STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JIMMY D. FOREHAND, Petitioner, vs. DEPARTMENT OF MANAGEMENT SERVICES, Respondent.	)	Case No. 05-0976

RECOMMENDED ORDER

This cause came on for formal proceeding and hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted pursuant to notice, in Tallahassee, Florida, on December 5-6, 2005, January 31-February 2, 2006, March 3, 2006, March 13, 2006, and March 31, 2006. The appearances were as follows:

APPEARANCES

For Petitioner: Jimmy D. Forehand, pro se
9491 Old Saint Augustine Road
Tallahassee, Florida 32311

For Respondent: Stephen S. Godwin, Esquire
Thomas H. Duffy, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Respondent committed an unlawful employment practice as envisioned in Section 760.10, Florida Statutes (2005), on the basis of the Petitioner's disability or handicap, and his age. It must also be determined whether the Respondent committed retaliation against the Petitioner for the Petitioner's alleged exercise of statutorily protected rights in complaining about health, or safety concerns, regarding his operation of a machine or device while an employee of the Respondent.

PRELIMINARY STATEMENT

This cause arose upon the filing of a Charge of Discrimination with the Florida Commission on Human Relations (Commission) by the Petitioner, Jimmy D. Forehand, on or about August 31, 2004. The Petitioner maintains he was effectively terminated from his employment in a discriminatory employment action based upon his age, based upon his alleged disability regarding an injury or injuries to his knee, and concerning purported breathing difficulties he had with regard to a previous diagnosis of asbestosis, alleged silicosis, and alleged deep vein thrombosis (DVT). The Petitioner also alleges that the Department of Management Services (DMS) (Respondent) retaliated against him because he raised health and safety concerns regarding the "VRS bulb eater," a machine which crushes

and disposes of used fluorescent light tubes, which he operated while an employee. He maintains that process was part of the reason for his purported termination based upon his complaints or concerns raised regarding operation of this device, and its alleged effect on his health.

On February 23, 2005, the Commission issued a No Cause Determination in the matter and on March 14, 2005, Mr. Forehand timely filed a Petition for Relief. The cause was ultimately transmitted to the undersigned Administrative Law Judge for adjudication.

After a number of efforts to bring the cause to hearing, due to continuances engendered by discovery disputes, the cause came on for hearing as noticed on the above dates. The Petitioner introduced 26 exhibits into evidence and presented the testimony of 32 witnesses, some of whom were called multiple times. The Respondent introduced three exhibits into evidence and presented the testimony of three witnesses.

Upon conclusion of the proceeding, a transcript of the lengthy proceedings was ordered and the parties requested an extended briefing schedule for filing proposed recommended orders dating from the filing date of the Transcript. Those Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. Jimmy D. Forehand was hired by the Department of Management Services or its predecessor on January 21, 1977. He was employed at that Agency for approximately 27 and one-half years through June 30, 2004. For the last 19 years of his tenure he was classed as an electrician. This is the entry level electrician trade position and has fewer complex duties and skills required for its performance, as opposed to the more complex position of master electrician, in terms of working with complex wiring, wiring problems, electrical devices, and so forth associated with that latter position. It has been stipulated that through his termination date of June 30, 2004, Mr. Forehand, was qualified to perform the duties and functions of his job.

2. The Respondent is an Agency of the State of Florida charged with managing all state government agency resources, services, properties, benefits, and procurement. It manages state-owned facilities, handles state human resources or personnel matters, employee benefit matters, as well as procurement of such things as office space and office supplies. It maintains the physical integrity of all state-owned properties. The Petitioner was employed for the Respondent by the Division of Facilities Management and Building Construction (Division of Facilities) which is responsible for managing and

maintaining office complexes and other properties owned by the state. The Petitioner specifically worked for the electrician unit of that Division.

The Disability Claim

3. The Petitioner experienced several purported medical conditions which resulted in workers' compensation claims during his tenure as an employee. The ones relevant to this case commenced in approximately 1992. In 1992 the Petitioner was engaged in a repair work assignment at a DMS-administered office building in downtown Tallahassee. He allegedly became exposed to asbestos during that job. The Petitioner and the employer, DMS, initiated a First Report of Injury and a workers' compensation claim ensued regarding the asbestos incident. The progress of that workers' compensation claim and its disposition are not relevant to this case, aside from the diagnosis concerning that claim as a part of the predicate for showing a disability for purposes of the case at bar.

4. In any event, in 1992, the Petitioner was diagnosed by a physician with asbestosis. Because of that diagnosis, through the workers' compensation process, the employer and carrier have authorized the Petitioner, in all the years since, to have an annual medical examination and chest X-ray under the auspices of the Division of Workers' Compensation, Department of Financial Services. This is for the purpose of monitoring the status of

the asbestosis. The Respondent has stipulated that it was aware of the diagnosis of asbestosis. It does not agree that the asbestosis constitutes a disability for purposes of Chapter 760, Florida Statutes (i.e. handicap). The Petitioner was released from the physician with regard to the asbestosis situation without work limitations or restrictions due to that diagnosis.

5. Sometime in 1999 the Petitioner injured his left knee on the job, apparently a severe sprain. A workers' compensation notice of injury was filed and a workers' compensation claim process ensued whereby he received treatment for his knee problem. When he reached maximum medical improvement he returned to work with a light duty recommendation from his treating physician, on a temporary basis. In fact, the Respondent accorded him a temporary light duty assignment after he returned to work from the knee injury.

6. The Respondent, through the Petitioner's supervisors, particularly Joe Jacobson, generally made an effort to try to find the Petitioner a light duty assignment when he returned from illness or injury, based upon a doctor's recommendation and/or the Petitioner's own request for light duty. His supervisor, Mr. Jacobson, would customarily call other building managers, the "OP/CON Center" and other agencies in an effort to find a light duty post Mr. Forehand could perform in until he was ready for the full duties of his regular position. Thus, on

several occasions Mr. Forehand was placed in light duty as a janitor or answering phones.

7. It was not always possible to find temporary light duty for Mr. Forehand when he requested it or when a doctor recommended it. Apparently Mr. Forehand was on leave without pay for a number of months on at least one occasion when no light duty was available for him. In this connection, however, the Respondent, throughout Mr. Forehand's tenure as an employee or at least since his 1992 asbestosis diagnosis, has shown a penchant for allowing Mr. Forehand to occupy and perform his duties in his regular position of electrician by working at his own pace, without regard to any time limit for performing his duties, without prohibition on his taking frequent rest breaks, and with tolerance for his late arrival at work, if tardiness was related to his physical condition. Thus, in a defacto fashion, the Respondent accommodated what it knew of Mr. Forehand's impairments, as he related them to the Respondent, or as they learned of them from reports from his physicians and from the workers' compensation process (i.e., breathing difficulties and to some extent left knee impairment after 1999).

8. In any event, the preponderant evidence establishes that when the Petitioner requested light duty and/or his physician recommended it, the Respondent would provide him with

light duty if it was available, although it was not always available. It accommodated what it knew of his impairments when he worked in his regular position, performing his regular duties, by the means described above; even though the Petitioner did not for the most part request rest periods, frequent breaks from his duties, additional time to complete his assignments, or for permission to trade assignments with another worker who might have a less physically taxing job. In fact, when the matter of his physical difficulties came up, or was raised by the Petitioner in a conversation with his supervisor on at least one occasion, his supervisor told him in effect to "do the best you can." The implication thus clearly was that if the Petitioner needed rest breaks, needed additional time to do assignments, that the Respondent would accommodate him by not holding him to a strict standard as to when his job duties got performed.

9. Since approximately the year 2000 or the fiscal year 2000-2001 the Respondent, like other state agencies, have been under a mandate from the Legislature and the Office of the Governor to save on costs and to become more efficient in its operations. One of the primary means of accomplishing this has been to require a reduction in the Agency's workforce. The Respondent has thus experienced a loss of employment positions since that fiscal year in each budget year and session of the

Legislature. It has thus lost approximately 635 full-time positions over a four-year period ending with the 2005 Legislature and Appropriations Act.

10. In fiscal year 2000-2001, the Petitioner's position was identified by the year 2000 Florida Legislature to be eliminated, by making it "non-recurring," such that his position would be cut or eliminated effective July 1, 2001. The Respondent's supervisors did not want him to be laid off. Therefore, they avoided his lay-off in that fiscal year by re-classifying him or his position into a vacant position within the Division of Facilities. They made the decision to retain him even with knowledge of his past workers' compensation claims, his asbestosis diagnosis and his knee injury of 1999 with related occasional light duty and time off from work.

11. When the 2000 Legislature identified his position as being one which would be non-recurring or deleted after July 1, 2001, the Respondent held a meeting with the Petitioner and all other employees whose positions had been deemed non-critical and subject to deletion in the job force reduction. What had occurred was explained and their options and procedures to remain employed or become re-employed were explained. Because his supervisors wanted to save him from lay-off, and re-classified a different position to place him in, he was protected when the 2001 Legislature carried through with its

previous year alteration of his position to non-recurring funding by withdrawing all funding and rate supporting his original position.

12. In continuation of its mandate to reduce the work force, the 2003 Legislature made 20 positions non-recurring, including the Petitioner's. This meant that the funding was determined to be non-recurring, meaning that the positions would be funded one more year, but at the end of the fiscal year, on June 30, 2004, these positions would no longer be funded and would be abolished.

13. In the Governor's and agency's budget preparation process thereafter, in 2003 and early 2004, the Legislatively-mandated reduction of 20 positions was incorporated. The Agency, however, in late 2003 or early 2004, arrived at the conclusion that it needed 15 of those 20 positions to be re-classified as critical positions necessary to its mission. Therefore, in the Legislative budget-making process, beginning in February and early March 2004, it sought to convince the Legislature's Appropriations staff and members that 15 of the positions were critical. It was successful in doing that during the Legislative session.

14. The Petitioner's position was not re-established as a recurring, critical position. This was because his position had previously been determined to be non-critical in the 2000-2001

fiscal year, and, since his job duties and responsibilities had not changed since that time, his position was again deemed to be no longer critical to continued division operation. It was determined by the Respondent that the functions of his position could be performed by including them in the duties of other positions, to be performed by persons who qualified for and occupied those positions (such as master electricians).

15. Although Mr. Jacobson, his supervisor, wanted to find a vacant position to place the Petitioner in as he had done in the 2000-2001 fiscal year job force reduction, there were no vacant positions available in which to place the Petitioner. Mr. Jacobson's testimony establishes this, as does that of Clint Sibille and Cherri Linn (Mr. Jacobson's supervisors). The fact that Mr. Jacobson had a desire to try to find a way to retain the Petitioner is somewhat corroborated by the statement or message from Ms. Linn to Mr. Jacobson to the effect that "you can't save him this time." This meant that, unlike the situation in 2000-2001, there were no vacant positions which could be converted to a position in which to place the Petitioner.

16. Moreover, the testimony of the supervisory lead worker, Bill Kerr, corroborated that of Joe Jacobson and Clint Sibille that there were no vacant positions to place the Petitioner in or to convert to a position suitable for his

qualifications. Their testimony shows that the Petitioner's position was not a critical one in the division, especially because it did not involve duties concerned with intricate electrical wiring, wiring repairs, working on complex electrical devices and other complex electrical work. This testimony established that it made no sense to convert a master electrician position into one which met Mr. Forehand's lesser qualifications because a qualified person in a master electrician position, can perform the Petitioner's duties and many more duties in terms of complexity and critical importance than can a person with the Petitioner's lesser qualifications in an entry-level electrician position. Mr. Forehand is not a licensed electrician. The Respondent thus determined that there were no positions which were vacant and sufficiently less critical to its operation as to justify it in converting such to one which met the Petitioner's qualifications (in a managerial context).

17. The Petitioner was not told of his lay-off until June 14, 2004. In fact, Mr. Jacobson, his supervisor, did not know that it was certain to occur until immediately before Mr. Forehand was told, several days before at the most. Clint Sibille had told Mr. Jacobson before the Legislative session convened that Mr. Forehand's position might be eliminated but he was not certain at that time (approximately in December 2003 or

January 2004). It is not clear which supervisor or manager made the initial decision that the Petitioner's position was not critical. It apparently was the recommendation of Clint Sibille, in concert with Cherri Linn, and with the final approval of the Division Director, then LeeAnn Korst. Mr. Jacobson, the Petitioner's immediate supervisor, did not request that his position be deleted.

18. During most of 2003, the Petitioner's job duties included operation of a florescent bulb or lamp crushing system. This was a device known as a VRS Bulb Crusher also known as the "bulb eater." It had apparently been purchased by the Agency sometime in 2002. The device consists of a large drum with a vertical tube through which burned-out florescent light bulbs are inserted so that they fall into the large drum where a mechanical device is operated which crushes the bulbs for disposal. The Petitioner performed a large portion of the bulb crusher's operation. This was particularly true during early 2004, when the Petitioner used the machine at a more intense level. Sometime in February 2004, the exhaust or filtration system of the machine sustained damage, or a break, so that dust and particulate matter and any gaseous or chemical contents of the broken bulbs had the opportunity to leak out of the area of the break into the ambient air.

19. A temporary repair was made and a permanent replacement part was ordered from the manufacturer. The machine continued to malfunction, however, and the repair did not hold.

20. The Petitioner complained to Bill Kerr, his lead worker, concerning the dust and particulate matter the machine apparently sprayed into the air. He also complained to his supervisor, Joe Jacobson. The Petitioner stated that he believed that the dust and particulate matter and other unknown contents of the broken florescent bulbs might aggravate the breathing problems he professed to have, which he related to his original asbestosis diagnosis. These complaints began in early March 2004. The Petitioner also complained to Dave Wiggins, the Respondent's Environmental Supervisor in March of 2004. When the complaints were made and the temporary repair was not successful, the Respondent stopped all use of the bulb machine in early March 2004. This was contemporaneous with the time or occasion when the Petitioner refused to use the machine any longer.

21. The complaints about the bulb crushing machine were reported up the "chain of command" so that on March 16, 2004, Glen Abbott, the Employee Relations Specialist of the Bureau of Personnel Management Services, made a written "medical report" (according to the Petitioner's testimony) concerning the Petitioner's reported exposure to "poisonous chemicals" in the

fluorescent bulbs being crushed through operation of the machine. This report was apparently required for workers' compensation purposes.

22. The Petitioner also told Clint Sibille, Mr. Jacobson's supervisor, of the machine's purported malfunction. Mr. Sibille asked Dave Wiggins, the Environmental Specialist, to investigate the machine to determine if the machine was malfunctioning or if the problem reported by the Petitioner was caused by operator error. Mr. Wiggins and Joe Jacobson, after investigating the matter, believed it to be caused by operator error in the manner in which the bulbs were inserted into the vertical tube of the machine.

23. The Petitioner maintains that he asked Clint Sibille to send him to a doctor concerning his fears of heath problems related to the machine and states that Clint Sibille told him to "see his own doctor." Mr. Sibille did confer with Cherri Linn about the Petitioner's request and Cherri Linn informed him that the Petitioner would have to engage in the workers' compensation report and claim process in order to see a doctor concerning his health-related fears about the bulb crushing machine.
Mr. Sibille then told the Petitioner's supervisor Joe Jacobson to tell the Petitioner of this.

24. Thereafter, at some point during the period of March through June 2004, after the Petitioner reported his complaints

concerning the use of the bulb crusher, Glenn Abbott told all the electricians and carpenters who had worked with the machine to obtain medical examinations under the normal workers' compensation procedure, to try to ascertain if there are any deleterious effects caused by these persons' operation of the machine.

25. Sometime in early May of 2004, the Petitioner called the Department of Environmental Protection (DEP) and spoke to someone there and made a verbal report of his belief concerning unsafe conditions regarding operation of the bulb crushing machine. After the Petitioner left employment with the Respondent Agency in July of 2004, the machine and the warehouse space where it was located was examined by a representative of the DEP and samples were taken, in an effort to ascertain if any hazardous materials had been produced by the machine or were present in that working area.

26. On May 18, 2004, the Petitioner re-injured the same knee which he had injured in 1999. A Notice of Injury concerning this knee injury was filed to trigger the workers' compensation process and the Petitioner saw a doctor through the workers' compensation procedure who examined and treated his knee problem (severe sprain). He was off work for a few days and then was sent back to work by the physician with a prescription of "light duty." He thus became available for work

with light duty, at the doctor's recommendation, on or about June 1, 2004. At about this time he told his lead worker Bill Kerr, of his blood clot and showed him the doctor's report concerning leg swelling. He also informed Joe Jacobson of this. He sought light duty and indeed Joe Jacobson made substantial efforts to find light duty available for him by calling the various building managers and the "opcon" center to see if any light duty was available. Mr. Jacobson went so far as to try to ascertain if there were any office filing duties that the Petitioner could perform. He was unable to locate any light duty work for the Petitioner at this time.

27. Joe Jacobson took annual leave in early June and while he was on annual leave, he received a call from his employer, (apparently Cherri Linn) around June 10th or 11, 2004, requiring him to come back to work because the job force reduction lay-off was going to be imposed on the Petitioner and his presence as his supervisor was apparently needed. On June 11, 2004, the Petitioner was called and told to report to work on Monday morning, June 14, 2004.

28. On Monday the Petitioner was called in to a meeting with Joe Jacobson and Tim Carlisle and told of his lay-off. He was immediately required by the Department's Inspector General, Tim Carlisle, to take boxes and pack up his belongings and to leave the premises. Carlisle helped him pack his belongings and

ushered him off the Respondent's premises. The Petitioner maintains that he did not know of his lay-off until that same day, which happened to be his fifty-fifth birthday. He was placed on leave with pay until June 30, 2004, his actual termination date.

29. In July of 2004, apparently on or about July 2, 2004, he filed a formal written complaint to the Chief Inspector General regarding his concerns and feared health consequences of the operation of the bulb crushing machine.

30. On or about July 20, 2004, Mr. Forehand visited a walk-in medical facility because he contends he was experiencing shortness of breath, chest pains, and tightness in his chest. He attributed these symptoms to use of the bulb crusher back in March and earlier. He testified that he was diagnosed with silicosis and that he physician determined that he could not tolerate walking 30 to 60 minutes at a time or lifting more than 15 or 20 pounds. Neither this physician nor any other testified, nor was non-hearing medical information admitted into evidence in this regard.

31. Interestingly, Mr. Forehand's testimony indicates he was diagnosed with a heart condition, apparently based on these symptoms, and in late 2004 underwent insertion of an arterial stint.

32. The Petitioner thus complained to his supervisors beginning in about early March 2004, concerning the fears he had about the results of the machine operations. He complained verbally to DEP in early May of 2004, but made no written formal complaint, to any agency or person, until after his termination in July 2004. The Petitioner was not asked to participate in an investigation, hearing or inquiry concerning the operation of the bulb crushing machine and made no written complaint to any supervisory officials of the Respondent, who could then themselves submit a complaint to the Inspector General or to the Human Relations Commission. In fact, in his own testimony the Petitioner admits that he made a written complaint in July of 2004.

33. In an apparent effort to show that the Respondent's proffered non-discriminatory reason for his termination was pretextual, the Petitioner advanced testimony from a number of witnesses, including himself, which he maintains shows a pattern and practice by the Respondent of retaliating against, and, if necessary, effectively firing older, disabled employees or employees who complain of safety hazards. In this regard, of the five positions selected to be eliminated in the job force reduction of 2004, four had incumbents when the decision was made. All four of those incumbents were over 40 years of age. Two of those four positions, however, became vacant before they

were eliminated by the job force reduction. Ms. Ashraf Achtchi was fired by the Respondent before her position became officially eliminated in the job force reduction and Preston Booth voluntarily resigned from his position for unknown reasons.

34. Ms. Achtchi testified to the general effect that she felt she had been discriminated against because of being ill and under medical treatment, yet she was still singled out (in her view) for being absent or tardy. Although the record may establish that she is over 40 years of age, there is no persuasive evidence that she suffered from a legally cognizable disability as that condition or term is defined below, even if she was under a doctor's care, was ill, and had frequent tardiness or absentness due to illness or a doctor's visit during her employment tenure. In any event, other than her own subjective opinion and Mr. Forehand's speculations based upon hearsay, there is no persuasive, competent evidence to show that she was terminated for any reasons based upon an unproven disability, her age or due to any retaliation regarding any protected status within the purview of Chapter 760, Florida Statutes.

35. The Petitioner maintains that both he and Mr. Feizi were over 40 and disabled. Whether or not the Petitioner established proof of disability will be dealt with in the

conclusions of law below. Mr. Feizi apparently suffered from a disease of the nervous system (AMS) and was confined to a wheel chair much of the time. It may thus be inferred that, for purposes of the legal elements of disability referenced below, that Mr. Feizi was disabled. Other than his subjective opinion and Mr. Forehand's subjective testimonial speculation, based upon hearsay, however, there is no competent, persuasive evidence concerning the reasons Mr. Feizi was terminated, other than that his position was simply eliminated through a job force reduction in the manner described in the above findings of fact. There is no persuasive, credible evidence to show that he was dismissed from employment based upon his age or due to his disability or as retaliation, nor was that proven with regard to Ms Achtchi.

36. Other employees testified concerning alleged retaliatory conduct on the part of the Respondent. Sid Palladino and John Corbin opined that they had been retaliated against for making safety complaints of various kinds, as well as for testifying on behalf of the Petitioner in this proceeding. Ralph Cleaver testified that he left the Department to work for the Department of Agriculture because he had filed a "whistle blower" claim and that the Respondent, in his view, would use retaliation for his taking such an action.

37. Barry McDaniel was 60 years old when hired and, abruptly soon thereafter, was asked to resign, according to his testimony, without any given reason. He testified that Mr. Sibille had him read a book purportedly advocating hard work and the hiring of young workers. The book was entitled "The Go Getter." According to Mr. McDaniel's testimony, the book was required to be read by all employees under Mr. Sibille's supervision. There was no evidence, however, that although Mr. McDaniel was asked to resign, that any other employee was so treated. The book was not in evidence and the undersigned has only Mr. McDaniel's subjective testimony concerning his thoughts regarding the theme and content of the book, in relation to his subjective belief that his age was the reason he was asked to resign. He testified that his immediate superior, who was also 60 years of age, was "gone" shortly thereafter. There is no evidence of any circumstances or facts concerning why Mr. McDaniel or his supervisor were actually asked to resign or in the case of his supervisor, may have voluntarily resigned. There are insufficient facts and circumstances established by the evidence to show any discriminatory motive related to age or otherwise with regard to the terminations of either of these men.

38. Sid Palladino testified that he was reprimanded for not wearing his uniform and that other employees were not

reprimanded when they had not worn uniforms either. He also testified that he felt he was retaliated against for making safety complaints as well as for testifying in support of the Petitioner in this proceeding. In fact, his reprimand was rescinded shortly after it was given him when it was learned that he had not worn his uniform or worn it properly because the uniform supplied him did not fit.

39. Additionally, other than their anecdotal comments in their testimony, there is no persuasive evidence that Mr. Palladino or Mr. Corbin were retaliated against for complaining of safety issues and the same is true of Ralph Cleaver opining that he was about to be retaliated against for being a whistle blower, and Barry McDaniel as well. There is simply no definitive, credible proof, other than these employees' own subjective opinions, upon which to base a finding that there was any pattern and practice of retaliation against employees for complaining about safety hazards, for supporting other employees' discrimination claims, for making whistle blower claims, for being disabled or on account of their age, which could be persuasively probative of the discrimination and retaliation claims of the Petitioner.[1/]

40. In this connection, it is also found that there are a number of remaining employees in the Petitioner's division, who were his age or older. Indeed, Mr. Robert Smith had retired and

then was later re-hired by the Department and the Division after suffering at least one episode of injury and medically prescribed light duty. Likewise, there are an unknown number of disabled or physically impaired persons remaining employed by the Department, after the dates and circumstances occurred with regard to the Petitioner's discriminatory claims. At least two of them testified in this proceeding.

41. These facts belie the existence of a systematic policy or practice of eliminating employees over age 40 or of Mr. Forehand's age or older, or those who might be disabled or suffering from physical or medical impairments.

CONCLUSIONS OF LAW

42. 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. (2005).

43. Section 760.10(7), Florida Statutes prohibits discriminatory employment practices, as, for instance, discharging a person for reasons of retaliation, as defined in Section 760.10(7), Florida Statutes. Specifically, Section 760.10(7), Florida Statutes, provides that:

> It is an unlawful employment practice for an employer, an employment agency, a joint-labor management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that

> person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. (Emphasis supplied)

44. The Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes, in prohibiting discrimination in the workplace, among other things, forbids the discriminatory termination of an employee. Specifically Section 760.10(1)(a), Florida Statutes, provides that it is an unlawful employment practice for an employer to discharge a person because of such person's age or handicap. The Respondent herein is an "employer" as defined in Section 760.02(7), Florida Statutes.

45. Florida courts have determined that federal decisional law is persuasive concerning claims arising under Chapter 760, Florida Statutes, deeming that it is essentially the mirror image of Title VII of the Federal Civil Rights Act of 1964. Likewise, the instructive or persuasive quality of federal decisions interpreting Title 42 U.S.C 21101 et seq., the "Americans With Disabilities Act," is also recognized by Florida courts. See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991), Razner v. Wellington Regional Medical Center, Inc., 837 So. 2d 437 (Fla. 4th DCA 2003) and Chanda v. Englehard/ICC, 234 F.3d 1219, 1221 (11th Cir. 2000). Therefore, the shifting burden analysis set forth in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973)

applies in proceedings arising under Chapter 760, Florida Statutes. The McDonnell shifting burden analysis provides: (1) The Petitioner must prove a prima facie case of discrimination by the preponderance of the evidence; (2) If the Petitioner proves a prima facie case, the burden shifts to the defendant (Respondent) who must "articulate some legitimate, non-discriminatory reason for the employee's rejection" in order to rebut the Petitioner's presumption attached to the prima facie case. McDonnell, 411 U.S. at 803. Once the employer brings forward evidence of a non-discriminatory reason for the employment action taken, the Petitioner must then bring forward evidence to demonstrate that the proffered reason offered by the employer is but a pretext for what really amounted to a discriminatory reason for the employment action at issue. The Petitioner, however, retains the ultimate burden of persuasion in an employment discrimination case. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

46. The Petitioner contends he was discriminated against on grounds of disability, age, and retaliation. A prima facie case of discrimination can be established by direct evidence of discriminatory intent, as by a statement or act. Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989); Young v. General Foods Corporation, 840 F.2d 825, 828, cert. denied, 488 U.S.

1004 (11th Cir. 1988). To support discrimination by direct evidence, the statement or act of the employer must be made by a decision-maker in the employment action at issue; must relate to the challenged employment decision and must reveal blatant discriminatory animus. Direct evidence of intentional discrimination is evidence which, if believed, would prove the existence of a fact without further inference or presumption. The Eleventh Circuit "marked severe limits for the kind of language to be treated as direct evidence of discrimination." Jones v. Bessemer Carraway Medical Center, 151 F.3d 1321, 1323 (11th Cir. 1998). It includes "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [a protected trait]." Carter, 870 F.2d at 581-82. Evidence that is subject to more than one interpretation does not constitute direct evidence of discrimination. Taylor v. Runyon, 175 F.3d 861, 867 (11th Cir. 1999). Nor does evidence of what could be deemed neutral remarks, from which a petitioner infers a discriminatory intent, constitute direct evidence. Carter, supra at 582.

47. The Petitioner apparently contends that the following statement is direct evidence of discrimination against his disability, age, or as retaliation: "you can't save him this time." That remark was made by Ms. Linn, a deputy division director, to Mr. Jacobson, the Petitioner's immediate

supervisor. The context of the statement was that in the fiscal year 2000-2001 the Petitioner's position was designated by the Legislature for elimination as being non-critical. However, when the position itself was about to be eliminated, a vacant position was found by the Respondent and the Petitioner's supervisors, to which the Petitioner was transferred in order to save his employment. Specifically, the Petitioner's electrician position was abolished on June 29, 2001, and he was re-assigned to another position which was vacant. That position was re-classified to electrician or to a position which comported with the Petitioner's qualifications. In fiscal year 2003-2004 however, the same position reduction was again required by the Legislature and there were no "open positions" to transfer the Petitioner into. Mr. Jacobson, the Petitioner's supervisor, understood Ms. Linn's comment to mean simply that there were no jobs available for the Petitioner with this job force position elimination, which process had been going on since the year 2000. Mr. Jacobson did not interpret the comment to refer to any retaliation or discriminatory act or intent against the Petitioner nor was it so, in light of the totality of the preponderant evidence of record. The statement is neutral and does not denote discriminatory intent and direct evidence of discrimination. No statistical evidence has been presented by the Petitioner, of any substantial nature, in attempting to

establish discrimination through statistical evidence therefore he must establish a prima facie case and rebuttal/pretextual proof of discrimination, if at all, by circumstantial evidence in accordance with the proof analysis test of McDonnell-Douglas, supra.

48. In order to establish a prima facie case of discrimination based upon disability or handicap, for purposes of the American With Disabilities Act or Section 760.10, Florida Statutes, (1) the Petitioner must establish that he has a physical or mental impairment which substantially limits one or more major life activities; (2) that he is able to perform the assigned duties and functions of his employment position satisfactorily with or without reasonable accommodation (which he must request); (3) that his employer was aware of his disability, that there is a record of his having the disability or that he was "generally regarded" as having such a disability; and (4) that despite his satisfactory performance he was terminated from his employment position, when others, similarly situated and outside his protected class were given more favorable treatment. See Clark v. Jackson County Hospital, 20 FALR 1182, 1184 (FCHR 1997); Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Schwertfager v. City of Boynton Beach, 42 F. Supp. 2nd 1347, 1357, 1362 (S.D. Fla. 1999).

49. The Petitioner bears the burden to establish the existence of a physical or mental impairment that substantially limits a major life activity (disability) as an element of his prima facie case and that because of that disability he was the victim of illegal discrimination. Cheatwood v. Roanoke Industries, 891 F. Supp. 1528, 1536 (N.D. Ala. 1995). It is stipulated that the Petitioner had a diagnosis of asbestosis in or about 1992. Once per year the Respondent has sent the Petitioner, through the workers' compensation medical evaluation process, to be examined, and have a chest X-ray, with regard to that diagnosis. There is no persuasive evidence, however, that the asbestosis is an impairment that was substantially limiting a major life activity such as breathing, walking, or working. Neither physician who diagnosed it, nor any physician since, has ever placed the Petitioner on any restrictions with regard to that diagnosis according to the evidence in this record.

50. Sometime in 1999 the Petitioner suffered a sprain to his left knee. He may have been off work for a few days. The record evidence does not show how long. His physician sent him back to work with a light duty recommendation and light duty was provided him. There is no substantial, persuasive evidence that he was placed on any restrictions on a repetitive or permanent basis concerning that injury, nor did it cause a substantial limit to a major life activity such as walking, squatting,

stooping, climbing ladders, or working. Therefore, during that time period from 1992 through early March of 2004, the Petitioner has not established that he had an impairment from these reasons that substantially limited one or more major life activities.

51. Although he believed and testified that he had breathing difficulties during this time and may have mentioned them to his co-workers informally on occasions, there is no competent, persuasive evidence, as to the third element of his prima facie case for disability discrimination that the Respondent-employer knew of any major impairment of life activities, based upon these facts, or that it generally regarded him as having such an impairment. The Respondent knew of the diagnosis of asbestosis, of the annual examinations with regard thereto, and knew of the 1999 knee injury, but the evidence does not show that it knew there was any permanent impairment or restriction related thereto.

52. It is stipulated that the Petitioner is qualified and capable to perform the essential functions of his job with or without reasonable accommodation by the Respondent. See Sutton v. United Air Lines, Inc., 527 U.S. 471-459 (1999). See also 42 U.S.C. 12111(8). The Petitioner is also required to identify to his employer a reasonable accommodation which his employer might provide him to better enable him to perform the essential

functions of his job. Other than requesting temporary light duty when he returned from medically-related time off from work, the Petitioner never asked for any accommodation for his purported disability according to the preponderant evidence. It is the Petitioner's burden to request such an accommodation. U.S. Airways, Inc., v. Barnett, 122 S. Ct. 1516, 1523 (2002).

53. To the extent that the Petitioner received any accommodation from the Respondent, it was largely the result of the Respondent's own initiative in not monitoring him closely about timely arrival at work, tolerating the fact that it sometimes took him longer to complete his job duties that it might have taken others, and tolerating his purported need to take frequent rest breaks. Thus, to the extent he was accommodated, it was a defacto accommodation and not directly as a result of the Petitioner's request or Respondent's knowledge that he had any impairment which substantially limits a major life activity such as breathing, walking, performing manual tasks, working, etc., as of early March 2004.

54. The Florida Legislature convened on or about the first Tuesday in March, 2004. In the session one year earlier, in 2003, the Legislature had determined that 25 positions of the Department, referenced in the above findings of fact should be classed as non-recurring and therefore subject to abolition after they were funded on a non-recurring basis for one more

fiscal year, the 2003-2004 fiscal year. The Respondent's position was one of these.

55. When an agency decides to take any position with regard to its budget for an upcoming session of the Legislature and its appropriation process, it must submit a budget request both to the Office of the Governor (in the preceding fall), to the Legislature, and its Appropriations Committees prior to the convening of the session. It must, therefore, decide at that time what its position will be with regard to such things as positions to be funded, etc. Therefore, the Respondent, decided, prior to the convening of the Legislature, that it would seek to re-classify 20 of the 25 positions at issue as "recurring" once again, on the theory that it believed them to be critical positions that it needed to retain. Concomitantly, it decided that five of the positions, including the Respondent's, were non-critical and did not need to be retained as described in the above findings of fact. Thus the decision to not re-classify the Petitioner's position as critical, and recurring as to funding, had to have been, and was, made before the convening of the 2004 Legislative session. That was when the employment decision at issue was made, although it was not announced to the Petitioner until June 14, 2004.

56. The Respondent contends that it was not announced to the Petitioner until then because, under normal agency policy,

employees who are to have their positions eliminated in job force reductions by the Legislature are not told of such until the agency is certain that the Legislature has finally done so, near or at the end of the Legislative session when the Appropriations Act is passed. While one may wonder whether such is indeed a "policy" since in the previous job force reduction, employees, including Mr. Forehand, were told they were at risk many months previous to the critical Legislative act and while one may certainly decry such an action by the agency in giving so little warning to employees in the position of Mr. Forehand of the imminent loss of their jobs, the preponderant, persuasive evidence does not demonstrate that the agency's decision, and the failure to warn Mr. Forehand of that fact prior to June 14, 2004, two weeks before termination, was related to a disability, age, or retaliation.

57. As found above, in 2003 Mr. Forehand began operating the bulb crushing machine, with that duty becoming more intense in early 2004. In February 2004 and early March 2004 the machine began emitting dust and particulate matter in substantial amounts due in part to a malfunction of the filtration or exhaust system, described above. Mr. Forehand began complaining of this to various supervisors in March 2004, culminating on or about March 16, 2004, with his refusal to further use the machine and Mr. Glen Abbott's completion of a

"medical report form" on that date regarding Mr. Forehand's complaints regarding the purported effects of the machine on his breathing, including congestion, and shortness of breath. The Respondent ceased using the machine immediately after this revelation.

58. Thereafter, in May of 2004, Mr. Forehand reported his complaints regarding the machine and his perceived health effects to the DEP, as found above. The Petitioner did not seek medical attention for his concerns about the effect the dust and particulate matter from the machine might be having on his asbestosis situation. He testified that he asked Clint Sibille to send him to a doctor and Mr. Sibille responded that he should see his own doctor. Contemporaneously, Mr. Sibille conferred with his co-assistant director, Ms. Linn, who told him that the Petitioner would have to engage the workers' compensation process to seek medical attention. Mr. Sibille then told the immediate supervisor Mr. Jacobson to so inform Mr. Forehand.

59. In any event, although various personnel and supervisors knew of the Petitioner's complaints regarding the effects he felt the bulb crushing machine was having on his asbestosis condition, it had not been established, by any medical testimony or report or other definitive, non-hearsay evidence what, if any, impairment may have been caused by the use of the machine during Mr. Forehand's tenure. There is no

showing that he lost any time from work during March through June 14, 2004, due to breathing difficulties or other reasons related to the machine operation.

60. Some three weeks after his employment ended, on or about July 20, 2004, Mr. Forehand visited a walk-in medical facility based on his own assessment of his condition at that time. He testified he had experienced shortness of breath, chest pains, and tightness in his chest, which he attributed to the use of the bulb crushing machine back in March and earlier. He testified that he was then diagnosed with Silicosis and the physician determined that the could not tolerate walking 30 to 60 minutes at a time or lifting greater than 15 to 20 pounds. The physician did not testify in this proceeding, however, and, be that as it may, the Respondent did not know of any such impairment, as described immediately above, at the time the employment decision was made, shortly before the 2004 Legislative session. Moreover, the employer did not know of the alleged Silicosis diagnosis at the time the Petitioner was told of his lay-off on June 14, 2004, or as of his last day of paid employment, June 30, 2004.

61. On May 18, 2004, the Petitioner suffered the second knee injury. He went to a physician for this injury and was out of work for several days. He then returned to work on or about June 1, being available by his physician's recommendation, for

"light duty." His supervisor Mr. Jacobson made the significant efforts to find him light duty found above, to no avail.

62. The Petitioner contends that he suffered from extensive swelling from his thigh to his ankle in conjunction with this twisted knee and that he had a blood clot and DVT. As the evidence developed however, the DVT and blood clot aspect of his injury and subsequent course were not known to the Respondent before the Petitioner left his employment. He did tell his lead worker, Mr. Kerr, that he suffered from pain and swelling in his leg due to the knee injury. Since the Silicosis, if it exists, and the DVT and/or swelling in the leg were not manifested or medically determined, if at all, until after the Petitioner left his employment the persuasive evidence does not show that the Respondent was aware of or understood the Petitioner to have any impairment substantially limiting any major life activities with regard to those two elements of injury just as the same is true as to the asbestosis and the early 1999 knee injury.

63. Moreover, during his entire tenure with the Respondent the evidence does not clearly establish that the Respondent ever asked for a reasonable accommodation of any purported impairment or disability. He did ask for temporary light duty after coming back to work from workers' compensation medical leave on several occasions. On those occasions he was given light duty, and when

the Respondent had no light duty to give him it accommodated in him a defacto sense by not requiring him to complete tasks within any certain time, allowing him frequent breaks, allowing him to be tardy when he had medical reasons for doing so. It essentially gave him a reasonably free rein in how he performed his job.

64. The employment decision at issue (to lay him off because the Respondent did not have a vacant position to reasonably place him in) was made before his problems with the bulb crushing machine arose and before his last leg injury occurred. The job force reduction or position elimination, was originally engendered by budgetary action of the Legislature and was acceded to by the Respondent, in effect, in the second year it occurred as to Mr. Forehand's position. In the first job force reduction, the Respondent was able to find a vacant position to re-classify for the Petitioner so it could protect his employment. It was unable to do so on the occasion at issue because the vacant positions available were for high skilled workers, such as master electricians which required the occupant to be a licensed electrician. The Petitioner is not a licensed electrician. It would impair the Respondent's ability to perform its critical functions if it had to re-classify one of its higher skilled positions such as master electrician, to a lower level position such as electrician in order to accommodate

the Petitioner. That reason, elucidated more fully in the findings of fact above, is the reason the Petitioner's position was abolished.

65. His loss of employment had nothing to do with any effort by the Respondent to get rid of him because he had a disability or even a physical impairment. The Petitioner in his testimony and evidence, and in his disclosures to supervisors of the Respondent prior to the time the decision to eliminate his position was made, had not thus informed his employer of the nature and severity of any impairment, if he had one, nor in his testimony did he establish the nature and severity of any impairment related back to his asbestosis diagnosis of 1992 or the 1999 knee injury.[2/] He thus did not establish that he had a disability by virtue of an impairment substantially limiting a major life activity such as breathing, working, walking, squatting, stooping, etc. or doing manual tasks. At the time the decision to eliminate his position was made, he had not yet begun complaining about the operation of the bulb crushing machine and the possible effect upon him, at least insofar as the evidence in this record is concerned. Thus he did not definitively and preponderantly establish that he had a legally constituted disability at the time that employment decision at issue in this case was made. Thus he has not established a prima facie case of disability discrimination.

66. Even if one ignores the fact that the Petitioner did not definitively prove a disability and assumes arguendo that a prima facie case had been established, the Respondent has come forward with a legitimate, non-discriminatory reason, described above, for the employment termination at issue. That is, it was a job force reduction originated at the behest of the Legislature and acquiesced in by the Respondent, to the extent of the Petitioner's and the other four positions that were subjected to lay-offs, for legitimate management reasons. The primary reason was that the second time around the Respondent did not have a legitimate, reasonably available vacant position to move the Petitioner into. That was the essential reason for the employment action in question and there has been no showing that any reasons was pretextual and really related to disability discrimination, or for that matter, age discrimination or retaliation.

The Age Discrimination Claim

67. The Petitioner's allegations of discrimination are also based on age. In order to establish such discrimination he must prove that (1) he is a member of a protected age group (generally over 40 years of age persons); (2) that he was qualified for his current position at the time of the adverse employment action; and (3) he must present evidence from which a fact finder could reasonably conclude that the employer intended

to discriminate on the basis of age. Alphin v. Sears Roebuck and Co., 940 F.2d 1497, 1500 (11th Cir. 1991). It is undisputed that at the time he was laid off, the Petitioner was 55 years of age. In fact, he was informed of the lay-off on his fifty-fifth birthday. Thus, the first element of the prima facie case has been established. Evidence which would be relevant in an attempt to show discrimination on the basis of age would be the Petitioner being replaced in his former job with a younger person, someone sufficiently younger to permit an inference of age discrimination. Fowle v. C&C Cola, a Division of ITT Continental Baking, Co., 868 F.2d 59, 61 (3rd Cir 1989).

68. In fact, the Petitioner was not replaced, because his position itself was abolished. The duties of that position were broken up and performed by other employees of the electrician unit, as needed. The other employees who remained in employment with the unit were of varying ages, some of them were above the age of 40 and some were older than the Petitioner. In fact, Robert Smith had retired once (early) and had then been re-hired by the Respondent. Although the four occupants of the five positions eliminated through the Legislative job force reduction were over the age of 40, there is no evidence to show how many of the 15 positions who were reclassified as recurring and critical positions and thus saved were under 40 and how many were over 40 are possibly even older than the Petitioner. There

is simply insufficient evidence to show any ongoing policy or intent by the Respondent to discriminatorily remove people from employment based upon their age.[3/]

69. The Petitioner here failed to establish his prima facie case because he failed to show that he was replaced by a younger person. See Williams v. Vitro Services Corp., 144 F.3d 1438, at 1441 (11th Cir. 1998). In the event, even if a prima facie case had been established, the Respondent has shown legitimate and non-discriminatory reasons through the evidence it brought forward concerning the reasons the Petitioner's job was eliminated, as has been found and concluded above concerning the disability portion of the claim.

70. Moreover, the showing by the Respondent has not been rebutted by persuasive proof that the Respondent's reasons for the job deletion were pretextual. There is simply no showing that there was discriminatory animus associated with the elimination of the Petitioner's job position and his employment through the Legislative/budgetary job reduction procedure and policy. There is no evidence as to the ages of each other retained member of the electrical unit or the division, but there is evidence that some of them were over 40 and at least one or two were the Petitioner's approximate age or older. Moreover, some of those employees are not exactly comparative employees, in any event, because they are master electricians

holding master electricians positions, which are more skilled and require more qualifications than the Petitioner's position. Such positions require a master electrician's license, which the Petitioner did not have, and was not required to have in his electrician position. There is simply no proper persuasive evidence to show that any employees in the Petitioner's electrical unit nor in the division were hired or laid-off, through the job force reduction procedure based upon their age. The Petitioner's self-serving, good faith belief, standing alone is insufficient to carry the ultimate burden of persuasion that discrimination has occurred. Little v. Republic Refining Co., Ltd., 924 F.2d 93, 96 (5th Cir. 1991); Shiflett v. G.E. Fanuc Automation, 960 F. Supp. 1022, 1031 (W.D. Va. 1997).

The Retaliation Claim

71. The Petitioner contends that he made a disclosure of what he contends is an action or omission by the Agency which created or presented a substantial danger to the "public's health, safety, or welfare" with regard to the problems he described concerning the operation of the bulb crushing machine and the health effects he feared might result. He contended at hearing and in his Proposed Recommended Order that he perfected a claim under the Whistle Blower's Act, Section 112.3187, Florida Statutes (2005). He also is apparently claiming retaliation by his employer based upon the provision of

Subsection 760.10(7), Florida Statutes, in which the filing of a claim regarding an alleged unlawful employment practice for which an employee is retaliated against by the employer, is actionable under Section 760.10, Florida Statutes.

72. Initially it is determined that the Petitioner has not established that the Division of Administrative Hearings and the undersigned has jurisdiction of any Whistle Blower Act Claim under Section 112.3187, Florida Statutes (2005), and the concomitant remedial procedure delineated in Section 112.31895, Florida Statutes (2005). That provision gives the Human Relations Commission authority to make investigation and make recommendations concerning a written claim filed by an employee who is protected by Section 112.3187, Florida Statutes, if that employee in his or her claim has met certain criteria, but not through an action which invokes the jurisdiction of the Division of Administrative Hearings.

73. The jurisdictional issue aside, however, the Petitioner must report to his agency or to the Agency Inspector General or the Chief Inspector General of Florida a violation or suspected violation of state, local or federal law, rule or regulation committed by an employee or agent of an agency "which creates and presents a substantial and specific danger to the public's health, safety, or welfare . . ." (which, factually, is the closest analogy to his complaints concerning the bulb

machine). Section 112.3187(7), Florida Statutes, must be examined to determine if the Petitioner is a member of the class of persons who are protected by this statutory provision. Subsection (7) requires as follows:

> This section protects employees and persons who disclose information on their own initiative in a written and signed complaint; who are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entities; who refuse to participate in any adverse action prohibited by this section; or who initiate a complaint through the whistle blowers hotline or the hotline of the Medicaid Fraud Control Unit of the Department of Legal Affairs; or employees who file any written complaint to their supervisory officials or employees who submit a complaint to the chief inspector general in the executive office of the governor, to the employee designated as agency inspector general under s. 112.3189(1), or to the Florida Commission on Human Relations. . . .

74. The Petitioner does not qualify as an employee who has perfected a claim under this subsection. Firstly, he had not filed a written and signed complaint according to the evidence in this record, at least before the subject employment action was taken. He was not requested to participate in an investigation, hearing or other inquiry conducted by any agency. He did speak to a representative from the DEP, but neither that agency nor any other requested him to participate in an investigation. He also was not requested to, and then refused,

to participate in any adverse action prohibited by this section. There is no evidence that he initiated a complaint through the Whistle Blowers Hotline and there is no evidence that he filed a written complaint to any of his supervisory officials, or employees who then submitted a complaint to the Chief Inspector General, to the agency Inspector General or to the Florida Commission on Human Relations. Thus the evidence clearly indicates that there was no perfected claim under the above statutory provisions commonly called the "Whistle Blowers Act," even if such a claim could be referred to Division of Administrative Hearings for adjudication based on the above-cited statutory provisions, which it cannot. There were not even verbal complaints concerning the effects of the machine operation until after the employment decision was made. Therefore, those complaints were not the subject of retaliation.

75. Concerning the claim of retaliation asserted in his Petition for Relief filed under Chapter 760, Florida Statutes, with the Human Relations Commission, which is jurisdictional, it is determined, for the same reasons explained with regard to the charges of disability discrimination and age discrimination, that the retaliation claim must fail. This is because the employment decision at issue, to proceed with the abolition of his position, in the manner and for the reasons found above was made before the commencement of the Legislative session and

before he began complaining verbally concerning the bulb crushing machine and his fears of its health effects upon him. Consequently, no competent, persuasive evidence of any retaliation on the basis of the Petitioner making such complaints, for the above reasons, has been established.

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 29th day of August, 2006, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 2006.

ENDNOTES

[1/] Elliott v. Group Medical and Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983). Employee or Petitioner's own, subjective opinion, standing alone that discrimination has occurred is insufficient to carry the ultimate burden of persuasion that the employment discrimination in question actually occurred.

[2/] Although the Petitioner offered evidence that he had asbestosis and the knee injury as an impairment it did not rise to the level of disability because the knee injury was temporary for one thing and it has been held insufficient for individuals to prove disability status by merely submitting evidence of a medical diagnosis of an impairment. Instead, ADA requires them to offer evidence that the extent of the limitation on a major life activity including that of working caused by their impairment or impairments is substantial. Toyota Motor Manufacturing Kentucky, Inc., v. Williams, 534 U.S. 184, (2002). The Petitioner's testimony and evidence does not meet this burden.

[3/] The fact Clint Sibille gave Barry McDaniel the book "Go Getter" was not evidence of age discrimination because, for one thing, there is no evidence that other employees were given the book to read as if management was trying to hint to them that age is a detriment to continued employment. Barry McDaniel merely stated that Clint Siblle said he would give that to all employees, there is no evidence that he actually did so and, if he did, there is no evidence that age discrimination or intent to terminate people who were above a certain age was the motive.

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.