

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT D. BROWN,)
)
 Petitioner,)
)
 vs.) Case No. 05-3285
)
 RAPAK, LLC,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 18, 2006, in Tampa, Florida, before Carolyn S. Holifield, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bruce A. Plessner, Esquire
Dennis Hernandez & Associates, P.A.
3339 West Kennedy Boulevard
Tampa, Florida 33609

For Respondent: Brian M. Stolzenbach, Esquire
Seyfarth, Shaw, LLP
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803

STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice by discharging Petitioner because of his age.

PRELIMINARY STATEMENT

On April 19, 2005, Petitioner, Robert D. Brown (Petitioner), filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission), alleging Respondent, Rapak, LLC (Respondent or Rapak), had discriminated against him based on his age, by terminating his employment, in violation of Florida Civil Rights Act of 1992, Title VII of the Federal Civil Rights Act of 1964, the Age Discrimination in Employment Act and/or the Americans With Disabilities Act. The Commission issued a "No Cause" Determination on August 3, 2005. Petitioner filed a Petition for Relief on September 12, 2005, and, again, alleged "age discrimination."

On or about September 12, 2005, the Commission transmitted the Petition for Relief to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a formal hearing. The matter was initially set for hearing on November 2, 2005, but was continued to February 7, 2006, at Respondent's request and continued again until April 18, 2006, at Petitioner's request.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of Jackie Chapman, Mark Fitzgerald, and Joe Pranckus. Petitioner's Exhibit 1 was admitted into evidence. Respondent's Exhibits 1 and 3 through 6

were received into evidence. Respondent did not call any witnesses.

A Transcript of the hearing was filed on May 11, 2006. By stipulation of the parties, it was agreed to extend the time to file proposed recommended orders to June 9, 2006. Both parties timely filed Proposed Recommended Orders in this matter.

FINDINGS OF FACT

1. Respondent produces flexible packaging, develops technology to fill that packaging with liquids, and provides services to incorporate its flexible packaging systems into its customers' facilities. Respondent primarily produces "bag-in-box" products and manufacturing systems for customers such as Pepsi-Cola and Wendy's, as well as various customers in the milk, juice, and chemical business.

2. Respondent operates two manufacturing facilities, one located at its headquarters in Romeville, Illinois, and another located in Union City, California.

3. Petitioner was born on April 24, 1946.

4. In 1996, Respondent hired Petitioner as a sales representative, and he served in that position until he was discharged on April 19, 2004.

5. Petitioner initially was assigned to service the Upper Midwest Region and was based in Chicago, Illinois. In 1999, Respondent reassigned Petitioner to the Southeast Region.

6. After his reassignment to the Southeast Region, Petitioner continued to live in the Chicago area for several years. However, in December 2002 or January 2003, Petitioner and Respondent mutually agreed that Petitioner would relocate to Florida. Because the move resulted from a mutual decision between Petitioner and one of Respondent's founders, Respondent paid \$25,000 towards Petitioner's moving expenses. After the move, Petitioner continued to be responsible for the same geographical territory and the same customers as before the move.

7. Joe Pranckus is Respondent's vice president of sales. At the time of Petitioner's discharge, the sales department consisted of a customer service department and four geographical sales territories: the Central, Western, Eastern and Mexico Regions. The Central and Western Regions (where Respondent's manufacturing facilities are located) each were overseen by a regional manager. The Eastern and Mexico Regions did not have regional managers. As Petitioner was located in the Eastern Region, Mr. Pranckus served as his direct supervisor.

8. From 1999 until his dismissal, Petitioner was Respondent's only sales representative in the Southeast. His primary responsibility was to maintain and increase Respondent's business in that region of the country. The Rapak sales department as a whole is generally responsible for maintaining

and increasing Respondent's overall sales. This involves not only selling products and services, but also following up with customers to help them solve problems and otherwise to ensure their happiness.

9. Because his primary responsibility was maintaining and increasing sales, Mr. Pranckus judged Petitioner almost exclusively by his year-to-date sales numbers as compared to the same period in the previous year. These numbers were calculated by Mr. Pranckus on a fiscal-year basis, from May 1st through April 30th. For the 2003-2004 fiscal year, Mr. Pranckus established a goal for Petitioner of 15 percent growth in sales. The minimum expectation was that Petitioner maintain at least the same amount of sales he had the previous year.

10. During the 2003-2004 fiscal year, Mr. Pranckus e-mailed Petitioner his sales-versus-last-year figures on almost a monthly basis. By the end of June 2003, Petitioner had sold only 84 percent as much as he had sold through June 2002; by the end of July, only 87 percent as much as he had sold through July 2002; by the end of August, 91 percent; September, 81 percent; October, 90 percent; November, 85 percent; December, 87 percent; and by the end of March 2004 (eleven months into the fiscal year), he had sold only 88 percent as much as he had sold through the first eleven months of the 2002-2003 fiscal year. In short, as the fiscal year drew to a close, it was clear that

Petitioner was going to suffer a net loss of business for the year.

11. In late October 2003, Petitioner suffered a heart attack and underwent triple bypass surgery. Petitioner was unable to work for approximately two months while recovering from surgery. However, Petitioner returned to work in January 2004, initially working on a limited basis.

12. Petitioner's sales numbers suffered because he lost some certain accounts owing to factors beyond his control (such as product quality and price issues). Nonetheless, Petitioner concedes that it was his job to replace his lost sales, no matter what caused his customers to switch suppliers.

13. Mr. Pranckus typically holds one sales meeting each year for his entire staff. In February 2004, Mr. Pranckus held one of those meetings. At that meeting, Mr. Pranckus informed Petitioner that "changes would be made if [his] numbers didn't improve."

14. In his application for unemployment compensation, Petitioner stated that Mr. Pranckus also warned him on March 10, 2004, that he needed to improve his sales numbers.

15. Finally, Mr. Pranckus sent an e-mail to Petitioner on March 27, 2004. In that e-mail, Mr. Pranckus delivered the following written warning:

Your territory is at a critical state. We can not continue along this path. Sales must be improved immediately or we will need to change. We agreed at our sales meeting to get this back on track. It is not showing up in the numbers and activity. Call me and let me know how we can help.

16. On April 19, 2004, Mr. Pranckus discharged Petitioner because of his poor performance. His year-to-date sales figures were unacceptably low, as compared to the previous year, and Mr. Pranckus saw no evidence of plans or activity designed to improve matters.

17. After Petitioner was discharged, he filed an application for unemployment compensation. On the application, Petitioner stated that he was discharged "for failure to achieve sales goals." Later in that same application, in response to a request to "briefly summarize your reason for separation from this employer," Petitioner wrote: "I did not achieve my sales goals." Petitioner did not assert anywhere in his application for unemployment benefits that he was discharged because of his age.

18. At the time of his discharge, Petitioner was 57 years old (almost 58). Mr. Pranckus did not know Petitioner's exact age, but he would have guessed (based on physical appearance) that Petitioner was in his mid-50s at the time. Mr. Pranckus did not consider this to be "old." In fact, Petitioner is not much older than Mr. Pranckus.

19. Mr. Pranckus interviewed three individuals to fill Petitioner's position. He ultimately selected Jim Wulff. Mr. Pranckus did not know their ages at the time of the interviews, but he would have guessed (again, by appearance) that Mr. Wulff was in his mid-50s and that the other two interviewees were in their mid- to late 40s and mid- to late 50s, respectively. In fact, Mr. Wulff was born on May 26, 1948, so he was 55 years old (nearly 56) when Mr. Pranckus hired him.

20. Sales analysis from June 2003 showed that eight Rapak employees or representatives did not meet the 100 percent sales goal. Those listed were either Rapak non-supervising employees with direct responsibility for sales, supervising employees, or non-employee independent brokers. However, none of these employees, whether younger or older, was similarly situated to Petitioner at the time of his discharge.

21. As an initial matter, there were four other non-supervisory employees with direct responsibility for sales: Dennis Hayes, Marvin Groom, Donald Young, and Keith Martinez. The other individuals responsible for sales were either supervisory employees or non-employee independent brokers. Because the two supervisors have management responsibilities and are responsible for their entire regions and the individuals who report to them, they are not judged primarily by whether they personally meet the 100 percent or 115 percent sales-versus-

last-year objectives. Brokers, meanwhile, are not employees. Rather, they are independent contractors paid on a straight commission, so Respondent receives value from their services regardless of how much they sell.

22. Mr. Hayes was the only other employee who performed the exact same job as Petitioner, but he reported to Regional Manager Dan Petriekis in the Central Region, not directly to Mr. Pranckus. Moreover, as of March 2004, Mr. Hayes had sold 127 percent as much as he had during the same period the previous year.¹ Mr. Hayes is almost ten years older than Petitioner.

23. Mr. Young was also responsible for sales, but he was semi-retired, serviced only one customer and received a base salary for his work. As of March 2004, however, Mr. Young had sold 115 percent as much as he had during the same period the previous year. Mr. Young is more than twelve years older than Petitioner.

24. Finally, while Keith Martinez and Marvin Groom had some responsibility for sales, their positions were "radically different" from Petitioner's. Whereas Petitioner could identify certain problems with Respondent's machinery and products and would refer those problems to a service technician to assist his customers, Mr. Groom and Mr. Martinez were both originally hired as service technicians. Based on this experience, they could

and did not only identify technical problems, but also performed the necessary maintenance and repair work on the spot, in addition to performing preventative maintenance. Petitioner, by contrast, has spent his entire working life as salesman. Accordingly, he was neither capable of, nor expected to, perform these additional maintenance and repair functions.

25. As a result, Mr. Groom and Mr. Martinez received more leeway on their sales performance than Petitioner because they brought additional value to Respondent's business that Petitioner could not offer. Nonetheless, as of March 2004, Mr. Groom was running at 100 percent versus the prior year and Mr. Martinez was running at 87 percent. Mr. Groom is roughly three years younger than Petitioner, and Mr. Martinez is 15 and one-half years younger than Petitioner.

26. Respondent paid Petitioner \$113,000 in salary and commissions during his last full calendar year of employment with Rapak. Petitioner was out of work for ten months after his dismissal. During that time, he received \$8,000 in unemployment compensation from the State of Florida and \$8,942.33 in severance pay from Respondent. In his new job, Petitioner projects that he will earn \$100,000 in his first year but admits that he could make at least \$113,000 because his compensation is once again dependent upon sales commissions.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. See §§ 120.569 and 120.57(1), Fla. Stat. (2005).

28. The Florida Civil Rights Act of 1992 makes it an unfair employment practice for any employer "to discharge . . . any individual . . . because of . . . age." § 760.10(1)(a), Fla. Stat. (2004). Respondent is an "employer" as defined in the Act. See § 760.02(7), Fla. Stat.

29. Federal case law interpreting the Age Discrimination in Employment Act ("ADEA") is generally applicable to age discrimination claims arising under the Florida Civil Rights Act. See Florida State Univ. v. Sondel, 685 So. 2d 923, (Fla. 1st DCA 1996). Accordingly, the United States Supreme Court's McDonnell-Douglas burden-shifting paradigm is applied to cases arising under the Florida Civil Rights Act. See Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991), citing McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

30. Under the McDonnell-Douglas model, an individual claiming that he was discharged because of his age cannot establish even a prima facie case unless he can prove that he was: (1) a member of the protected age group; (2) discharged; (3) qualified to do the job; and (4) replaced by a younger

individual. Moreover, even if the claimant was replaced by a younger person, he cannot establish a prima facie case if the replacement was "insignificantly younger." See O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312-13 (1996).

31. If the claimant establishes a prima facie case of age discrimination, the employer must at least articulate a legitimate reason for the discharge. Once that has occurred, however, the ultimate burden shifts back to the claimant to prove by a preponderance of the evidence that this articulated reason is merely a pretext for an age-based decision. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

32. The Commission has held that the Florida Civil Rights Act unlike the ADEA, which protects only individuals over age 40 prohibits discrimination based on any age, from "birth to death." See, e.g., Marchinko v. Wittemann Co., Case No. 05-2062 (DOAH November 1, 2005), FCHR Order No. 06-005 (January 6, 2006); Coffy v. Porky's Barbecue Restaurant, Case No. 04-4316 (DOAH March 18, 2005), FCHR Order No. 05-053 (May 18, 2005). In addition, unlike the federal statute, the Florida Civil Rights Act prohibits favoring the old over the young, as well as the young over the old. See Id. As a result, the Commission has held that an individual seeking to establish a prima facie case of age discrimination need establish only that he was replaced

by someone of a "different" age rather than someone younger.
See Id.

33. This conclusion does nothing to detract from the common sense holding in O'Connor that the "difference" in age between the person claiming age discrimination and his replacement must be "significant."

34. Here, Petitioner did not establish even a prima facie case of age discrimination because his replacement, Jim Wulff was only two years his junior. See, e.g., Munro v. Winn-Dixie Stores, Inc., Case No. 03-3591 (DOAH March 23, 2004) ("where, as here, the age difference between the successful candidate and the plaintiff/petitioner is less than ten years, that age difference is presumptively insubstantial for purposes of establishing a prima facie case of age discrimination without showing that the employer viewed the rejected employee's age to be significant").

35. Petitioner met only three of the four elements required under Chapter 760, Florida Statutes (2006): (1) he is a member of a protected class in that he is over 40 years of age; (2) he was subject to adverse employment action in that he was terminated from his job as a sales representative; and (3) he was qualified to do the job in that he was able to complete the necessary tasks associated with being a sales representative. However, Petitioner failed to establish the

fourth element that he was replaced by a younger person or a person of a different age in that Mr. Wulff is only two years younger than Petitioner.

36. Having failed to establish all four elements required under Chapter 760, Florida Statutes (2006), Petitioner has not proved a prima facie case.

37. Assuming arguendo that Petitioner proved a prima facie case, Respondent has articulated and substantiated its legitimate reason for Petitioner's dismissal. The evidence adduced at the hearing clearly established that Petitioner was discharged because his sales figures were well below his supervisor's expectations.

38. Petitioner has not proved by a preponderance of the evidence that Respondent's reliance on his poor sales performance was a mere pretext for age discrimination. To the contrary, the supervisor who discharged Petitioner testified that he did not even consider Petitioner to be much older than himself, much less objectively "old." Furthermore, when Petitioner was discharged, Respondent's employee sales force consisted of one individual who was 70 years old, one who was 67, one who was 55 and one who was 42, in addition to Petitioner, who was 57. After Petitioner was discharged, he was replaced by someone who was 55. These facts undermine any

suggestion that Respondent harbored prejudice against individuals Petitioner's age.

39. In sum, Petitioner failed to prove by a preponderance of the evidence that he was discharged because of his age.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Respondent committed no unlawful employment practice and dismissing the Petition for Relief.

DONE AND ENTERED this 26th day of July, 2006, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of July, 2006.

ENDNOTE

1/ The March 2004 report was the last one Prankus prepared before Petitioner's discharge.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Brian M. Stolzenbach, Esquire
Seyfarth, Shaw, LLP
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803

Bruce A. Plessner, Esquire
Dennis Hernandez & Associates, P.A.
3339 West Kennedy Boulevard
Tampa, Florida 33609

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.