

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES E. SILVEY,)
)
 Petitioner,)
)
vs.) Case No. 05-3608
)
KAUFMAN, ROSSIN & CO.,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice on February 22, 2006, by video teleconference at sites in Miami and Tallahassee, Florida, before Administrative Law Judge Florence Snyder Rivas, of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Loring N. Spolter, Esquire
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For Respondent: James S. Bramnick, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent terminated Petitioner's employment in violation of Chapter 760, Florida Statutes (2004), popularly

known as the Florida Civil Rights Act of 1992 (Florida Civil Rights Act).

PRELIMINARY STATEMENT

On June 07, 2005, the Petitioner, James E. Silvey (Petitioner or Silvey), filed a complaint with the Florida Commission on Human Relations (FCHR). Petitioner alleged that the Respondent, Kaufman, Rossin & Co. (Respondent or KR), had discriminated against him on the basis of age in violation of the Florida Civil Rights Act when it terminated his employment on June 15, 2004. The allegations were investigated and on September 19, 2005, FCHR issued its determination of "no cause."

Silvey filed a Petition for Relief on September 28, 2005. FCHR transmitted the case to the Division of Administrative Hearings (Division) on October 3, 2005. The case was assigned to Administrative Law Judge Florence Snyder Rivas under DOAH Case No. 05-3608, and was set for a final hearing on January 11, 2006.

The final hearing did not go forward on that date; instead, a continuance was granted upon a joint motion by the parties in order to afford them reasonable time to complete discovery and motion practice following the substantial disruption occasioned by Hurricane Wilma.

On January 31, 2006, Respondent filed a Motion for Summary Final Order and Incorporated Memorandum of Law, which Motion was

directed toward the merits of Petitioner's claims. On February 8, 2006, Petitioner filed a Motion for First Extension of Time to Respond to Respondent's Motion for Summary Final Order. An extension of time was granted, and Petitioner filed his Response to Respondent's Motion for Summary Final Order on February 16, 2006. Upon consideration, it was determined that disputed issues of material fact existed and Respondent was not entitled to judgment as a matter of law. Accordingly, the Respondent's Motion for Summary Final Order was denied.

The identity of witnesses, exhibits, and attendant rulings are contained in the one-volume transcript of the proceedings filed with the Division on March 16, 2006. The parties sought and were granted 30 days from the filing of the transcript to submit proposed recommended orders. Both parties submitted timely Proposed Recommended Orders, which have been duly-considered.

FINDINGS OF FACT

1. Petitioner is an accountant. Respondent is an accounting firm. The parties and their four-year employment relationship are more fully described below to the extent relevant.

2. Petitioner was born on June 13, 1943. Petitioner was employed by Respondent beginning May 1, 2000. At the time of his hiring, Petitioner was 56 years old. At the time of the

alleged unlawful employment practice--in this case the termination of his employment effective July 1, 2004--
Petitioner was 61 years old.

3. Respondent accounting firm was established in Miami in 1962. At that time, the firm had three employees, including name partners James Kaufman (Kaufman) and Jay Rossin (Rossin), both certified public accountants. Kaufman and Rossin have been continuously employed on a full-time basis at the firm they founded. Kaufman and Rossin were, at the time Petitioner was hired, ages 64 and 66, respectively. Since the firm's founding, KR has developed a national practice. At all relevant times, KR is an employer within the meaning of the Florida Civil Rights Act. At the time of the hearing, KR employed over 200 people; professionals comprised approximately three-fourths of the KR workforce.

4. At all times material to this case, KR's main office was located in Miami, and Kaufman and Rossin held controlling authority in the firm. Kaufman and Rossin have, since the firm's founding, been consistently engaged with KR's day-to-day affairs, including its growth and profitability. Kaufman, in close consultation with Rossin, is at all relevant times responsible for hiring and terminating KR employees.

5. When KR was founded, and for some time after, its primary business was to provide basic accounting and related

services to individuals and businesses based in South Florida. At all relevant times, KR seeks to expand and to increase its Florida and national market share. To accomplish this goal, KR makes efforts to hire accountants with expertise in practice areas which are growing. In order to maintain the firm's profitability, KR eliminates professional employees who concentrate their practice in areas for which demand is declining or is likely to decline in the foreseeable future.

6. Professional staff is expected to market their services. To that end, KR provides in-house marketing personnel. The job of the marketing staff is to assist practice areas and individual members of the professional staff to develop a business plan to generate business for the firm and for themselves. A business plan might include generating business from in-house referrals, new engagements from existing clients, or obtaining new clients. The responsibility to achieve and maintain profitability remains at all times with the professional. Silvey had access to the firm's in-house marketing staff at relevant times. Throughout its history, KR exercises discretion--primarily Kaufman's discretion--to terminate any professional who fails to support his "overhead" and to achieve a profit for the firm.

7. At the time Silvey was hired by KR, the firm reasonably expected that Silvey would be profitable to the firm. Silvey

had substantial experience in sales and use taxation, which experience was gained during years of public service at the Florida Department of Revenue (DOR) and the Northwest Florida Water Management District.

8. Prior to embarking upon a career in tax work, Silvey earned a bachelor's degree in business administration from the University of South Florida. Upon graduating in 1969, and for several years thereafter, Silvey worked in the private sector. His jobs included management training at J.C. Penney & Co.; department manager at J. Byron & Associates; collection manager, loan officer and assistant vice president for commercial loans at People's Bank; and as an insurance salesman with Intagon Finance.

9. Silvey began his employment at DOR in 1977. From this time forward, Silvey's college education was not significant to his job duties. In the beginning, Silvey worked as a tax auditor. Thereafter, he held a variety of positions at DOR. Beginning in 1989, he became supervisor of taxpayer assistance. During his tenure in that capacity, he supervised as few as eight and as many as eighteen taxpayer assistance employees and spent at least three-fourths of his time on sales and use tax issues.

10. Sometime in the 1980s, Dan Wagner (Wagner) began his employment at DOR where he became acquainted with Silvey.

Silvey became Wagner's supervisor "somewhere around [19]'89." Throughout Wagner's employment at DOR, he worked primarily in the area of sales and use tax. He was involved with the writing of Florida's sales tax regulations, as was Silvey.

11. Silvey left DOR in 1990 to accept an administrative position for the Northwest Florida Water Management District. He returned to DOR in 1992 and was assigned to dispute resolution. In this capacity, all of his work involved sales and use tax. In 1995, Silvey became a tax audit specialist. While Silvey held that position, he and other DOR employees were assigned to provide "lectures or teaching programs" to business associations, field personnel, and auditors regarding general tax issues throughout Florida. Silvey enjoyed teaching and public speaking, and, by all accounts, was good at it.

12. Sometime in 1997, Silvey left DOR to accept a position as a tax manager at a large accounting firm, Price Waterhouse (PW). Wagner had previously left DOR to accept a position at another large accounting firm, KPMG. Approximately a year after Silvey joined PW, Wagner left KPMG to work at PW. At PW, sales and use tax comprised the substantial majority of Wagner's workload.

13. While employed at PW, Silvey and Wagner both reported to Debbie Fowler (Fowler). Fowler was at all relevant times a certified public accountant and held a master's degree in

taxation. At PW, Silvey performed tax work in the areas of sales and use and documentary stamps. He also developed a specialization in telecommunications tax work. While at PW, sales and use taxation comprised a substantial majority of Silvey's practice. However, during their employment at PW, Silvey and Fowler worked to develop their expertise and clientele in Silvey's telecommunications practice because at that time, telecommunications was considered a growth area for accounting firms.

14. Sometime in early 2000, a "headhunter" arranged for Fowler to interview for employment at KR. Fowler interviewed with Kaufman. Following extensive negotiations, which included Kaufman's making a commitment to opening a Fort Lauderdale office, Fowler accepted a position as a senior manager at KR. Fowler told Silvey and Wagner of her negotiations with KR, and at their request, Fowler made Kaufman aware of Silvey and Wagner, both of whom she held in high regard. Following individual and private interview(s) which Kaufman conducted with Silvey and with Wagner, a so-called SALT (state and local tax) practice group emerged, with Fowler as team leader and Silvey and Wagner working under her supervision. It was anticipated that the bulk of the group's work would be in the area of sales and use taxes. The SALT team and other, longer-term employees of KR, opened a Fort Lauderdale office for the firm shortly

after the members of the SALT group began their employment at KR.

15. In the course of Fowler's discussions with Kaufman, Fowler indicated that she hoped to generate business in the cruise industry and from utilities that required sales tax and telecommunication tax expertise. She hoped, too, that with Silvey's assistance she could generate substantial business in the area of documentary stamps and telephone and sales tax projects.

16. On March 21, 2000, Kaufman offered Silvey a job with a starting salary of \$85,000. Silvey negotiated his starting salary upward to \$92,000. The terms of employment also included 10 percent of fees billed and collected on work originated by Silvey, plus benefits. Kaufman offered Wagner employment, as well. Neither Silvey nor Fowler participated in the negotiations between Kaufman and Wagner, and the terms upon which he was offered employment at KR are not reflected in the record. It is undisputed that KR's offers of employment to Fowler, to Silvey, and to Wagner were independent of one another. In other words, there was no requirement that employment offered to Fowler, to Silvey, or to Wagner was predicated upon their coming to KR as a "package." Once hired, however, the three became the KR SALT practice group, which Fowler had discussed with Kaufman.

17. Silvey obtained some clients for KR and attempted unsuccessfully to obtain others. Yet, he contends that his employment status was not to be adversely affected by his individual contribution to KR's profitability. In fact, every professional in the firm was required to achieve profitability within a reasonable period of time following commencement of employment. Professionals were likewise required, over the long term, to maintain profitability, or otherwise add value to the firm. If a professional could not be profitable by performing work on matters generated by colleagues, s/he was obliged to obtain new business in sufficient quantity to maintain full-time, profitable employment. Those involved in planning for KR's SALT practice anticipated that Fowler would bear the main responsibility of generating new business, but there was no evidence that Silvey was exempt from the obligation imposed upon all KR professionals to achieve and maintain profitability. Silvey was aware that Fowler and Kaufman regarded him as an integral part of Fowler's marketing efforts with respect to the establishment of a profitable telecommunications practice. There is no persuasive evidence that Silvey or Wagner ever bargained for or reasonably expected that they had no independent duty to achieve and maintain profitability. Put another way, Silvey and Wagner did not bargain for and did not have an agreement with KR for indefinite employment,

irrespective of whether they could, through internal or external marketing efforts, generate profitability for the firm.

18. KR promoted the SALT practice on its website. At all relevant times, biographies of Silvey and Kaufman were posted on the KR website. Silvey's biography, which he had approved in advance of its posting, represents Silvey to be an expert in documentary stamps and telecommunications taxation; Wagner's website biography represents him to be an expert in sales and use taxation.

19. It had been hoped by KR that the SALT team would quickly commence to generate profits for the firm, but business did not materialize in sufficient quantity to support full-time salaries for all three members of the SALT group. Because she headed the practice and had primary responsibility for its development, Fowler volunteered in mid-2001 to take a substantial pay cut. Fowler voluntarily resigned from the firm in June 2002. At the time of her departure, the SALT practice was doing well in terms of overall revenue and productivity; the group had had a "rather decent year." With Fowler's overhead eliminated, KR was optimistic about the year ahead. Silvey, in particular, had substantial telecommunications projects during fiscal year 2001-2002. Kaufman was "very pleased" and gave him a bonus and raise.

20. Also in mid-2002, Wagner was promoted to manager and received a \$10,000 raise and an \$8,000 bonus.

21. While employed as head of the KR SALT practice, Fowler's policy was to review and approve work performed by Silvey and Wagner prior to its being sent to clients and others. Following her departure, no CPA or other supervisor proofed their work in advance of its being sent out of the office. KR had confidence in the quality of the work product generated by Silvey and by Wagner and in their overall competence at their jobs. However, KR remained concerned regarding whether Silvey and Wagner could produce enough billable time to achieve and maintain profitability.

22. At some point following Fowler's departure, Mike Custer was assigned to supervise Silvey and Wagner. Custer spoke to both men about the need to develop their "productivity, chargeability [and] obtaining new clients."

23. On April 15, 2003, KR held its traditional "end of tax season" party at Senor Frog's bar and restaurant in Coconut Grove. Silvey recalls that he and Kaufman had a pleasant conversation, the specifics of which he does not recall. Silvey does acknowledge, however, that the matter of his productivity was discussed. Although Kaufman had become increasingly concerned about Silvey's chargeability, he nevertheless promised Silvey that he would have a job in the fiscal year ahead in

order to give him every opportunity to develop his practice. Subsequently, Kaufman conducted an annual performance review for Silvey. Silvey did not receive a raise or bonus at that time. Kaufman was concerned that, looking forward, there was not enough work to keep both Silvey and Wagner busy in their field of primary expertise, sales and use tax. Moreover, the telecommunications industry itself was contracting. With that contraction, industry business in the field where Silvey and KR had had hoped to expand Silvey's practice was reasonably expected to decline. There was sentiment in the firm to terminate Silvey's employment at that time. One of the partners who held this view was founding partner Rossin. Kaufman nevertheless adhered to his commitment to give Silvey an additional year in which to develop his practice. Wagner, too, was told at his 2003 performance review that he had to be more chargeable.

24. At some point in the employment relationship, Kaufman inquired of Silvey if he had "any retirement plans." Silvey testified that the question was asked at his 2003 performance review session. According to Silvey, Kaufman asked him if he "[had] any plans on retiring?" Kaufman says he asked the question earlier, "probably 2001" or within a year of when Silvey's employment began. On this and other relevant matters, Kaufman's testimony is credited. In general, Kaufman's account

of conversations and events relating to the hiring and employment history of Fowler, Silvey, and Wagner is clear; consistent with exhibits admitted into evidence; and consistent with the testimony of Fowler, who was the only witness not aligned with a party. By contrast, Silvey's testimony regarding his 2003 evaluation meeting with Kaufman, and other relevant events which occurred before and during his employment at KR, is vague and/or based upon self-serving speculation. Petitioner's contention that Kaufman perjured himself at hearing with respect to what transpired at the 2003 evaluation meeting is expressly rejected.

25. In late 2003, Custer expressed concern that Silvey's [telecommunications] work appeared to be "drying up." Custer, Wagner and Silvey discussed ways in which they might bring in additional work. Included in that conversation was the possibility of generating additional work from the hotel industry.

26. In the period of time following his 2003 performance review, Silvey was unsuccessful in generating profits for KR. On June 15, 2004, Kaufman came to Silvey's Fort Lauderdale office and told him that he "hated to do it," but had decided to terminate Silvey's employment because Silvey had not been able to generate an adequate amount of billable hours.

27. Silvey attempted to keep his job at Wagner's expense. Silvey told Kaufman that he was as chargeable if not more chargeable than Wagner and that he had a "broader background" in tax. The record does not support Silvey's view of his value in 2004 relative to Wagner's. Instead, the evidence established that by mid-2004, Kaufman had reasonably concluded that Wagner was the better choice to handle the sales and use tax clients KR was serving in 2004, and that Wagner had greater potential than Silvey to add value to the firm. Kaufman reasonably believed that there was and would continue to be insufficient sales and use taxation business to provide full-time, profitable employment for both Silvey and Wagner. Further, Kaufman reasonably believed that KR's business would continue to grow in the area of sales and use tax and to contract in the area of telecommunications tax. By 2004, substantial engagements upon which Silvey had been working were "winding down" with no new client prospects on the horizon. In the year prior to his termination, Silvey generated no new business for KR. In the six months prior to his termination, he had no engagements to perform work in connection with any existing or new clients. At the time of the 2004 evaluation, Wagner's experience in sales and use tax exceeded Silvey's by two to five years. In addition, Wagner had more experience in analyzing sales and use tax rules and a reputation for being more "methodical" than

Silvey. Moreover, at the time Silvey was terminated, KR affiliates from around the country were sending specialized business relating to aircraft and boat acquisition to Wagner because he had "a reputation" in such matters, which Silvey did not. Kaufman therefore adhered to his decision to terminate Silvey. At the time of the final hearing, Wagner remained productively employed at KR.

28. Silvey claims that in the course of terminating his employment, Kaufman said, "well, you're getting ready to retire anyway." Kaufman flatly denies this claim. Kaufman testified that it is "inconceivable" he would have made such a statement because he was aware that Silvey's "economic situation was not that comfortable"; Silvey had previously told him that he had no plans to retire; and "I [Kaufman] wouldn't taunt or tease him [Silvey] over the fact that he was about to retire." In addition, Kaufman informed Silvey that he "had no objection to [Silvey] providing service in his area to our client base, and I [Kaufman] was going to do anything I could to help him." It is determined that Kaufman did not believe it was Silvey's intention to retire in 2004 and did not make any statement which could reasonably be deemed to be suggest that Silvey presently had or should have an intention to retire. To be clear, it is determined that on this occasion Kaufman made no direct or indirect reference to retirement, or to Silvey's age.

29. At the time Silvey was terminated, the firm employed a fulltime accountant who was past 80 years of age. She is a long-term employee who remains productive and adds value to the firm.

30. In addition to Silvey, KR terminated two professionals, ages 35 and 42, due to lack of billable work in their fields of expertise in 2003-2004. In sum, KR is highly focused on the productivity of its professional employees. Those who generate profits are welcome to work as long as they are willing and able, and those who do not generate profits are terminated when managing partner Kaufman becomes convinced that they will not become profitable within a reasonable period of time. The sole reason for Silvey's termination was his failure to achieve profitability for at least two fiscal years prior to his termination, coupled with KR's reasonable determination that it was unlikely he would achieve profitability in the foreseeable future.

31. Respondent did not replace Petitioner's position after his termination.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57 (1), Florida Statutes (2006).

33. The Florida Civil Rights Act, among other things, forbids the discriminatory firing of an employee. Subsection 760.10(1)(a), Florida Statutes (2004), states:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

34. Respondent is an "employer" as defined in Subsection 760.02(7), Florida Statutes (2004), which provides:

(7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.

35. FCHR and Florida courts look to federal discrimination law for guidance when construing provisions of the Florida Civil Rights Act. See Brand v. Florida Power Corp., 633 So. 2d. 504, 509 (Fla. 1st DCA 1994). Accordingly, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) applies to claims arising under the Florida Civil Rights Act. See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

36. Under the McDonnell Douglas analysis, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful employment discrimination. If the prima facie case is established, the burden shifts to Respondent employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of the evidence that Respondent's articulated reason(s) for its adverse employment decision is pretextual. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

37. The unlawful employment practice alleged in this case is discrimination based on age. In order to prove a prima facie case of discrimination based on age, Petitioner must prove that he was "(1) a member of the protected class, [in this case], by virtue of his age; (2) qualified to do the job; (3) subjected to adverse employment action; (4) replaced by a person outside the protected class or suffered from disparate treatment because of membership in the protected class." See Kelliher v. Veneman, 313 F.3d 1270, 1275 (11th Cir. 2002); Williams v. Vitro Services Corporation, 144 F.3d 1438, 1441 (11th Cir. 1998); Anderson v. Lykes Pasco Packing Co., 503 So. 2d 1269, 1270 (Fla. 2d DCA 1986).

38. In this case, it is determined that Petitioner proved the first three elements of a prima facie case in that he was (1) a member of a protected class by virtue of his age at all relevant times; (2) qualified to do the job; and (3) subjected to adverse employment action, in this case, termination.

39. However, in order to establish a prima facie case of age discrimination, Petitioner must establish the fourth element. That is, Petitioner must also prove that a person outside the protected class replaced him, or that he suffered disparate treatment because of membership in the protected class. This, he failed to do. Petitioner did not prove he was replaced by a person outside the protected class. Instead, the evidence established that Silvey was not replaced. Neither did Silvey offer persuasive evidence that he suffered disparate treatment because of membership in the protected class. At most, Silvey's evidence concerning alleged disparate treatment established that Kaufman asked Silvey if he "[had] any plans on retiring"; Kaufman made this inquiry on one occasion more than two years prior to Silvey's termination. This evidence is not sufficient to establish that Silvey suffered disparate treatment because of membership in the protected class. Having failed to prove the fourth element, Silvey failed to prove a prima facie case of age discrimination.

40. Assuming arguendo that Petitioner had proved a prima facie case of age discrimination, Respondent established that Petitioner was terminated due to a lack of work in those areas of practice in which Petitioner specialized--telecommunications and documentary stamp tax--and was not the most qualified member of the SALT practice in terms of expertise in sales and use taxation, where the firm reasonably hoped to achieve and maintain profitability for one fulltime employee.

41. Further, even if Petitioner had established a prima facie case of unlawful employment discrimination based on age, Respondent rebutted any presumption of discrimination with persuasive evidence of legitimate, non-discriminatory reasons for termination of Petitioner.

42. Petitioner failed to prove that the Respondent's reasons for terminating his employment are pretextual. Rather, legitimate, non-discriminatory business reasons for the actions taken against the Petitioner's employment status were proved by preponderant, persuasive evidence. Age played no role in KR's decision to terminate Silvey's employment; rather, he was terminated because and only because there was insufficient work in areas of practice in which he specialized and because he was not the better qualified candidate to serve and develop KR's sales and use taxation practice, where the firm reasonably hoped to achieve and maintain profitability for one fulltime employee.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 25th day of May, 2006, in Tallahassee, Leon County, Florida.

Florence Snyder Rivas

FLORENCE SNYDER RIVAS
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.