

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESPERANZA GONZALEZ,)
)
 Petitioner,)
)
 vs.) Case No. 03-0720
)
 SUNGLASS HUT, INC., n/k/a)
 LUXOTTICA RETAIL,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on May 27, 2003, by video teleconference between Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Esperanza Gonzalez, pro se
1411 Meridian Avenue, Apartment 1
Miami Beach, Florida 33139

For Respondent: Mark J. Chumley, Esquire
Keating, Muething & Klekamp, PLL
1400 Provident Tower
One East Fourth Street
Cincinnati, Ohio 45202

STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner based on her age as alleged in the Petition for Relief from an Unlawful Employment Practice (Petition for Relief) filed with

the Florida Commission on Human Relations (FCHR) on February 26, 2003.

PRELIMINARY STATEMENT

By her "Amended Charge of Discrimination" dated March 7, 2001, Petitioner charged her employer (Respondent) with discriminating against her based on her age. Petitioner gave the following description of how she had been discriminated against based on her age:

1. In December 1999 I was given a poor evaluation although my sales and performance had been good. I believe this was done in an attempt to keep me from obtaining a promotion. I was also harassed by my supervisor. . . .

2. In April/May 2000 [I] was passed over for a promotion. The position of manager was offered to a young female (Farrah Shafi) with very little experience (approximately 23 years old) who was new to the company. Due to her sales she was never actually given the title of Manager.

3. I was denied training which was given to Ms. Shafi. . . .

Following its investigation, FCHR entered its "Notice of Determination: No Cause" on January 21, 2003.

On February 26, 2003, Petitioner filed her Petition for Relief with FCHR that alleged she had been passed over for a promotion as manager and given an unfair performance evaluation. The Petition for Relief did not repeat the allegation contained in the Amended Charge of Discrimination that she had been denied training that had been given Ms. Shafi.¹

The FCHR referred the matter to the Division of Administrative Hearings, and this proceeding followed. At the final hearing, the parties offered one joint exhibit (Petitioner's performance evaluation in December 1999). Petitioner testified on her own behalf, but presented no other witnesses. Petitioner offered two exhibits, neither of which was admitted into evidence because neither was shown to have any relevance to any matter at issue in this proceeding. Following the final hearing, Petitioner mailed to the undersigned several documents that she wanted admitted as exhibits. These documents were not authenticated at the final hearing, have not been admitted into evidence, and were not considered by the undersigned in the preparation of this Recommended Order.

Respondent presented the testimony of Ricky Boykin, who is Respondent's human resources manager. Respondent offered one exhibit, which was admitted into evidence.

No transcript of the proceedings has been filed. Respondent filed a Proposed Recommended Order, which has been considered by the undersigned in the preparation of this Recommended Order. Petitioner did not file a Proposed Recommended Order.

All statutory citations are to Florida Statutes (2002), unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is a female who was born April 29, 1946. At all times material to this proceeding, Respondent employed Petitioner as a sales person at a retail sales counter operated by Respondent, but located within a Burdines department store. Respondent did not have an on-site manager for this sales location.

2. In December 1999, Petitioner received a routine performance evaluation signed by Joyce Rodriguez, who was Petitioner's supervisor. This was a favorable evaluation that rated Petitioner in each category as either having "Exceeded Standards" or "Achieved Standards." As a result of this favorable evaluation, Petitioner received an increase in her hourly rate of pay. There was no evidence that Petitioner was discriminated against by her 1999 performance evaluation or by the pay increase she received as a result of that evaluation.

3. Ms. Shafi, the employee mentioned by name in Petitioner's Amended Charge of Discrimination, was not hired by Respondent for a management position, nor was she ever promoted to a management position.

4. Petitioner has never applied for or otherwise requested a management position with Respondent. Opportunities for entry-level management positions exist only at retail locations with on-site managers, which would require Petitioner to transfer to

another location. Respondent's management has discussed such positions with Petitioner at various times, but she failed to take advantage of any of these opportunities.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this case pursuant to Sections 120.569 and 120.57(1).

6. Section 760.10 prohibits employment discrimination based on an individual's age. Section 760.10(1)(a) provides, in part, as follows:

1. It is an unlawful employment practice for an employer:

(a) 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.

* * *

(4)..It is an unlawful employment practice for any employer . . ., to discriminate against any individual because of . . . age . . . in admission to, or employment in, any program established to provide apprenticeship or other training.

7. Petitioner has the burden of proving by the preponderance of the evidence a prima facie case that Respondent committed an unlawful employment practice. See Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). If that prima facie case is

established, the defending Respondent must articulate a legitimate, non-discriminatory reason for the action taken against Petitioner. The burden then shifts back to Petitioner to go forward with evidence to demonstrate that the offered reason is merely a pretext for unlawful discrimination. See McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973); 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).

8. Petitioner presented no evidence that would establish a prima facie case of discrimination against Respondent, and the burden of going forward with the evidence never shifted to Respondent. Petitioner failed to meet her burden of proof in this proceeding, and her Petition for Relief should be dismissed.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 6th day of October, 2003, in
Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of October, 2003.

ENDNOTE

1/ This allegation refers to Respondent's training program for new sales associates referred to as the "On-Boarding" program. This training program was not available when Petitioner was hired, and there was no evidence that the training program would have enabled Petitioner to become a manager. Respondent's management has offered Petitioner the opportunity to participate in the On-Boarding program, but she declined the offer.

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.