

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GABE KAIMOWITZ,)
)
 Petitioner,)
)
 vs.) Case Nos. 05-2170
) 05-2972
 THREE RIVERS LEGAL SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on March 21 through 23, April 19, and 21, 2006, in Gainesville, Florida.

APPEARANCES

For Petitioner: Gabe H. Kaimowitz, Esquire, pro se
Post Office Box 140119
Gainesville, Florida 32614-0119

For Respondent: Carla D. Franklin, Esquire
4809 Southwest 91st Terrace
Gainesville, Florida 32608

STATEMENT OF THE ISSUE

The issue is whether Respondent Three Rivers Legal Services engaged in unlawful employment practices with regard to Petitioner.

PRELIMINARY STATEMENT

Petitioner Gabe Kaimowitz (Attorney Kaimowitz) filed an Amended Complaint of Employment Discrimination with the Florida Commission on Human Relations (the Commission) on November 17, 2004, which alleged that Respondent Three Rivers Legal Services (TRLS) discriminated against him because of his race (white) and age. It further alleged that TRLS had retaliated against him. This was designated FCHR Case No. 2004-23165 by the Commission.

This Complaint addressed Americorps positions in Jacksonville and Lake City, that became available in August 2004.

Subsequent to being advised that more than 180 days had passed without action by the Commission, Attorney Kaimowitz filed a Petition for Relief on June 13, 2005. The Petition requested a hearing before the Division of Administrative Hearings.

This Petition alleged that he was discriminated against because of his race, white, and asserted that he represented a "class of qualified white male applicants for attorney and paralegal positions who were rejected in favor of less experienced people of color and white women in the Gainesville office of Three Rivers Legal Services, since Respondent's

Executive Director was hired in 1997." The executive director of TRLS during times pertinent was Allison Thompson, and she continues to serve in that capacity.

The Complaint also alleged retaliation. The reason for the retaliation, he claimed, was his earlier complaint about age and race discrimination in not being hired as a fair housing testing coordinator or fair housing attorney. The retaliation alleged was that, "(2) TRLS attorneys who had no known personal knowledge of Petitioner tortuously interfered with his relationship with poor African-American single heads of households he briefly represented in 2003." He further noted that Ms. Thompson said she would not consider him for vacancies, ". . . because of criticisms he made in the course of the so-called FCHR investigation, before this Petition was amended." He alleged this information was provided to him by Ms. Thompson on August 2, 2004.

This Petition was transmitted to the Division of Administrative Hearings and filed on June 16, 2005. This action became DOAH Case No. 05-2170.

On July 27, 2005, Attorney Kaimowitz filed an Amended Petition for Relief subsequent to an "Amended Determination: No Cause," filed by the Commission on June 29, 2005. This was the Commission's FCHR Case No. 2004-20032, and it ultimately became DOAH Case No. 05-2972.

Attorney Kaimowitz claimed that he was a victim of age and race discrimination and of retaliation. Specifically, Kaimowitz claims that TRLS discriminated against him when he was rejected for two vacancies advertised by TRLS for which he applied on May 10, 2003. One vacancy was for a fair housing attorney and the other was for a fair housing testing coordinator.

This Amended Petition also asserted that he represented two subclasses. One, he claimed, consisted of a class of qualified white male applicants for attorney and paralegal positions who were rejected in favor of less experienced people of color and white women in the Gainesville Office since the current executive director of TRLS has been in that position. The second subclass, he claimed, consisted of qualified applicants of either gender who are more than 40 years of age.

Attorney Kaimowitz also asserted that TRLS discriminated against him because of an alleged hearing deficit. Attorney Kaimowitz claimed that the cause of the retaliatory conduct was Ms. Thompson's knowledge of his lawsuits based on age discrimination against other legal services programs and specifically her knowledge of a financial settlement he obtained from Central Florida Legal Services.

This case was filed at the Division of Administrative Hearings on August 18, 2005.

DOAH Case Nos. 05-2170 and 05-2972 were consolidated by an Order of Consolidation, entered by Administrative Law Judge Michael P. Ruff, on September 15, 2005. Subsequent to Petitioner's Application for Disqualification of Judge P. M. Ruff, with accompanying Affidavit for Disqualification of Judge P. M. Ruff, Judge Ruff recused himself on September 21, 2005. The case was thereafter assigned to Administrative Law Judge Harry L. Hooper.

Attorney Kaimowitz filed four motions during the course of the proceedings demanding that this Administrative Law Judge disqualify himself. Each was denied because of his failure to allege any valid reason for disqualification. Each denial was followed with a motion for reconsideration of the denials, which were, in turn, denied.

At the hearing, Kaimowitz called Ms. Thompson as a witness and testified in his own behalf. He had 65 exhibits admitted, which are listed as Appendix 1. At his request, a host of exhibits which were not admitted, are listed as Appendix 2.

TRLS called Ms. Thompson, Mary O'Rourke, and Alan Charles Hill, and had nine exhibits admitted which are listed as Appendix 3.

No transcript was ordered. At the completion of the hearing the parties were instructed that proposed recommended orders were due in ten days without regard to weekends or

holidays. That period ended May 1, 2006. No proposed recommended orders were filed.

References to statutes are to Florida Statutes (2003) unless otherwise noted.

FINDINGS OF FACT

The Petitioner

1. Attorney Kaimowitz was born on May 5, 1935. He attended the University of Wisconsin, served in the U. S. Army, and was a journalist early in his career. He worked to obtain voting rights for African-Americans in the Deep South as a volunteer for the Congress of Racial Equality in the summer of 1964.

2. He attended law school at New York University and while attending law school worked for the New York Civil Liberties Union as an investigator.

3. Upon graduating from law school in 1967, he applied for membership in the New York State Bar Association and was eventually admitted.

4. He was employed as a staff attorney with the Center on Social Welfare Policy and Law in New York City. He was suspended from that position.

5. In 1970 he was awarded a Reginald Heber Smith Fellowship which took him to Michigan Legal Services in Detroit, Michigan. He remained there until he took a sabbatical so that

he could complete a Legal Services Corporation Research Fellowship in 1979 and 1980, which was located at the University of North Carolina at Chapel Hill. He could have returned to his employment at Michigan Legal Services but instead sued that entity. He also sued Pennsylvania Legal Services, Legal Services of North Carolina, and the Mental Health Law Project of the District of Columbia for alleged age discrimination in hiring.

6. From December 1980 until 1984 he was employed as associate counsel for the Puerto Rican Legal Defense and Education Fund in New York and Connecticut. He left there because of a "labor dispute."

7. In March of 1985 he was hired as director of the Greater Orlando Area Legal Services (GOALS). He was fired in 1986. He sued GOALS, and obtained a financial settlement. Subsequently he applied for jobs with Broward County Legal Services and Central Florida Legal Services. When he was turned down for those jobs, he sued both entities based on age discrimination.

8. The action against Central Florida Legal Services ended in 1999 or 2000 with a confidential settlement involving the payment of money to Attorney Kaimowitz. At some point he also entered into a confidential settlement with Broward County Legal Services.

9. Attorney Kaimowitz claims that the suits he filed against various legal services programs were based on his personal mission to reform the hiring practices of legal services programs, and he avers that he has been on that mission since 1980. Although he claims to have instituted these suits for altruistic motives, many of them resulted in monetary settlements that benefited him personally. None of these suits were tried to the point that a verdict resulted.

10. After being fired by GOALS he obtained a master's in communications from the University of Central Florida in 1988. While attending school he worked as a journalist for the "Orlando Weekly," a publication targeted to African-Americans in the Orlando area.

11. Subsequently Attorney Kaimowitz represented African-Americans in civil rights actions, including employment discrimination in the Orlando area. He was in private practice of law at that time although he had no office. In 1989 or 1990 a court assessed fees against him for engaging in frivolous litigation.

12. Attorney Kaimowitz moved to Gainesville because his domestic partner was seeking a Ph.D. at the University of Florida. From May 14, 1999, until February 7, 2002, he worked for Alachua County as an investigator into citizen complaints of discrimination in housing and public accommodation. He was

terminated from that job because of accusations of "serious misconduct." He claimed his discharge from this job was in retaliation for whistle blowing. He sued, and received a monetary settlement.

13. He subsequently and unsuccessfully sought employment with the City of Gainesville, the University of Florida, and with the State of Florida. He had a dispute with the University of Florida based on the University's failure to publish written material that he submitted. He filed suits pro se based on age discrimination against Gainesville for failing to hire him and against the University of Florida and the Florida Board of Regents because of the publication dispute and because they refused to hire him. The suit against the Board of Regents was settled by a monetary payment to him of a confidential sum, according to Attorney Kaimowitz.

14. In 1997, Judge Maurice Paul, a U. S. District Judge, entered an order forbidding Attorney Kaimowitz from filing pro se lawsuits in his court.

15. Prior to 2003, Attorney Kaimowitz was disciplined by the Florida Supreme Court on two occasions. A Florida Bar report dated January 29, 2002, reported a finding on January 3, 2002, of professional misconduct. He was reprimanded for making a statement he knew to be false or with reckless disregard as to

its truth or falsity concerning the integrity of a judge. He had been previously reprimanded by the Florida Supreme Court in 1998.

16. Attorney Kaimowitz is proud that he has filed countless motions to disqualify judges. He claims he has succeeded in disqualifying, at one time or another, every judge in the Middle District of Florida, and several in the Eighth Judicial Circuit, which includes the Gainesville area.

17. Attorney Kaimowitz agrees with the notion that he is, "the most well-known offensive personality in the Eighth Judicial Circuit," but asserts that this reputation was not fully achieved until 2004. This self-characterization is accepted based on the evidence adduced in this case.

18. Attorney Kaimowitz suffered a hearing loss and began using hearing aids in 1992. It is found as a fact that he hears well enough to try a case, which was demonstrated in this case. At his request, counsel table was moved close to the bench. He subsequently announced that this accommodated his hearing deficiency.

19. Attorney Kaimowitz was arrested for causing a disturbance in a Gainesville City Commission meeting in 2002. He is very proud of being arrested.

20. On November 16, 2004, Eighth Judicial Circuit Judge Larry Gibbs Turner entered an order entitled Sentence on

Judgment of Guilty of Direct and In-Direct Criminal Contempt,
following a Judgment of Guilty of eight separate allegations of
direct and indirect criminal contempt on October 13, 2004. This
Order recited the following language:

A review of the fifteen (15) volumes of the record in this cause clearly demonstrates that throughout these proceedings Mr. Kaimowitz carefully, willfully, and with calculation and premeditation abused his status as a lawyer/pro se litigant in filing repetitious and frivolous pleadings including, but not limited to, his repeated motions to recuse every judge associated with this case. Mr. Kaimowitz's most recent effort to recuse this undersigned judge was framed by his GABE KAIMOWITZ'S APPLICATION TO DISQUALIFY JUDGE LARRY G. TURNER, FROM TAKING ANY FURTHER ACTION IN THIS MATTER - LAWFUL OR UNLAWFUL - BECAUSE THE JURIST HAS BEEN AND CURRENTLY APPARENTLY IS AN EMPLOYEE OF THE FLORIDA BOARD OF REGENTS, AND/OR ITS SUCCESSOR RESPONSIBLE FOR THE UNIVERSITY OF FLORIDA AND AFFIDAVIT/CERTIFICATE WITH GABE KAIMOWITZ'S APPLICATION TO DISQUALIFY JUDGE LARRY G. TURNER, FROM TAKING ANY FURTHER ACTION IN THIS MATTER - LAWFUL OR UNLAWFUL - BECAUSE THE JURIST HAS BEEN AND CURRENTLY APPARENTLY IS AN EMPLOYEE OF THE FLORIDA BOARD OF REGENTS, AN/OR ITS SUCCESSOR RESPONSIBLE FOR THE UNIVERSITY OF FLORIDA. The motions/applications seeking recusal of each of the judges in this cause provide ample evidence of Mr. Kaimowitz's "style" of litigation in which he intentionally confuses, obfuscates, insults, defames, and makes scurrilous and unsubstantiated claims against parties, judges, witnesses, and others related and unrelated to the litigation. Further evidence is found in his VERIFIED MOTION FOR ARREST OF JUDGMENT BASED ON FRAUD COMMITTED UPON THIS COURT. Beginning at page 10 of that motion Mr. Kaimowitz claims that he ". . . has

learned that repeated motions for recusal as evidence pours in eventually tends to work in his favor. For instance, after Judge Jopling finally recused himself, Kaimowitz had little difficulty resolving at mediation the underlying cases. They were assigned to Judge Turner at the time, but all he did was agree to the parties' stipulated willingness to proceed to mediation." Over the following several pages, Mr. Kaimowitz recites his history of recusal litigation in other state and federal cases.

21. Judge Turner permanently enjoined Attorney Kaimowitz from filing further pro se litigation in the county and circuit courts of the Eighth Judicial Circuit. Although Judge Turner based his finding on Kaimowitz v. The Florida Board of Regents, Eighth Circuit Case No. 01-1996-CA-3260, he noted a number of cases involving Attorney Kaimowitz going back to 1996, including Eighth Judicial Circuit Case No. 01-2003-CA-2400-A, Gabe Kaimowitz v. Gainesville, Florida, and the Gainesville Sun, in which Judge Toby S. Monaco outlined abuses as a basis for his dismissal of Attorney Kaimowitz's Complaint with prejudice.

The Respondent and Its Executive Director, Allison Thompson

22. TRLS exists pursuant to Title 42 U. S. Code, § 2996 et seq. It is governed, inter alia, by Title 45, Code of Federal Regulations, § 1600.1, et seq. Its mission is to provide equal access to the system of justice so that those who are otherwise unable to afford adequate counsel may have high quality legal assistance to seek redress of grievances. It receives funding

from the Legal Services Corporation in Washington, D.C., the Florida Bar Foundation, United Way, and other local and national government sources.

23. TRLS is headquartered in Gainesville, Florida, and serves eleven mostly rural counties surrounding Alachua County, as well as Alachua County. It works with other volunteer agencies and with pro bono attorneys. It is essential to the success of TRLS that it maintain cordial relations with the community and the bar.

24. Ms. Thompson hires all of the TRLS management team. TRLS does not use an application form when seeking applicants for jobs. Advertisements for positions solicit resumes. TRLS does not maintain a "pool" of applicants for any particular job.

25. The number of employees at TRLS fluctuates depending on funding. The racial, age, and gender composition of TRLS personnel from May 2003 to May 2004, was as follows:

Whites	20
Blacks	19
Asian	2
Hispanic	2
Male	11
Female	32

26. Of the above, the oldest was born in 1947. Three of the above were born in that year.

27. Since 2003, new attorney hires, (including law school graduates not admitted) were as follows:

Whites	10
Blacks	6
Asian	0
Hispanic	1
Male	4
Female	13

28. Of these, the oldest was born in 1958. TRLS has hired, since Ms. Thompson has been Executive Director, at least one person who was over the age of 70.

29. TRLS does not have quotas or a diversity plan that requires certain races, genders, or ages to be given preference in hiring. TRLS is guided in this regard by Title 45, Code of Federal Regulations, § 1616.1, et seq. Specifically, Title 45, Code of Federal Regulations, § 1616.6 requires that TRLS adopt, "employment qualifications, procedures, and policies that meet the requirements of applicable laws prohibiting discrimination in employment, and shall take affirmative action to insure equal employment opportunity." The hiring record of TRLS, taken as a whole, demonstrates compliance with this requirement and does not indicate any pattern of discrimination.

30. Ms. Thompson has been the executive director of TRLS since 1996. She is an African-American. She graduated from the University of Florida Law School and was admitted to the Florida Bar in 1974. She has extensive experience in the delivery of legal services to the poor. She worked for Tampa Legal Services beginning in 1973. It became a Legal Services Corporation

program while she was employed there. She began working for Rhode Island Legal Services in 1976, practicing primarily family law.

31. Ms. Thompson worked for Philadelphia Legal Services for five years and then, beginning in 1982, worked for a number of years in the U. S. Virgin Islands where she was litigation director. She was appointed Executive Director of TRLS in December of 1996.

Job applications with TRLS in 2003 and earlier

32. Attorney Kaimowitz applied for a managing attorney position with TRLS in 1997. Ms. Thompson interviewed him and determined that he was an "interesting person" but was not the type of person who would work well with others. She concluded he would be difficult to manage. She noted that if she had a job which did not require working well with others, she might wish to hire him in the future.

33. Attorney Kaimowitz applied for a job as a staff attorney in 2001. He received a letter dated May 13, 2001, from Ms. Thompson, advising him that he was not selected and that she would keep his resume on file. Attorney Kaimowitz responded to this letter with a letter dated August 15, 2001, that pointed out two settlements he had received from legal services programs in Florida based on their alleged discrimination against him because of his age.

34. He also discussed his whistle blowing with regard to GOALS and stated, "I include this information to indicate that when there really is a will, there is a way." Ms. Thompson took this as a threat.

35. Attorney Kaimowitz applied for a job as a managing attorney in the TRLS Lake City office in 2002. He was not interviewed for that position.

36. TRLS advertised for a fair housing attorney and a fair housing testing coordinator in various publications during April 2003. Attorney Kaimowitz applied for both of these jobs.

37. He interviewed with Ms. Thompson and Mary O'Rourke, a staff attorney with TRLS, on May 30, 2003. Ms. Thompson asked Ms. O'Rourke to sit in as a witness to the interview because she was concerned that Attorney Kaimowitz would sue TRLS if she did not hire him.

38. Initially, Attorney Kaimowitz expressed an interest in both the fair housing attorney job and the fair housing testing coordinator job. However, during the interview Attorney Kaimowitz stated that he did not wish to apply for the fair housing attorney position, but wished to be considered only as an applicant for the fair housing testing coordinator position. The occupant of this position was expected to supervise individuals who would determine if discrimination in housing was occurring.

39. Attorney Kaimowitz claimed during his testimony that he told Ms. Thompson and Ms. O'Rourke that his ability to hear was impaired. He claimed he told them he required an accommodation for his hearing loss. He stated that he had a discussion with Ms. O'Rourke during the interview about an electronic system where a court reporter would record words spoken, and the words would be displayed on a monitor so that he could read what was being said.

40. Attorney Kaimowitz appeared at the interview wearing one hearing aid. Ms. Thompson said that Attorney Kaimowitz said that one of his hearing aids was "in the shop." Ms. Thompson testified that he announced during the interview that his hearing loss was corrected by his hearing aids. Ms. Thompson said it was clear that he had no difficulty in understanding her with only one hearing aid. In no event did she perceive him as being hearing impaired.

41. Ms. O'Rourke stated that the conversation claimed by Attorney Kaimowitz regarding an electronic monitor system to aid hearing never occurred. Based on Ms. O'Rourke's testimony, Ms. Thompson's testimony, and Attorney Kaimowitz's credibility, which is addressed in detail below, it is found that at the time of this interview Attorney Kaimowitz did not claim the need for an accommodation based on an alleged hearing impairment and he was not perceived as being hearing impaired.

42. Ms. Thompson wanted employees at TRLS who would maintain a good relationship with the local bar. Even though the housing testing coordinator position was not a job requiring the incumbent to be a licensed attorney, it is not helpful for TRLS to have employees who are at odds with the local bar or community. She was looking for an employee who was a team player, who could get along with the other employees at TRLS, the local bar, and with persons in the community. She also wanted someone with good references.

43. The fair housing testing coordinator required training in Jacksonville. Ms. Thompson believed Attorney Kaimowitz could not be trained because, "He already knew everything." She believed he couldn't take orders. She was troubled because he had no references from people who had supervised him. Although attorneys who have their own practice cannot give references of supervisors, they usually can give a judge or judges as a reference, but Attorney Kaimowitz did not provide any judges as references.

44. Attorney Kaimowitz provided a co-plaintiff in a lawsuit and a professor named Joe Little as references. Ms. Thompson called Professor Little but did not feel it would be worthwhile calling his co-plaintiff, who was embroiled in a lawsuit at the time. She was concerned because Attorney Kaimowitz told her, with regard to references, "everyone in

Gainesville was suspect." Moreover, he did not provide any references from his time as director of GOALS, which was a job where he had a supervisor who could comment on his work.

45. Ms. Thompson was aware of Attorney Kaimowitz's arrest during a Gainesville City Commission meeting, and was aware of at least one of his Florida Supreme Court reprimands at the time she decided not to hire him. She was also aware that he would occasionally write in "black English," and she found that offensive. She believed him to be a disruptive force. She stated she would not hire him if he was "the last man on earth." She stated that an equally obnoxious black man would often apply for positions at TRLS, and she would not hire him for the same general reasons that she would not hire Attorney Kaimowitz.

46. Ms. Thompson thought Attorney Kaimowitz would be a liability to her organization. She noted that, "He makes comments without any basis. He makes sweeping comments when he knows nothing. He doesn't even check."

47. Brenda Scafadi was eventually hired for the housing testing coordinator. She was, at the time, a 50-year-old white woman who had a disability in the form of fibromyalgia. She was not an attorney. She was hired because she was perceived to be a team player and she had good references. Ms. Scafadi resigned after about eight months and was replaced by Steve Malu, a 50-year-old Nigerian, who also was not an attorney.

48. Attorney Kaimowitz was a person Ms. Thompson had personally known for about six years at the time of the interview. She also knew about him from his letters to the "Gainesville Sun" and numerous e-mails he sent to her and to others. She was aware of his reputation in the community. She refused to hire him because she did not believe he would be a good employee. Neither his age, nor his race, nor his claimed hearing loss was a factor in her decision.

49. Attorney Kaimowitz received a letter from Ms. Thompson dated July 22, 2003, advising him that she had, "decided to offer the position to different applicants who I thought would be more appropriate for our needs."

The Americorps positions

50. On August 1, 2004, Americorps positions in Gainesville and Jacksonville were advertised. These jobs were targeted at inexperienced attorneys and paid "living expenses" and a promise of scholarship help rather than a salary.

51. During the evening of August 2, 2004, Ms. Thompson offered testimony before the Gainesville City Commission. After her testimony she departed, although the meeting continued. After exiting the building, she heard footsteps behind her and turned to see Attorney Kaimowitz following her. There were no other people in the area. He stated that he wanted to "mediate our situation" but was informed by Ms. Thompson that there was

nothing to mediate because she did not discriminate. She told him she was tired of him making disparaging comments about her program and her staff.

52. Attorney Kaimowitz expressed an interest in the Americorps positions in an e-mail to Ms. Thompson dated August 5, 2004, which was in the nature of a resume. In this letter he said, "I certainly will refrain from any action I suggested I might take through this month of August, so that we can see if we can reach an accommodation in that time." Ms. Thompson regarded this as a threat.

53. Ms. Thompson did not interview him for the Americorps positions because the "resume" e-mail of August 5, 2004, did not match the requirements of the job. Three of the positions were designed for attorneys TRLS could train so that they could recruit students from the law school to assist in the delivery of services. The other two positions required no litigation skills and were designed to provide limited legal services over the telephone to a large volume of clients.

54. Another reason Ms. Thompson found Attorney Kaimowitz to be unsuitable for this job were statements he made to her, such as claiming she hired an "incompetent black male." She had seen, and was familiar with, another widely circulated writing in which he stated, "The real 'piece of work' is Three Rivers Legal Services, and their foolish young attorney of color

Glorimil Walker, everyone's favorite minority attorney since she speaks her mind--even if it is against the adults and children at University Centre."

55. The Americorps attorneys hired during this period, instead of Attorney Kaimowitz, included Shelly E. Beach, who was a 26-year-old white female, Melissa B. Long, a 29-year-old black female, and Julie A. Santioni, a 26-year-old white female.

56. Ms. Thompson, and TRLS did not discriminate or retaliate against Mr. Kaimowitz in refusing him an Americorps position. He was not hired because the job was unsuitable for him and because he was unsuitable for employment at TRLS.

Retaliation

57. Attorney Kaimowitz's original claim of retaliation was based on his view that TRLS would not hire him because he had sued Central Florida Legal Services and that Ms. Thompson knew and would not hire him because of that lawsuit. Ms. Thompson denied this.

58. Attorney Kaimowitz's second claim of retaliation was based on the complaint to the Commission concerning the refusal of TRLS to hire him for the fair housing testing coordinator position. For reasons that are abundantly clear herein, there were numerous reasons for not hiring him other than retaliation.

Attorney Kaimowitz's Credibility

59. Attorney Kaimowitz claims that he applied for the fair housing attorney position as well as the fair housing testing coordinator. Both Ms. Thompson and Ms. O'Rourke stated that at his interview he said he wished to apply only for the fair housing testing coordinator. Attorney Kaimowitz also claims that he informed Ms. Thompson and Ms. O'Rourke at his interview that he was hard of hearing and required an accommodation. Ms. Thompson and Ms. O'Rourke both said that during the interview he asserted that any hearing problems he had were resolved by hearing aids.

60. Attorney Kaimowitz has demonstrated through his pleadings and actions in court, and before this Administrative Law Judge, that he has a low regard for the truth. As an example, he claims to believe in the equality of mankind, but during his examination of Ms. Thompson, he threw a document at her and stated that, "And then you could never find discrimination unless I don't want a nigger in here."

61. As a consequence all issues involving credibility are resolved against Attorney Kaimowitz. That being the case, it is found by a preponderance of the evidence that he did not seek the fair housing attorney position in 2003 and that he did not assert during the interview that he was hard of hearing and thus required an accommodation.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.01, et seq.

63. Title 45, Code of Federal Regulations, § 1616.1, when addressing attorney hiring, states, "This part is designed to promote a mutually beneficial relationship between a recipient and the local Bar and community, and to insure that a recipient will choose highly qualified attorneys for its staff."

"Recipient" refers to a legal services program, which, in this case, means TRLS.

64. Attorney Kaimowitz has the ultimate burden of proving by the preponderance of the evidence that Respondent committed an unlawful employment practice. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

65. Petitioner is an "aggrieved person" and Respondent is an "employer" within the meaning of Section 760.02(10) and (7), Florida Statutes, respectively. Section 760.10(1)(a), Florida Statutes, makes it unlawful for Respondent to refuse to hire any individual based on that individual's race, handicap, or age.

66. Section 760.10(7), Florida Statutes, provides that it is an unlawful employment practice for an employer to

discriminate against a person because that person has opposed an unlawful employment practice or because that person has made a charge under Chapter 760.

67. The Florida Civil Rights Act (the Act), Section 760.01, et seq., is patterned after Title VII of the Federal Civil Rights Act, 42 U.S.C. Section 2000e, et seq. Federal case law interpreting Title VII and similar federal legislation is applicable to cases arising under the Florida Act. See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991) and School Board of Leon County v. Weaver, 556 So. 2d 443 (Fla. 1st DCA 1990). Specifically, the Act is illuminated by the provisions of the Age Discrimination in Employment Act, Title 29 U.S.C., § 621, et seq.

Alleged Discrimination Based on Age

68. In Florida, the Commission has held that in a "failure to hire" age discrimination case, one element in a prima facie case is a showing that "the potential employer hired someone of a different age." Thus, in proving a prima facie case, it is not necessary to prove that a younger person was hired instead of Attorney Kaimowitz. It is only necessary to prove that a person of a different age was hired. To this extent, the Act differs from federal law, which seeks to protect older citizens. See Faye Musgrove v. Gator Human Services, Case No. 98-0173

(DOAH July 23, 1998), and Faye Musgrove v. Hamilton House/Career Systems Development, Corp., Case No. 98-0173 (DOAH July 23, 1998), Final Orders, Case No. 99-003 (FCHR April 12, 1999).

69. No direct or statistical evidence of age discrimination exists in this case. Therefore a finding of discrimination, if any, must be based on circumstantial evidence.

70. The burden and order of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

71. To demonstrate age discrimination under McDonnell Douglas Corp. v. Green, Attorney Kaimowitz must first establish a prima facie case of age discrimination. Thereafter, the employer may offer legitimate, nondiscriminatory reasons for its failure to hire him. If the employer does that, in order to prevail, Attorney Kaimowitz must establish that the employer's articulated legitimate, nondiscriminatory reasons were a pretext to mask unlawful discrimination. Smith v. J. Smith Lanier & Co., 352 F.3d 1342 (11th Cir. 2000).

72. To establish a prima facie case of age discrimination, Attorney Kaimowitz must show that (1) he was a member of a protected class; that (2) he was subjected to an adverse employment action; that (3) he was qualified to do the job; and

that (4) he lost the position to an individual of another age. Williams v. Vitro Services Corp., 144 F.3d 1438, 1441 (11th Cir. 1998).

73. Attorney Kaimowitz was 68 years of age when he applied for the position of fair housing testing coordinator and was 69 when he sought the Americorps positions. He was in a protected class. He suffered an adverse employment decision because he was not hired.

74. He was not, however, qualified for these positions because TRLS was searching for a person who could work well and get along well with others and who would enhance TRLS's ability to work in the community. As noted above, Title 45, Code of Federal Regulations, § 1616.1 contemplates a working relationship between TRLS and the community and the Bar. Attorney Kaimowitz had a record of fomenting discontent over the years, and in the Gainesville area in recent years. He is a difficult person who is self-described as "the most well-known offensive personality in the Eighth Judicial Circuit." As such he was not qualified to work at TRLS.

75. The jobs for which he applied were awarded to persons of a different age. In fact, they were offered to persons much younger than Attorney Kaimowitz. Nevertheless, because he was

not qualified for these positions, Attorney Kaimowitz did not establish a prima facie case of age discrimination under the Act.

76. If one assumes, arguendo, that Attorney Kaimowitz did prove a prima facie case of age discrimination, TRLS provided nondiscriminatory reasons for not hiring him. TRLS proved that Attorney Kaimowitz was not hired for the positions for which he applied because of his proven inability to work well with others, his poor reputation with the Bar, his poor reputation in the community, his antagonism toward certain African-Americans, his "know it all" attitude, and Ms. Thompson's belief that he would be a liability to TRLS should he be employed there.

77. Attorney Kaimowitz produced no evidence demonstrating that this was a pretext for age discrimination. Accordingly, he was not discriminated against based on his age.

The Alleged Discrimination Based on Race

78. A prima facie case involving the failure to hire due to racial discrimination requires Attorney Kaimowitz to prove that (1) he was a member of a protected group; that (2) he applied and was qualified for a job for which an employer was seeking applicants; that (3) despite his qualifications, he was rejected; and that (4), after his rejection, TRLS hired someone of Attorney Kaimowitz's qualifications or continued to seek applicants from persons of Petitioner's qualifications.

79. Although discrimination against a person of the white race is sometimes referred to as "reverse discrimination," the Act protects persons of all races from discrimination based on race. Consequently, Attorney Kaimowitz, a white person, can be, and was in this case, a member of a protected group. For the reasons set forth above, however, he was not qualified for the positions sought.

80. A white woman was hired, rather than Attorney Kaimowitz for the fair housing testing coordinator, and two white women and one black woman were hired in the Americorps positions. This does not bolster Attorney Kaimowitz's assertion that TRLS discriminated against white people.

81. If one assumes, arguendo, that Attorney Kaimowitz did prove a prima facie case of racial discrimination, TRLS provided abundant, nondiscriminatory reasons for refusing to hire him. Attorney Kaimowitz did not prove these reasons were pretextual. Accordingly, there is no proof that TRLS discriminated against Attorney Kaimowitz based on race.

Retaliation

82. The analysis required to demonstrate retaliation is the familiar McDonnell Douglas Corp. v. Green, procedure. Attorney Kaimowitz must first establish a prima facie case of retaliation. Thereafter, the employer may offer legitimate, non-retaliatory reasons for its failure to hire him. If the

employer succeeds, Attorney Kaimowitz must establish that the employer's articulated legitimate, reasons were a pretext to mask unlawful retaliation in order to prevail. Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998).

83. To prove a prima facie case of retaliation, Attorney Kaimowitz must show the following: that (1) he engaged in statutorily protected expression; that (2) he suffered an adverse employment action, such as not being hired; and that (3) the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998) and EEOC v. Navy Federal Credit Union, 424 F.3d 397 (4th Cir. 2005).

84. Attorney Kaimowitz's original claim of retaliation stated that TRLS would not hire him because he had sued Central Florida Legal Services based on age discrimination, and that Ms. Thompson was aware of that lawsuit, and therefore, would not hire him.

85. Section 760.10(7), Florida Statutes, provides that, "It is an unlawful employment practice for an employer to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section. . . ." No cases have been provided by the parties, nor have any been found, where the alleged statutorily protected

expression occurred at an entity other than the entity refusing to hire. Section 760.10(7), Florida Statutes, does not rule out that possibility, so for purposes of this case it is found that the first element of the prima facie case is satisfied.

86. Attorney Kaimowitz suffered an adverse employment action because he was not hired, so the second element of proof is satisfied. However, there was no causal connection between the statutorily protected action and the failure to employ Attorney Kaimowitz. Accordingly, a prima facie case of retaliation as alleged in DOAH Case No. 05-2972 is not proved.

87. Even assuming, arguendo, that Attorney Kaimowitz had established a prima facie case of retaliation, he has failed to show that TRLS's non-discriminatory explanations for their refusal to hire him were a pretext for retaliation in DOAH Case No. 05-2972.

88. Attorney Kaimowitz also alleged retaliation in DOAH Case No. 05-2170. He claimed in this regard that the statutorily protected action was his complaint in DOAH Case No. 05-2972, that he was not hired for the fair housing attorney position and fair housing coordinator position because of age and race discrimination. The retaliation he claimed occurred was the refusal to hire and also the tortuous interference with his relationship with poor African-American single heads of households he briefly represented in 2003.

89. No proof of this latter allegation was permitted because the activities alleged, even if they occurred, are outside of the scope of the Act. With regard to the former, the analysis regarding DOAH Case No. 05-2972, above, applies equally to this case, and with the same result.

The Alleged Class Action

90. Attorney Kaimowitz claimed to represent certain classes of persons who had been discriminated against by TRLS. Class actions are not permitted in administrative proceedings pursuant to Chapter 120, as noted in Medley Investors, Ltd. v. Lewis, 465 So. 2d 1305 (Fla. 1st DCA 1985). As stated in Medley, the legislature has not applied Fla. R. Civ. P. 1.220 to administrative hearings, and class standing in an administrative proceeding should not be inferred in the absence of a statute that provided that right.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the petitions be dismissed.

DONE AND ENTERED this 1st day of June, 2006, in
Tallahassee, Leon County, Florida.



HARRY L. HOOPER
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.