. Mr. Heslep was often absent from work without permission for extended periods of time. He sometimes would not answer his company telephone to avoid contact with his employer. His unexcused absenteeism from work had a negative impact on his performance at work. He was told before he was hired that the job of investigator was "results oriented," meaning that his level of performance was based on the amount of video surveillance tape he produced. He production of video surveillance tape fell far below what was expected of PMI investigators.

12. Mr. Heslep was warned by his supervisor on a number of occasions that he was not producing enough video surveillance tape. He acknowledged that he was not producing enough video surveillance tape, but still failed to perform the job he was hired to do and was being paid to perform.

13. Because of his sub-standard work performance, PMI's Vice President of Human Relations, Willie Farrow, attempted to re-assign the Petitioner. Since the Petitioner had a propensity to arrive to work late or to leave work early, Mr. Farrow felt a position within the PMI organization where Mr. Heslep could be more closely supervised would be more appropriate. The investigative position he was in allowed employees to work without supervision. Mr. Heslep refused this position assignment however.

14. The decision to assign Mr. Heslep to a new position within the PMI organization had nothing to do with the fact that he was 39 years of age. The decision was based purely on PMI's supervisory personnell's observation, a good faith belief that Mr. Heslep's work performance was sub-standard and because of the multiple, extended periods of unexcused absenteeism. There is no evidence which would suggest that the decision was based upon Mr. Heslep's age. When Mr. Heslep refused the new position he was terminated.

#### CONCLUSIONS OF LAW

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

16. Assuming arguendo that the Petitioner had adduced evidence of a prima facie case, which he did not, because he

failed to appear at the hearing, the Respondent would have the burden to establish a legitimate, non-discriminatory reason for removing the Petitioner from his position as investigator. See Lawrence Zaben v. Air Products Chemical, Inc., 129 F.3d 1453, at 1457 (11 Circuit 1997), Clark v. Coates and Clark, Inc., 990 F.2d 1217, at 1227 (11 Circuit 1993).

17. An employer's good faith belief that an employee's work is sub-standard is a legitimate, non-discriminatory reason for removing the employee or terminating the employee. Clark 990 F.2d at 1228, Young v. General Foods, Corp., 840 F.2d 825 at 830, (11 Circuit 1988).

18. The Petitioner's superiors and supervisors at PMI had a good faith belief that the Petitioner's work performance was sub-standard for a variety of reasons, delineated in the above findings of facts. PMI therefore established a legitimate, non-discriminatory reason for terminating the Petitioner from his position as an investigator.

19. Once an employer in a discrimination case articulates a legitimate, non-discriminatory reason for the adverse employment decision, the burden is then placed on the Petitioner to introduce "significantly probative evidence showing that the asserted reason is merely a pretext for discrimination." Clark 990 F.2d at 1228.



20. The Petitioner presented no direct, circumstantial or statistical evidence, patterns or facts, nor could any facts be gleaned from PMI's evidence, that would in any way suggest that the Petitioner suffered an adverse employment decision because of his age. The Petitioner failed to appear and thus wholly failed to introduce any evidence of a prima facie case, and no evidence which would show that the employer's asserted reason for removing him as an investigator was merely pretextual and that the employer had really discriminated against him based on his age. There is simply no evidence whatever to show that the Petitioner's age was any motivating factor at all in the employment decision at issue.

#### RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

#### RECOMMENDED:

That a Final Order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 3rd day of April, 2003, in  
Tallahassee, Leon County, Florida.

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P. MICHAEL RUFF  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of April, 2003.

ENDNOTE

1. Mr. Heslep has offered no justification for failure to appear at hearing. Notice was sent to his last known address. On the day before issuance of this Recommended Order he advised that he wanted to respond to the Proposed Recommended Order submitted by the Respondent and produce evidence. However, it is inappropriate to re-open the proceedings to do so. This would amount to a denial of fundamental fairness and due process of law to the Respondent. The Petitioner has not made any comment or communication regarding justification for failure to appear at the hearing, which was the place and time for him to put on his evidence.

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.