

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WYN SAMUEL,)
)
 Petitioner,)
)
 vs.) Case No. 05-0566
)
 COLORADO BOXED BEEF COMPANY,)
 INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal proceeding and hearing before P. Michael Ruff duly-designated Administrative Law Judge in St. Augustine, Florida, on June 21, 2005. The appearances were as follows:

APPEARANCES

For Petitioner: Wyn Samuel, pro se
130 Willow Pond Lane
Ponte Vedra Beach, Florida 32082

For Respondent: Robert J. Stovash, Esquire
Stovash, Case and Tingley, P.A.
Sun Trust Center
200 South Orange Avenue, Suite 1220
Orlando, Florida 32801

J. Scott Hudson, Esquire
200 South Orange Avenue, Suite 1220
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STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Petitioner was discriminated against through an adverse employment decision by the Respondent, because of the Petitioner's age.

PRELIMINARY STATEMENT

This cause arose upon the filing of a charge of discrimination, based upon age, and then an amended charge of discrimination pursuant to Sections 760.01 through 760.11, Florida Statutes. Specifically, it was alleged by the Petitioner that the Respondent, Colorado Boxed Beef Company, Inc., had committed an unlawful employment practice by discriminating against the Petitioner based upon his age, and retaliation for the same reason, in terms of reducing the Petitioner's compensation and terminating him.

The allegations in the charge and amended charge were investigated by the Florida Commission on Human Relations (Commission) which ultimately determined that there was no reasonable cause to believe that a discriminatory act or practice in employment had occurred. The determination of "no reasonable cause" was issued on January 7, 2005. Thereafter, the Petition for Relief was filed by the Petitioner and the matter was duly transmitted to the Division of Administrative Hearings and the undersigned administrative law judge for the

conduct of a formal proceeding and hearing to resolve the dispute.

The cause came on for hearing as noticed. The hearing was conducted in St. Augustine, Florida on June 21, 2005. During the hearing the Petitioner called one witness, himself, to testify on his behalf. The Respondent presented the testimony of one witness as well, George Carter. Additionally, the Respondent presented two exhibits, which were admitted into evidence. The Petitioner presented no exhibits. Upon conclusion of the proceeding, the parties requested a transcript thereof and sought to file proposed recommended orders. Proposed recommended orders were timely filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner was hired by the Respondent on or about April 27, 1998, as a salesperson. When the Petitioner was hired he was 77 years of age. He is currently 84 years of age. Apparently the principal reason the Petitioner was hired was because of his substantial business contacts and principal client, which was Winn Dixie Stores, Inc. The Petitioner had sold food, principally seafood, to Winn Dixie for a substantial period of time. The Petitioner worked for a division of the Respondent known as the Great Fish Company. The Great Fish

Company began operations in October of 1998. Mr. Carter, the president of Great Fish Company was the Petitioner's supervisor.

2. During his employment with the Respondent, the Petitioner worked from his home. He sold seafood to customers, principally Winn Dixie, for which he was primarily paid on a commission basis.

3. During his term of employment his compensation plan was periodically changed by the Respondent. Some of those changes financially benefited the Petitioner in some years and other changes served to reduce his commission or compensation. During the term of the Petitioner's employment with the Respondent, the Respondent also periodically changed the compensation plans of other employees of the Respondent; some of those changes involved reductions of their compensation plans and some involved increases. This depended upon the sales volume of those individual employees or the revenue situation of the company overall.

4. In or about June of 2003, the Respondent changed the Petitioner's compensation plan. This change did not benefit the Petitioner but represented a reduction in compensation. This change to his compensation plan, however, was based upon legitimate business and financial reasons and was non-discriminatory, because it was based upon a down-turn in business, sales, and revenue for the company.

5. Around the same period of time, the Petitioner advised the Respondent that he believed he was underpaid on earned commissions. Because of this the Respondent performed an audit of the Petitioner's commissions to determine if indeed he had been underpaid. The results of that audit did not establish that the Petitioner had been underpaid but rather that he had been overpaid by approximately \$9,000.00 dollars. The audit results were provided to the Petitioner and the Petitioner disputed the results.

6. The Petitioner never complained during his employment to any employees of the Respondent or supervisors suggesting that any employees or supervisors had discriminated against him or retaliated against him because of his age or because of his dispute concerning compensation, during his term of employment. There is no evidence that the Petitioner was singled-out or treated less favorably than other employees, including other employees of different ages, in terms of his compensation or other employment conditions. Indeed, there was no persuasive evidence presented at hearing that the Petitioner was treated less favorably in any way than other employees of the Respondent, regardless of their ages.

7. There apparently came a time after June of 2003 and during 2004 when the Petitioner earned very little or no commissions from the Respondent. His employment was never

actually terminated by the Respondent. The Petitioner rather either voluntarily quit his employment sometime prior to the final hearing or his sales opportunities dropped off so that, essentially, he was earning little or no compensation from the Respondent, while working out of his home in accordance with their arrangement. This down-turn in business apparently had a great deal to do with the severe financial circumstances his principal customer, Winn Dixie Stores, Inc., found itself in during this same period of time. In any event, the reduction in the Petitioner's commissions and compensation was not shown to be due to any effort or intent by the Respondent to single him out because of his age and reduce his compensation in some effort to force him to resign or retire. The reduction in his compensation was for the business reason of a decrease in revenues generated by the Petitioner himself or being experienced by the company as a whole, necessitating reduction of not only the Petitioner's but other employee's compensation, as a matter of a prudent business practice by the Respondent.

CONCLUSIONS OF LAW

8. 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. (2004). In a proceeding such as this the initial burden is upon the Petitioner to establish a prima facie case of discrimination

based upon his age. Once he establishes that prima facie case, then the burden to go forward with evidence shifts to the Respondent to show a legitimate, nondiscriminatory reason for the employment action in question. If the Respondent articulates such a reason the burden to go forward shifts back to the Petitioner to show by preponderance of the evidence that the reason offered by the Respondent is pre-textual and that its true reason is indeed discrimination. McDonnell-Douglas Corporation v. Green, 411 U.S. 798, 801 (1973); Lee v. GTE Florida, 223 F.3d 1249, 1253 (11th Cir. 2000).

9. In terms of the Petitioner establishing a prima facie case of discrimination based upon age, it is undisputed that the Petitioner was 77 years of age when he was hired. It is also undisputed that he was qualified and capable of performing the duties of his employment position. One of the elements of a prima facie case of age discrimination, however, is that the Petitioner has been treated differently and less favorably than similarly situated individuals of "different" age (as opposed to only those of a "younger" age). See Musgrove v. Gator Human Services, c/o Tiger Success Center, et al., 22 F.A.L.R. 355, at 356 (FCHR 1999). See also Morris v. Emory Clinic, 402 F3d 1076, 1082 (11th Cir. 2005). The Petitioner in this case has not shown persuasive evidence that he suffered an adverse employment action while others having comparable or lesser qualifications

than he did not suffer such adverse employment actions (reductions in compensation) nor was it shown that the other employees were accorded more favorable treatment than he was accorded.

10. The evidence rather shows that a number of employees suffered compensation reductions based upon legitimate business reasons of loss of sales and revenues. The Petitioner was not singled-out for such treatment. While it is unfortunate that, apparently, sales drastically declined with his principal client, Winn Dixie, the resultant reduction in commission compensation to him was not shown to be due to a discriminatory or retaliatory intent by the Respondent. It was simply the result of an unfortunate decrease in the Respondent's and the Petitioner's sales volume and revenue. Consequently, for the above reasons, the Petitioner failed to establish a prima facie case of age discrimination or retaliation.

11. He has offered no persuasive evidence that the Respondent's actions in connection with changes in his compensation plan, and in connection with the audit of the Petitioner's commissions, are based upon his age or upon any animus directed toward retaliating against the Petitioner. The Petitioner may have been disappointed that the compensation plan was changed to his detriment, and may dispute the results of the audit concerning his commission payments, but there was no

credible evidence that his age was a factor in the decision to change his compensation plan or to audit his commissions.

12. The Respondent articulated legitimate, non-discriminatory reasons for its decision, or decisions over several years, to change the Petitioner's compensation plan. Simply put, the decisions concerning the audit and reduction of his compensation plan did not single him out exclusively for such treatment -vis a vis other employees based upon age or retaliation and were due to legitimate business reasons involving sales and revenue declines.

13. Concerning the conduct of the audit, the credible persuasive evidence established that the audit was conducted on the Petitioner's commissions as a result of the Petitioner's asserting to the Respondent that he had been underpaid. Thus, the Respondent's audit was carried out for legitimate, non-discriminatory fact-finding reasons. The results of the audit were simply adverse to the Petitioner and therefore were disputed by him but were not shown to be discriminatory or retaliatory in nature.

14. In summary, legitimate non-discriminatory business reasons for the actions taken against the Petitioner's employment status was proven by preponderant, persuasive evidence and, for the reasons concluded above, no preponderant persuasive evidence was offered by the Petitioner to establish

that those reasons were a pretext for age discrimination or retaliation.

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 argument 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 11th day of August, 2004, in Tallahassee, Leon County, Florida.



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 11th day of August, 2004.

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.