STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARMEN CHRISTENSEN, Petitioner, vs. CITY OF ORLANDO, Respondent.	)	Case No. 02-4810

RECOMMENDED ORDER

Pursuant to notice a formal administrative hearing was held on April 14, 2003, in Orlando, Florida, before Fred L. Buckine, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Carmen Christensen, pro se
5419 Shiloh Drive
Adamsville, Alabama 35005

For Respondent: Amy T. Iennaco, Esquire
City of Orlando
400 South Orange Avenue
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue is whether Respondent, City of Orlando, violated Section 760.10, Florida Statutes (2001) (All references to the Florida Statutes are to Florida Statutes 2001), when on

January 30, 2002, Respondent terminated Petitioner's employment as a wastewater treatment plant operator.

PRELIMINARY STATEMENT

On April 2, 2002, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) charging Respondent with discrimination based on her gender and age.

By letter dated November 5, 2002, the FCHR informed Petitioner of its determination finding no cause and advised Petitioner of the right to request a de novo administrative hearing by filing a petition for relief within 35 days of November 5, 2002.

Petitioner timely filed her Petition for Relief with the FCHR. On December 16, 2002, her Petition for Relief was transmitted by the FCHR to the Division of Administrative Hearings, requesting assignment of an Administrative Law Judge to conduct all necessary proceedings.

On December 17, 2002, an Initial Order was issued, assigning this matter to Administrative Law Judge Jeff Clark and requiring the parties to submit a timely response regarding available dates for the final hearing. Neither party filed a response.

On January 7, 2003, an Amended Initial Order was issued. On January 13, 2003, Petitioner filed a request for extension of

time to respond to the Amended Initial Order,[1] and on January 15, 2003, a Notice of Ex-Parte Communication was entered. On January 29, 2003, Petitioner's request for an extension of time to respond to the Amended Initial Order was granted, ordering the parties to respond on or before February 4, 2003. On January 31, 2003, Petitioner responded to the Amended Initial Order, and on February 3, 2003, a Notice of Hearing, scheduling the final hearing for March 4, 2003, in Orlando, Florida, and an Order of Pre-hearing Instructions were entered.

On February 6, 2003, an Amended Notice of Hearing was entered, rescheduling the final hearing for April 4, 2003, and on March 26, 2003, Respondent's compliance with the Order of Pre-Hearing Instructions was filed.

On March 31, 2003, Petitioner filed a Request for Disqualification of Administrative Law Judge Jeff Clark. By Order of April 1, 2003, Petitioner's request for assignment of another Administrative Law Judge was granted, and the case at bar was transferred to the undersigned. On April 2, 2003, an Order denying Petitioner's April 1, 2003, request for continuance was entered.

At the final hearing, Petitioner appeared pro se. Petitioner testified in her own behalf and presented the testimony of four employees of Respondent: Thomas Lothrop, deputy director of Public Works; Angel Cardona, labor relations

specialist; Colin Benner, chief operator of Wastewater Conserve II; and Paul Deuel, plant manager of Wastewater Conserve II. Petitioner's 42 exhibits were received into evidence. Respondent called the above-named four employees as witnesses and presented 12 exhibits that were received into evidence.

On April 7 and April 10, 2003, Respondent and Petitioner, respectively, filed motions for extension of time to submit their proposed recommended orders, and by Order of April 11, 2003, the parties were ordered to file proposed recommended orders not later than May 16, 2003. By their joint motion, the parties waived the requirement that this Recommended Order be issued within 30 days thereafter. See Rule 28-106.216, Florida Administrative Code.

On May 5, 2003, a one-volume Transcript of this proceeding was filed. On May 12 and May 16, 2003, Petitioner and Respondent, respectively, filed Proposed Recommended orders that have been considered by the undersigned in formulation of this Recommended Order.

FINDINGS OF FACT

Based upon observation of the witnesses and their demeanor while testifying, the documentary materials received in evidence, and the entire record compiled herein, the following evidentiary, relevant, material and ultimate facts are determined:

1. Respondent, City of Orlando (City), is a municipality of the State of Florida and, at all times material to this cause, was an "employer" as that term is defined in Section 760.02(7), Florida Statutes.

2. Petitioner, Carmen Christensen (Ms. Christensen), at all times material to this cause, was an "aggrieved person" as that term is defined in Section 760.02(10), Florida Statutes.

3. Ms. Christensen alleged in her petition that on January 30, 2002, the City terminated her employment for putting a decimal point in the wrong place on a city document. She alleged that other male employees put erroneous numbers on city documents and admittedly falsified city records and that they were only suspended for three days, but kept their jobs. Ms. Christensen further alleged her termination by the City was due, in part, because of her age, 58 years old, and her gender, female, in violation of Section 760.10(1)(a), Florida Statutes.

4. In 1993, the City's Apprentice Training Program was hiring and training potential city employees needed in various trades within the City's workforce. Ms. Christensen entered the apprentice program and selected to become qualified as a wastewater treatment plant operator. She completed the training program, took the State's Treatment Plant Operator Certification Examination, passed the examination, and was awarded a Department of Environmental Protection Class "C" Wastewater

Treatment Plant Operator Certification. In the years between her initial training in 1993 and her termination in January 2002, Ms. Christensen progressed through training and work experience and acquired a Class "A" Wastewater Treatment Plant Operator Certification.

5. As a wastewater treatment plant operator, Ms. Christensen's responsibilities and duties included conducting turbidity meter tests and recording her test results on the wastewater treatment plant's turbidity tracking sheet log. The process requires that two tests be performed by the wastewater treatment plant operator. The results of the first and second tests are recorded on the tracking sheet, to ensure that the turbidity of the wastewater is within acceptable standards.

6. The City, from time to time, would receive from the Department of Environmental Protection revised standards for turbidity meter testing. Upon receipt of revised standards, the wastewater treatment plant operator is responsible for recalibration of the turbidity meter to the revised standards for the wastewater treatment plant.

7. On January 14, 2002, the City's calibration standard for the turbidity meter changed from 0.8 NTU (Nephelometric Turbidity Units) to 7.9 NTU. The 7.9 NTU turbidity meter calibration change was made on Wastewater Conserve II turbidity

meters and entered in the plant's logbook. Ms. Christensen, as a plant operator, is required to read the plant logbook at the beginning of every work shift.

8. During the period of January 18 through January 25, 2002, during which time the 7.9 NTU turbidity meter standard was installed, Ms. Christensen made eight daily turbidity meter test entries of 0.8 NTUs in the plant's logbook. When, on about January 25, 2002, her supervisor became aware of Ms. Christensen's 0.8 NTU turbidity meter test result entries, he asked her for an explanation. Ms. Christensen explained that she had made the turbidity meter tests on each date indicated by putting the standard in and turning the knob to read 0.8 and always obtained a 0.8 reading, but mistakenly placed the decimal points in the wrong place. The City placed Ms. Christensen on suspension with pay, from January 25, 2002, to January 29, 2002, pending a complete investigation of the circumstances surrounding the eight 0.8 NTU turbidity meter test result entries.

9. To provide Ms. Christensen with an opportunity to vertify her claim of actually having performed eight tests and getting a 0.8 NTU turbidity meter test result each time, and as a means of verifying Ms. Christensen's claim of placing her decimal point in the wrong place by mistake, her supervisor and she agreed that she should perform a turbidity meter test and

prove she had gotten the 0.8 NTU test results January 18 through January 25, 2002, the time the 7.9 NTU turbidity meter standard had been installed.

10. On January 28, 2002, in the presence of Paul Deuel, Chief Operator; George Clark, Mechanic IV/Union Steward; and Bob Hanna, Mechanic VI/Union Representative, Ms. Christensen performed a turbidity meter test but could not obtain the 0.8 NTU turbidity meter test result she claimed to have gotten during the eight-day period of January 18 through 25, 2002.

11. Ms. Christensen's inability to obtain the 0.8 NTU turbidity meter test result she entered in the logbook conclusively demonstrated that she had not performed the turbidity meter tests on the dates indicated. Her inability to obtain the 0.8 NTU test result further proved that the turbidity meter test results of 0.8 NTU entered by Ms. Christensen in the plant's logbook over the eight-day period between January 18 and January 25, 2002, were intentional false entries. Under the observation of her supervisors and the other persons herein above with knowledge and experience with turbidity meter testing, Ms. Christensen appeared to be unfamiliar with the calibration operation of the turbidity meter.

12. The eight entries of 0.8 NTU readings entered on the plant's log by Ms. Christensen over an eight-day period beginning January 18, 2002, and ending January 25, 2002, were

not based upon actual turbidity meter test result readings taken from Wastewater Conserve II's wastewater turbidity meter and did not, in fact, reflect true turbidity meter test result readings. Accordingly, the eight 0.8 NTU test result readings entered by Ms. Christensen were eight intentional false turbidity meter test result entries made in the City's records.

13. Based upon its investigation of the totality of circumstances, including Ms. Christensen's explanation for her invalid readings, her inability to reproduce the 0.8 NTU turbidity meter reading, and her unfamiliarity with the turbidity meter's calibration operation, the City concluded that Ms. Christensen's explanation was intentionally false and her eight log entries were intentionally false. It was upon this conclusive determination of "falsifying city records," and not her age or gender, that the City based its decision to terminate Ms. Christensen's employment.

14. Ms. Christensen was within the class of City employees covered by the collective bargaining agreement (CBA) between the City and the Labor International Union of North America (L.I.U.N.A.), Local 678. Article 22.3 of the CBA provides, in part, that: "[D]ischarge will be imposed if any employee . . . has committed a major offense." Under subsection 7, major offenses may include "falsification of records, official statements, or omitting information on records."

15. After her termination, Ms. Christensen exercised her right to grieve her termination under Article 10 of the CBA. Subsequent to filing her grievance, Labor Relations Specialist, Angel Cardona, negotiated a settlement of Ms. Christensen's grievance wherein she agreed to drop her grievance in exchange for her "no rehire" status to be changed to a "rehire" status.[2]

16. Ms. Christensen's proffered circumstantial evidence of both male and female City employees, within the age group of 40 to 58 years old, including wastewater plant employees and employees in other areas of service, who made mistakes in completing City documents and were not terminated. In each example presented by Ms. Christensen, the City successfully demonstrated that each named employee either voluntarily resigned his or her position with a "no rehire" notation in his or her personnel file or was terminated by the City. Ms. Christensen was given the option to have a "no rehire" notation in her personnel file, but refused and sought relief through this proceeding.

17. The City proved that both male and female employees who were terminated were terminated only after it was determined that each City record entry was not a mistaken entry but was an "intentional false entry," and, in each case, the employee was terminated as in the instant case.

18. Based upon the Findings of Fact hereinabove and the evidence of this record, Ms. Christensen has failed to establish, by circumstantial evidence, a prima facie case that would support a finding that unlawful discrimination was the cause or was a part of the cause for the City's termination of her employment.

19. The City articulated a legitimate reason for the termination of Ms. Christensen's employment as a wastewater treatment plant operator, "falsification of city records." This is a legitimate reason for the termination by the City without regard or consideration of Ms. Christensen's age or gender.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding pursuant to Sections 120.569(1), 120.57(1), and 760.11(7), Florida Statutes.

21. Section 760.10(1)(a), Florida Statutes, provides that it is an unlawful employment practice for an employer:

> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

22. The FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

23. The United States Supreme Court established, in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII, which is persuasive in cases such as that at bar, as reiterated and refined in the case of St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

24. This analysis illustrates that a petitioner has the burden of establishing, by a preponderance of evidence, a prima facie case of discrimination. If that prima facie case is established, the defending respondent must articulate a legitimate, non-discriminatory reason for the action taken against the petitioner. The burden then shifts back to the petitioner to go forward with evidence to demonstrate that the offered reason is merely a pretext for unlawful discrimination. The Supreme Court stated in Hicks, before finding discrimination in that case, that: "[T]he fact finder must believe the plaintiff's explanation of intentional discrimination."

509 U.S. at 519. In the Hicks case, the Court stressed that even if the fact finder does not believe the proffered reason given by the employer, the burden remains with the petitioner to demonstrate a discriminatory motive for the adverse employment action taken.

25. In order to establish a prima facie case, Petitioner must establish that she is a member of a protected group; that she is qualified for the position in question; that she was actually subjected to an adverse employment decision; that she was treated less favorably than similarly situated persons outside her protected class; and that there is some causal connection between her membership in the protected group and the adverse employment decision that was made. See Canino v. U.S., E.E.O.C., 707 F.2d 468 (11th Cir. 1983); and Smith v. Georgia, 684 F.2d 729 (11th Cir. 1982).

26. Here, Petitioner alleges the following adverse and discriminatory employment actions:

> Terminated me for putting my decimal point in the wrong place on a city document. Other male employees put erroneous numbers on or no number at all. Past employees admittedly falsified city records (all males) and they were suspended for 3 days, kept their jobs. I had been on light duty for 2 months, superintendent had to carry samples, they did not like that.
> I rounded off 7.9 to 0.8 -put my decimal point in wrong place. Did perform samples. Did not terminate male employees for similar offenses.

> I did not falsify any records, I was discriminated against. I had worked midnights for a long time and had problems sleeping. City did not terminate male employees.

27. Petitioner seeks the following relief:

> Back pay, retirement, and personal leave, raises I would have received. Income I was deprived of for the next 10 years; yearly bonuses past and future; insurance; pain, stress, suffering and inconvenience caused.

28. Viewed most favorably toward Petitioner's position and argument in her Proposed Recommended Order, the preponderance of the evidence fails to establish a prima facie case of unlawful discrimination by Respondent and fails to support her position that her termination was on the basis of her age and gender.

29. To the contrary, the credible, material and substantial evidence shows that Respondent was consistent in its non-discriminatory termination of employees, both male and female within the age group as Petitioner, for "falsification of city records." Respondent clearly established a legitimate reason for Petitioner's termination, that of "falsification of city records."

30. Petitioner failed to carry the burden and prove by a preponderance of the evidence that Respondent's reasons for Petitioner's termination were either false or pretextual, or that her sex (female) or age (58) was the real reasons for

Petitioner's termination. Accordingly, Petitioner's Petition for Relief should be dismissed.

RECOMMENDATION

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

The Florida Commission on Human Relations enter an order of dismissal of Petitioner's, Carmen Christensen, Petition for Relief based on gender and age discrimination against Respondent, the City of Orlando.

DONE AND ENTERED this 10th day of June, 2003, in Tallahassee, Leon County, Florida.

FRED L. BUCKINE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of June, 2003.

ENDNOTES

1/ At the time of her termination, Petitioner lived in the city of Orlando, Florida. After her termination and prior to this cause being transmitted to the Division of Administrative Hearings, Petitioner relocated to 5419 Shiloh Drive, Adamsville, Alabama 35005, resulting in a temporary delay in exchange of correspondence.

2/ The Department of Environmental Protection, by letter dated October 2, 2002, signed by Vivian F. Garfein, Director, Central District, informed Ms. Christensen of the determination, which was based upon record reviews performed on February 26 and April 23, 2003, that revealed specific violations of Rule 62-602.650(1), Florida Administrative Code, Duties of Operators, to wit: (1) Perform responsible and effective on-site management and supervision over personnel and plant functions including, if applicable, reuse and disposal systems within the operator's responsibility; and (2) Submit all required reports in the manner required by the Department in Rule 62-601.300 or 62-550.730, Florida Administrative Code, to the permittee or supplier of water. The specific violations discovered were: inaccurate information documented in the turbidity calibration logbook. "On January 14, 2002, the turbidity standard was changed from 0.8 NTU to 7.9 NTU. However, over an eight-day period beginning January 18, 2002, and ending January 25, 2002, you made seven (7) calibration entries of 0.8 NTU, which differs from the new standard of 7.9 NTU." As a result, DPR placed Ms. Christensen on probation for two years from the date of the letter and required her to complete one Continuing Education Unit during probation. Ms. Christensen did not accept this resolution even though it would have retained her employment with the City of Orlando.

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.