

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT LARSON,)
)
 Petitioner,)
)
 vs.) Case No. 04-2709
)
 LAKEVIEW CENTER, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for final hearing, as noticed, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Shalimar, Florida on January 5, 2005. The appearances were as follows:

APPEARANCES

For Petitioner: Robert Larson, pro se
919 Roanoke Court
Fort Walton Beach, Florida 32547

For Respondent: Russell F. Van Sickle, Esquire
Beggs & Lane
Post Office Box 12950
Pensacola, Florida 32591-2950

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner was a victim of discrimination based upon

his age and disability, in purported violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

This cause arose upon the filing of a charge of discrimination by the above named Petitioner with the Florida Commission on Human Relations (Commission) on January 2, 2004. The charge of discrimination alleges that the Petitioner was terminated due to disability (depression) and his age. This charge led to a Commission investigation of the matter, with the ultimate finding of "No Cause." Based upon that finding the Petitioner submitted a Petition for Relief on August 2, 2004. In that Petition he alleges that his termination was due to issues concerning his disability and his age.

The cause was transmitted to the Division of Administrative Hearings on August 2, 2004, and ultimately came on for hearing before the undersigned as noticed. Respondent's Answer to the Petition was filed August 17, 2004.

At the hearing the Petitioner presented his own testimony and that of Elena Laufer and David Gambrell. The Respondent presented the testimony of James Avett, Richard Baker, Russell Schreiner, and Johnnie Zimmerman. The Respondent presented seven exhibits which were admitted into evidence. Upon conclusion of the proceeding a transcript was ordered and the parties were given the opportunity to submit proposed

recommended orders. The Proposed Recommended Orders submitted have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, Robert Larson, was hired by Gulf Coast Enterprises (GCE) in November 2000, as a mail clerk and driver, under a contract that GCE had with the federal government to conduct postal services for Hurlburt Field Air Force Base near Fort Walton Beach. His job duties included picking-up and delivering mail at various points on that military base. His duties included the handling of "confidential" or "accountable" mail.

2. GCE is a division of the Respondent, Lakeview Center, Inc. Lakeview Center, Inc., is a mental health community behavioral treatment center in Pensacola, Florida. GCE is a vocational division of Lakeview Center, Inc., whose mission is to provide job opportunities for disabled persons. GCE enters into contracts with other entities, including the federal government, designed to enable it to place people with disabilities in jobs, to work through service contracts which GCE enters into with those other entities. This is a preferential contract, "set aside" program under the federal Javits-Wagner-O'Day Act, which allows GCE to contract with the federal government for job placement of disabled persons outside of the normal contract bidding process. The provisions of this

arrangement provide that the contract services must meet government quality standards and at least 75 percent of the direct labor for performing the contract must be provided by people with disabilities.

3. The Petitioner was qualified to be hired by the Respondent under this program because he has a disability, depression. Although the Petitioner's supervisors knew he had a disability, as a matter of policy the Respondent does not disclose the identification of an employee's particular disability to the employee's supervisor. The documentation of an employee's specific disability was kept by the Respondent in a confidential file, separate from the regular personnel file information to which the employees' supervisors had access.

4. Four employees worked in the Petitioner's department during the time pertinent hereto. The project manager was James Avett. The assistant project manager was Richard Baker and James Bacon and the Petitioner were mail clerks and drivers. The Petitioner reported to the project manager and when the project manager was unavailable to the assistant project manager.

5. The Petitioner's supervisor, Mr. Avett, received two complaints from customers on the Petitioner's mail route on November 4, 2003. Those customers were Onjel Gambrell and Technical Sergeant Armour. Both complaints alleged the

Petitioner was being rude to customers. Ms. Gambrell who worked at the Hurlburt Field Library, wrote an e-mail setting forth her complaint about the Petitioner. That e-mail described the Petitioner as rude, as not responding to greetings from the customer, and specifically scolding employees of the library for moving the mail box location within the library. The library was under renovation, necessitating the movement of the mail box.

6. After speaking with the customers who were making the complaints, Mr. Avett asked the Petitioner to come into his office to talk about the complaints. Mr. Avett asked Assistant Project Manager, Richard Baker, to also attend the meeting. Mr. Avett informed the Petitioner at the meeting concerning a customer complaints, showed him Ms. Gambrell's e-mail and started to discuss the importance of customer relation skills. In response, the Petitioner refused to acknowledge that he did anything wrong, or that there was need for any improvement on his part. The Petitioner said that both customers were lying.

7. The Petitioner then launched into a series of complaints directed at Mr. Avett and Mr. Baker. He complained that Mr. Baker would yell at him but Mr. Avett had not heard Mr. Baker yell at anyone. When Mr. Baker tried to respond to the accusation, the Petitioner looked at Mr. Avett and asked Avett to tell Mr. Baker to be quiet while the Petitioner was

talking. The Petitioner complained that Mr. Avett and Mr. Baker could do a better job in supervising.

8. The Petitioner also complained that the other mail clerk/driver, James Bacon, did not yet have his security clearance from the federal government, and therefore Mr. Bacon could not yet handle the confidential mail. Mr. Avett explained that it was normal to have a delay in gaining a security clearance and that Mr. Baker, as assistant manager, had to be in the office when Mr. Avett was not in the office. After listening to these complaints by the Petitioner, the meeting was adjourned, to be resumed on the next morning because of the lateness of the day.

9. On November 5, 2003, Mr. Avett presented the Petitioner with a performance discussion record filled-out by Mr. Avett. That record constituted a written warning to the Petitioner regarding the two mail stops where people had complained about the Petitioner's rudeness when delivering mail to their offices. The desired outcome depicted on that document was noted in the written warning and required that the Petitioner conduct himself in a professional manner, being respectful, courteous, and helpful to all customers 100 percent of the time. The consequences noted in the written warning were additional counseling, with the possibility of dismissal for failure to comply.

10. The Petitioner was told to read and sign the performance record, but refused, contending that none of it was true. Instead the Petitioner requested that he meet with Mr. Avett's supervisor. Mr. Avett told the Petitioner that he would arrange such a meeting. Russell Schreiner, Mr. Avett's supervisor, agreed to a meeting on the following Monday, November 10, 2003.

11. Mr. Schreiner met with the Petitioner and Mr. Avett on that day. The Petitioner stated at the meeting that the complaining customers were lying and being vindictive. He did not believe that he should have a written warning concerning those customer complaints. He refused to sign the performance discussion record containing the warning. The Petitioner also complained about the mail delivery schedule; complained that he had never met Ms. Gabrell; and complained that Mr. Bacon did not yet have his security clearance. He also complained about not being allowed to use military computers for his personal internet use, even though such use would have been in violation of pertinent military rules and GCE rules.

12. The Petitioner continued to refuse to acknowledge customer complaints and refused to sign the written warning. He refused to concede that improvement was needed on his part.

13. After the November 10, 2003, meeting, Mr. Schreiner spoke with Johnnie Zimmerman at the Respondent's Human Resources

Department and discussed his concerns about the Petitioner not acknowledging customer complaints and not being content with his job. He was concerned that the Petitioner could become a security risk because he worked with confidential military documents in the course of his job. The decision was made however, to allow the Petitioner to continue in his employment.

14. On December 11, 2003, another customer complaint was lodged against the Petitioner by Master Sergeant Pitt. Master Sergeant Pitt was responsible for overseeing the Hurlburt Postal Services Contract with the Respondent. Master Sergeant Pitt complained to Mr. Avett that the Petitioner had called the Military Communication Squadron "Help-desk," which he was not authorized to do, and informed the "Help-desk" that Master Sergeant Pitt was unavailable and unresponsive to the needs of the Petitioner because Sergeant Pitt was performing other duties. The Petitioner conceded that he called the "Help-desk" and the first thing the "Help-desk" person asked him when he called was why he was not communicating with Master Sergeant Pitt. Mr. Avett counseled the Petitioner about this complaint from Master Sergeant Pitt, instructing him that under no circumstances was he to go to the "Help-desk," but if he was having a problem with Master Sergeant Pitt to direct those concerns to Mr. Avett.

15. On the next morning, December 12, 2003, before Mr. Avett arrived at the office, the Petitioner began yelling at his assistant project manager, Mr. Baker. He was yelling that the accountable mail should have been marked by Mr. Avett or Mr. Baker in large black marker letters for its destination to ease the job of the person making the actual delivery. In reality the mail was in exactly the same condition it normally was when picked up for delivery. The Petitioner began complaining in a loud voice and cursing, concerning the manner in which the accountable mail was marked. Mr. Baker told Mr. Avett that the Petitioner was being mad, loud, and was cursing, and Mr. Avett tried to calm the Petitioner down. However, the Petitioner continued to get louder and more belligerent, telling Mr. Avett and Mr. Baker to "get off their fat asses" and to start doing something. The Petitioner was sent home at this point and, after consultation with Mr. Schreiner and Ms. Zimmerman, the decision was made to discharge the Petitioner. The termination was due to an accumulation of incidents involving misconduct, including particularly the Petitioner's conduct on December 12, 2003, his refusal to accept responsibility for the customer complaints, and the security risk he might pose as someone who handles confidential military mail. The discharge decision was recommended by Mr. Schreiner and approved by Ms. Zimmerman.

16. In his testimony at the final hearing the Petitioner contended that the written warning of November 4, 2003, was not warranted. During the hearing he attempted to claim that he was not aware of the nature of the customer complaints on November 4, 2003, but he also testified that at the time he was asked about the complaints on that date he knew exactly which two situations Mr. Avett was referring to. He knew that the customers had complained of his rudeness.

17. Ms. Gambrell testified at the hearing and established that she had informed the Petitioner on multiple occasions that the mail drop box at the library had to be moved due to ongoing library renovations in the front desk area of the library. The Petitioner nevertheless continued to yell at her concerning the moving of the box even after repeatedly being informed that renovations necessitated moving the mailbox. The Petitioner had even refused to pickup the mail on occasion when the mailbox was not where the Petitioner thought it should be. Ms. Gambrell established that the Petitioner yelled at library employees and was rude to them and acted in an unprofessional manner.

18. Some of the Respondent's customers were thus upset with the Petitioner's conduct and the Respondent felt that it had to give a written warning to the Petitioner regarding his interaction with customers in order to ensure good customer relations. The Petitioner's attitude and position, made known

to his supervisors, that each customer was lying or being vindictive are not credible and indicate that he lacked of willingness to improve customer relation skills in spite of his supervisors admonishment that he needed to do so.

19. Although the Petitioner contended at hearing that he had to ask someone in the library to help him find the mailbox when it was moved during renovations, in his deposition he testified that he saw the mailbox in its new location without having to ask anyone. He also acknowledged at hearing that the library was undergoing renovations. It is simply not demonstrated in this record that it was reasonable for the Petitioner to berate the customers of his company, the library personnel for moving the mailbox when the library was being renovated. Rudeness toward a customer of his employer company is certainly a reasonable basis for his employer to be concerned and to admonish him against further such incidents.

20. Concerning the events of the morning of December 12, 2003, the Petitioner has conceded that he was upset and raised his voice at Mr. Avett and Mr. Baker. Indeed he told them to "get off their fat asses" or "fat butts" among other vulgarities. There is no question that the Petitioner yelled at his supervisors on that day and in doing so was insubordinate.

21. The Petitioner contended that the assistant project manager, Baker, had yelled at him during his employment.

Mr. Baker denied having yelled at him, but, in any event, Mr. Baker played no part in the decision to discharge the Petitioner and Mr. Baker never made any age or disability-related comments toward the Petitioner.

22. The Petitioner was sixty-six years old at the time of his discharge from the Respondent's employment. He also suffered from the disability of depression. The Petitioner's age or disability was never the subject of any reference with regard to his discharge, to the customer complaints, or to the December 12, 2003, action of insubordination by the Petitioner. The only comments made to the Petitioner, in the Petitioner's version of events, were made by Mr. Avett when Mr. Avett allegedly called him "old fart." He also testified that Mr. Avett told him that he should not worry about embarking on a 401K retirement plan because he was going to retire soon. Mr. Avett denied making either comment and stated that he never had a conversation with the Petitioner about a 401K plan and that the Respondent does not even have a 401K retirement program. The Petitioner was unable to recall when Mr. Avett purportedly made either of the alleged comments and did not remember the context at hearing. In his deposition however, he described the "old fart" reference as having been in a jovial manner anyway. The Petitioner's testimony in this regard is not sufficiently credible to establish that Mr. Avett made the

comments, particularly in the context the Petitioner sought to establish.

23. The evidence reveals that Mr. Schreiner, who recommended discharge, and Ms. Zimmerman, who made the discharge decision, never made any comments concerning the Petitioner's age or disability. The Petitioner had testified that Mr. Avett once told him that he thought that "only women got depression." Mr. Avett denied making such a comment and denied even being aware of the nature of the Petitioner's disability during 2003. This is because the nature of the disabilities of employees at the company (which is in the business of hiring and placing disabled employees) is a matter which remains confidential in personnel files. It is not generally known throughout the company, even by supervisors.

24. The Petitioner was unable to identify any of the Respondent's employees who were not in his protected class, who were treated differently after refusing to acknowledge customer complaints and after being insubordinate.

25. The Petitioner never complained of age or disability discrimination when he was employed with the Respondent. He never requested any accommodation for his disability from the Respondent. He had received the "harassment policy" from the Respondent in September of 2003 and knew how to make a complaint if he believed one was warranted. He made complaints during his

employment, including that Mr. Baker had yelled at him, but these complaints did not relate to age or disability discrimination.

26. Indeed the Petitioner had a number of conflicts with Mr. Avett during the course of his employment tenure, that did not relate to age or disability issues. The Petitioner, for instance, complained that Mr. Avett and Mr. Baker, who were Air Force retirees, were viewed as more valuable to the Respondent company than the Petitioner because their work was conducted on a Air Force base. The Petitioner complained about the extremely "political" atmosphere at Hurlburt Field and at the offices of the Respondent. He complained about Mr. Avett's smoking cigarettes in a restroom and in a company work van when he was alone. These complaints tend to indicate that the Petitioner held some animus or bias toward Mr. Avett and Mr. Baker. There is no preponderant, persuasive evidence of any discriminatory animus, in terms of age or disability discrimination by the Respondent, or any supervisory staff toward the Petitioner.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

28. Chapter 760, Florida Statutes, the Florida Civil Rights Act, prohibits discrimination on the basis of age or disability.

§ 760.10, Fla. Stat. The issue that must be determined concerns whether the age or disability of the Petitioner actually played a role in the employer's decision-making process and had any determinative influence on the outcome. See *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

29. In a case such as this, where there is no direct evidence of age discrimination, the burden shifting analysis in *McDonnell-Douglas Corporation v. Greene*, 411 U.S. 792 (1973), is applied. Under this analysis the Petitioner must first prove a prima facie case of age discrimination. In order to do this the Petitioner must show that he (1) was a member of a protected age class; (2) that he was subject to an adverse employment action; (3) that he was qualified for the job; (4) that he was replaced by a younger individual. See *Chapman*, 229 F.3d at 1024. It has been held by the Florida Commission that Chapter 760, Florida Statutes does not specify any particular age threshold, persons of any age are protected by the statute. Thus, arguably, all persons would meet the first prong of a prima facie case, and, presumably, the fourth prong of the prima facie case could be satisfied simply by a petitioner by having been replaced by

either a younger or older person. However, determination of these issues is not relevant to the case at hand because the Petitioner was sixty-six years old and thus under any standard met the first prong of a prima facie case. He was also discharged from employment, so the second portion of the prima facie case test, that he suffered an adverse employment action, has been established. He is also qualified for his position, except for the conduct precipitating his discharge, thus meeting the third requirement of a prima facie showing. The Petitioner however, did not satisfy the fourth part of the prima facie case test, because the Petitioner did not provide any evidence as to the age of any person replacing him after his discharge.

Moreover, he did not show that he was replaced. Accordingly, the Petitioner's age discrimination claim must fail because of a failure to establish a prima facie case of age discrimination.

30. Assuming arguendo though that a prima facie case of age discrimination was made out by the Petitioner, the Respondent articulated a legitimate, non-discriminatory reason for the discharge. Id. The Petitioner was discharged directly following an episode of insubordination to his supervisors described in the above Findings of Fact, concerning his yelling, criticizing, and using profanity towards his supervisors. He had also refused to sign a written warning regarding being rude to the Respondent's customers and had caused another customer

complaint by an individual who supervised the postal services contract provided by the Respondent, Master Sergeant Pitt. The burden thus falls upon the Petitioner to prove that the reason given by the employer was not the real reason for the discharge, but was a pretext and to otherwise prove that age was really the motivating factor in the discharge decision. Id. This burden has not been met.

31. The preponderant, persuasive evidence of record does not show that age played any part in the decision to discharge the Petitioner. Had the Respondent wished to discharge the Petitioner because of age the Respondent could have done so as soon as the Petitioner refused to sign the written warning or acknowledge customer complaints directed at the Petitioner. Even after the customer complaints and the Petitioner's inappropriate response to them, the Respondent gave the Petitioner another opportunity to succeed, which the Petitioner failed to take advantage of. The discharge decision was not made until after the clearly insubordinate acts of December 12, 2003. Age was not a factor. The Petitioner presented no evidence that the discharge reasons given by the Respondent were pretextual. The Petitioner was unable to present evidence that any similarly situated individual of any other age older, or younger was treated differently by the Respondent.

Disability Discrimination Allegation

32. The Petitioner maintains that he was discharged because of his disability as well. This is a somewhat unique situation of alleged disability discrimination because the Petitioner was qualified for his job because he had a disability. His employer was in the business of employing and placing for employment persons who had disabilities. Had the Petitioner not had a disability he likely would not have been hired by the Respondent in the first place. The Respondent's mission is to place persons with disability in employment positions; thus, the Petitioner is in the position of having the burden to prove that his employer which is in the business of routinely employing disabled persons discharged him because he was disabled.

33. The burden-shifting analysis referenced above is also used for allegations concerning disability discrimination where, as in this case, there is no direct evidence of disability discrimination. See Rosbach v. The City of Miami, 371 F.3d 1354 (11th Cir. 2004). In order to state a prima facie case of disability discrimination, the Petitioner must show that he was disabled, was qualified for his job with or without reasonable accommodation, and was replaced by a non-disabled employee or otherwise unlawfully discriminated against because of his disability. Id.

34. The Petitioner was not able to state a prima facie case of disability discrimination because, although he has a disability, was subject to an adverse employment action, and was qualified for his job (except for the conduct that precipitated his discharge), he failed to present any evidence that he was replaced with either a non-disabled employee or even an employee that did not suffer from depression, the Petitioner's specific disability.

35. The Petitioner also did not rebut the Respondent's articulated, legitimate non-discriminatory reason for the discharge. The Petitioner did not meet his burden of persuasion to show that disability was the motivating factor in the decision to discharge him.

36. Although the Petitioner did not raise any claim for a denial of a reasonable accommodation, it is notable that the Petitioner admitted that he never sought any accommodation for his disability. The employee seeking the accommodation has the burden to request one. See Gaston v. Bellingrath Gardens and Home, Inc., 167 F.3d 1361, 1363-64 (11th Cir. 1999). The Petitioner neither alleged any failure to offer reasonable accommodation nor did he identify any such reasonable accommodation. Any hypothetical reasonable accommodation for the Petitioner's depression could not be reasonable if it went so far as to allow rudeness to customers, to allow failure to

acknowledge areas of needed improvement in customer relation skills, and to allow yelling and insults to supervisors. The communication and customer service skills were identified requirements in the job description, which required daily interaction with customers. The Respondent had a right to expect courteous and respectful behavior towards customers from the Petitioner, because poor customer service could result in termination of the postal services contract with the federal government, thus eliminating all of the GCE jobs of persons employed under the contract.

37. The Petitioner has simply failed to carry his burden of persuasion that either disability or age were motivating factors in his discharge.

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 in its entirety.

DONE AND ENTERED this 2nd day of May, 2005, in Tallahassee,
Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
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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.