

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PHILIP PORTER,)
)
 Petitioner,)
)
 vs.)
) Case No. 07-1334
 DEPARTMENT OF AGRICULTURE AND)
 CONSUMER SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on June 15, 2007, in Ocala, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Philip Porter, pro se
Post Office Box 946
Silver Springs, Florida 34489

For Respondent: Stephen Donelan, Esquire
Department of Agriculture
and Consumer Services
509 Mayo Building
407 South Calhoun Street
Tallahassee, Florida 32399-0800

STATEMENT OF THE ISSUE

Whether Respondent Employer is guilty of an unlawful employment practice by failure to hire Petitioner due to age and/or handicap.

PRELIMINARY STATEMENT

On August 17, 2006, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), alleging disability/handicap (schizophrenia) and age (over 40).

On March 7, 2007, FCHR issued its Determination: No Cause and Notice of Determination: No Cause. On or about March 20, 2007, Petitioner filed a Petition for Relief.

The case was referred to the Division of Administrative Hearings on or about March 26, 2007. The Division's case file reflects all pleadings, orders, and notices.

At the June 7, 2007, disputed-fact hearing, Petitioner testified on his own behalf and had Petitioner's Exhibit P-3 admitted in evidence. Respondent presented the oral testimony of Elaine Cooper, Nancy Neely, Mike Long, Anada "Beth" Vaughn, and Dwight Poole. Respondent's Exhibits R-1 through R-11, were admitted in evidence. In addition, the Joint Pre-Hearing Statement [sic. Stipulation], as interlineated by agreement of the parties (Joint Exhibit A), was admitted in evidence.

A Transcript was filed on June 9, 2007. Each party's timely-filed Proposed Recommended Order has been considered in preparation of this Recommended Order.

The Joint Pre-Hearing Statement's stipulated facts have been modified somewhat in this Recommended Order for clarity and

form's sake, but not as to content. Also, some peripheral, immaterial "fact" stipulations have been modified and included only as part of this Preliminary Statement because they are purely procedural.

FINDINGS OF FACT

1. Respondent Department of Agriculture and Consumer Services is an agency of the State of Florida and is an "employer" as defined by Section 760.02(7), Florida Statutes.

2. Petitioner's Charge of Discrimination and Petition for Relief are based on his age and/or handicap as they relate to his not being hired as an Operations and Management Consultant II - SES, for position no. 42001640, at Respondent's Forestry Youth Academy.

3. The Forestry Youth Academy is a low-risk, residential facility for juvenile offenders, which is operated by Respondent's Division of Forestry, pursuant to a contract with the Department of Juvenile Justice (DJJ).

4. The Minimum Requirements published for the employment position at issue were:

A Bachelor's Degree from an accredited college or university and four (4) years of professional experience in systems analysis, management analysis, program planning, program research, program evaluation, engineering or administrative work.

A Master's Degree from an accredited college or university can substitute for one (1) year of the required experience.

Professional or nonprofessional experience as described above can substitute on a year-for-year basis for the required college education.

5. This means that the minimum requirements for the position at issue were to have earned a bachelor's degree from an accredited college or university and have four years of professional experience in systems analysis, management analysis, program planning, program research, program evaluation, engineering or administrative work. A master's degree from an accredited college or university could substitute for one year of the four years of professional experience. Professional or nonprofessional experience as described above could substitute on a year-for-year basis for the required college education. Therefore, an applicant with a bachelor's degree and four years of the specified professional experience could qualify. Likewise, an applicant with a bachelor's degree and a master's degree would need only three years of the specified professional experience to qualify, and an applicant without any college education would need four years of professional or non-professional experience (substituted for the college education) and four years of specified professional

experience to qualify, i.e. a total of eight years of the specified experience.

6. The Major Duties and Responsibilities of the position at issue, as advertised, were:

MAJOR DUTIES AND RESPONSIBILITIES:

This is independent and complex administrative and consultative work providing operational and management coordination for an agency.

Reviews administrative policies, procedures, guidelines and related directives to be implemented; evaluates impact on operations; identifies potential problems; recommends appropriate action.

Assists Coordinator to develop and monitor the Contract with the Department of Juvenile Justice, including Quality Assurance Codes and Standards for the care, custody, and treatment of juveniles.

Coordinates with the Department of Juvenile Justice in the selection of juveniles with regard to the admissions process and discharge process.

Identifies statewide operational problems in the implementation of administrative service policies and procedures or program policies and procedures.

Investigates, assesses, analyzes and makes recommendations to resolve issues and problems presented by administrators.

Provides direction, guidance and counsel to administrators and their staffs in the management and operation of service programs and responsibilities.

Performs firsthand, on-site analysis of operational problems of service programs; serves on interdisciplinary staff teams to develop optimum resolutions; carries out the implementation of solutions.

Consults with staff members to develop solutions for programmatic operational

problems.

Performs related work as required.

7. The vacancy advertisement also included the following language:

SPECIAL NOTE:

If you need an accommodation because of a disability in order to participate in the application/selection process, please notify the contact person in advance. We hire only US citizens and lawfully authorized alien workers.

AN EEO/AA EMPLOYER

Requirements:

Certifications	Drivers License
Occupation	MANAGEMENT ANALYSIS
Education	Bachelors (or equivalent Work experience)
Job Type	Full Time
Region/County	Levy County
Years of Experience	3-5 years
Percent of Travel	1-25%

8. The position at issue was initially advertised as an "Internal Agency Opportunity" with a closing date of April 19, 2006. (Stipulated Fact 1.)

9. The position was subsequently re-advertised as "Open Competitive," with a closing date of May 19, 2006. (Stipulated Fact 2.) This was done at the direction of the Division of Forestry Director, Mike Long, in order to expand the potential pool of prospective candidates.

10. The parties stipulated that Petitioner applied for the position on or about May 6, 2006. (Stipulated Fact 3.) Exhibit

R-2, shows that Petitioner "signed electronically using password" on May 6, 2006.

11. The parties stipulated that Petitioner's application, among others, was rejected in favor of the successful candidate, Dwight Poole (age approximately 36; disability unknown). (Stipulated Fact 5.) No evidence demonstrated that Mr. Poole has any handicap/disability.

12. The parties did not stipulate that Petitioner is handicapped/disabled.

13. Petitioner's testimony is the only cognizable evidence of his present alleged handicap. Petitioner testified, without medical corroboration, that he has a history of being unable to work due to impairments brought on by schizophrenia and/or schizoid personality disorder, first diagnosed in the late 1970's.^{1/} Petitioner described his alleged handicap as being unable to have any intimate human contact and being unable to interact with others in a significant way for 25-30 years. He testified that he could not relate to others as most people can relate to others.

14. While the foregoing portion of Petitioner's testimony is unrefuted, Petitioner comported himself appropriately and with considerable legal finesse throughout the three hours of final hearing herein. This, and his employment history as found infra (see Findings of Fact 28-37) does not support his

contention that he is legally handicapped within the purview of Chapter 760.

15. The parties stipulated that Petitioner is a member of a protected class in that he is over the age of 40. (Stipulated Fact 6.)^{2/}

16. The employment application submitted by Petitioner for the position at issue did not disclose Petitioner's age. (R-2) However, in response to written interview questions, Petitioner disclosed that he had graduated from high school in 1966. This information is in Petitioner's handwriting and bears his stipulated interview date of May 15, 2006. (R-4)

17. Petitioner was interviewed by Robert King, Respondent's Coordinator of the Forestry Youth Training Program, on or about May 15, 2006. (Stipulated Fact 4.)

18. Petitioner met the minimum qualifications for the contested position. (Stipulated Fact 7.)

19. Mr. King interviewed 18 applicants for the position herein. He ranked Petitioner thirteenth out of 18 applicants. He ranked Dwight Poole, an employee at the Forestry Youth Academy for nearly eight years, as first out of the 18 applicants.

20. Mr. King's typed priority sheet, which ranked the 18 candidates he interviewed (R-6) and Mr. Poole's handwritten and signed interview question sheet (Part of R-3), each show that

Mr. King interviewed Mr. Poole on April 20, 2006. Another typed item is labeled "Florida First Application" (Part of R-3), and bears a date of May 28, 2006, which date, if it refers to the date the application was first submitted, would demonstrate that successful candidate Poole did not apply for the position at issue until more than a month after he had interviewed with Mr. King.^{3/} However, the May 28, 2006, date on this exhibit bears no "signed electronically" notation as appears on Petitioner's application. (See Finding of Fact 10 and Exhibit R-2.) Therefore, on the successful candidate's so-called application, the May 28, 2006, date could symbolize almost anything, including but not limited to, the most recent date Mr. Poole's application was printed in preparation for hearing.

21. Upon orders from Director Long, Beth Vaughn, Manager of the Department of Agriculture and Consumer Services' Administrative Unit in Tallahassee, journeyed to the Forestry Youth Academy in Ocala and interviewed the three candidates whom Mr. King had ranked highest. Ms. Vaughn concurred with Mr. King's top ranking of Dwight Poole. She was not aware of any candidate's age or that any candidate had a handicap.

22. On May 31, 2006, Ms. Vaughn sent to Assistant Director Jim Karels, a written recommendation for a 15 percent (rather than the traditional promotional 10 percent) salary increase for Mr. Poole. Therein, she stated that Mr. Poole had been

continuously employed by Respondent since November 27, 1998, and related his work history and exceptional skills and experience. (Exhibit R-7). (See also Findings of Fact 39-46.) Ms. Vaughn's recommendation logically would have been made after she interviewed Mr. Poole, using Mr. King's ranking sheet, and before Mr. Poole actually assumed the vacant position.

23. Director Long is based in Tallahassee. He made the final selection of Dwight Poole for the contested position. Assistant Director Karels' recommendation of Dwight Poole played a big part in Mr. Long's ultimate selection of Mr. Poole for the position at issue. However, no written recommendation by Mr. Karels is in evidence. The date of Mr. Long's final selection of Mr. Poole also is not in evidence, but Mr. Long was not aware of any candidate's disability status or the age of any candidate when he made his selection of Dwight Poole.

24. The best date that can be assigned for Mr. Poole's assuming the contested position is June 7, 2006, the date handwritten in the printed "official use" portion of his application. (R-3) That means that he assumed the position with only seven years and five months of specialized experience with the Respondent. However, Mr. Poole's application shows he had earned an AA Degree in 2005; served as a youth counselor on a cruise line for six months in 1994; served as a Behavioral Science Specialist with the United States Army for three years;

and had held several years of managerial positions in stores, working with computer inventories. (See Finding of Fact 44.)

25. In addition to the contested position herein, Petitioner has not been hired by Respondent and other State agencies for other positions for which he has applied. Petitioner feels this is because people do not like his resume, see him as too old, or because his MBA degree is stale. He testified that he "can only assume" that his age or handicap have something to do with his lack of success.

26. There is no disability status indicated for any of the 38 Florida Youth Academy employees as of September 13, 2006. (Stipulated Fact 9.) Respondent Employer interprets the Americans With Disabilities Act (ADA) as prohibiting any employer from collecting information on people with disabilities. Because of this interpretation, Respondent does not keep records of which employees or job applicants are, or are not, legally disabled, pursuant to the ADA. Respondent does not even keep a record on the item in evidence of which employees or job applicants are otherwise physically impaired/handicapped/disabled. The records in evidence do not even list any workers who are temporarily on medical leave or out on workers' compensation. Therefore, there is no way to assess, from the parties' stipulation or from the items in evidence, whether Respondent has in place an effective

affirmative action plan pursuant to Section 503, of the Rehabilitation Act of 1973. However, Exhibit R-11 shows that the federal Equal Employment Opportunity Commission (EEOC) has investigated Petitioner's allegations that Respondent is in violation of Section 503, and that the EEOC has determined that there was insufficient evidence to show a violation. In any case, federal Section 503 compliance is a "non-issue" in this proceeding pursuant to Chapter 760, Florida Statutes.

27. Respondent Agency has in place a policy prohibiting discrimination in the recruitment, hiring, and employment of persons based on race, color, sex, creed, national origin, political opinions or affiliations, disability, marital status, or age. Its policy is contained in a handbook, and supervisors are required to attend educational courses on non-discrimination up to three times per year. Respondent also widely disseminates job vacancy notices and tries to affirmatively post vacancy notices in a number of locations which would appeal to persons in the named categories. Sometimes, Respondent's supervisors work with the Department of Education, Division of Vocational Rehabilitation, to educate or hire that Agency's clients. (See also Finding of Fact 7.)

28. Petitioner's employment application included an employment history covering July 1, 1974, through May 6, 2006.

29. Petitioner's application related that from July 1, 1974, until June 1, 1979, Petitioner worked for Electro-Com Corp. as a project/operations manager.

30. There was a gap in Petitioner's application from June 1, 1979, to April 1, 1980. Petitioner testified that during this period he became a street person.

31. Petitioner's application related that from April 1, 1980, until January 1, 1996, Petitioner was self-employed as a portfolio/property manager, buying and selling stocks and bonds and managing all aspects of a small portfolio of real property. Petitioner testified that his family had entrusted two real estate properties to him for his own support and that his family managed the portfolio when he could not do so during this period. He further testified that he lived in a van in the woods during part of this period.

32. Petitioner's application related that from January 1, 1996, until March 1, 2004, Petitioner was pursuing his Bachelor's and Master's degrees.

33. Petitioner has, in fact, obtained a bachelor's degree and an MBA.

34. Petitioner's application related that from April 13, 2004, until January 28, 2005, Petitioner was employed as a substitute teacher in the Marion County School District.

35. Petitioner's application related that from January 29, 2005, until March 31, 2005, Petitioner was employed in Orlando by the State of Florida, Department of Financial Services, as a Financial Examiner of funeral homes and cemeteries. His stated reason for leaving that employment was that the commute to Orlando was too difficult and that the lack of safe, affordable housing in Orlando made relocation to Orlando undesirable.

36. Petitioner's application accounted for a gap in employment by indicating he was on disability from August 1, 2005 to February 1, 2006, and was "ready for employment" status thereafter. (Stipulated Fact 8.)

37. More specifically, Petitioner listed his job title as "Ready for Employment" and his duties and responsibilities as "currently ready for employment status with the Florida Department of Education Vocational Rehabilitation Service." On his written interview questions, there was the question, "Are there any gaps in employment of six months or longer on your application since leaving high school? If yes, please explain. (Month/Year.)" Petitioner wrote in "I've been on disability since 3/1/05. I am currently certified as being able to work by Florida Vocational Rehabilitation."

38. Dwight Poole's employment application contains his employment history from May 1, 1989 to April 10, 2006.

39. Mr. Poole served approximately three years in the United States Army as a Behavioral Science Specialist from 1989 until 1992.

40. Between 1992 and 1998, Mr. Poole held warehouse jobs involving computerized inventories, management skills, and coordinating several locations of auto parts stores.

41. Since November 27, 1998, Mr. Poole has worked exclusively for Respondent's Division of Forestry at the Florida Youth Academy, acquiring the specific skills and expericne required or desired by the advertisement.

42. In 1998, Mr. Poole began working at the Forestry Youth Academy as a House Parent. In 2002, he was promoted to the position of administrative assistant, reporting to Robert King, who interviewed all the job applicants for the present position at issue. Mr. King was better acquainted with Mr. Poole than with the other applicants for the position at issue when he interviewed them. (See Findings of Fact 17 and 19.)

43. From 2003 to 2006, Mr. Poole's title was "HSPS", with a wide range of duties organizing a treatment team, ensuring security, and overseeing numerous operational procedures and evaluations, and he reported to Ms. Jill Hartl.

44. In 2005, while continuously employed by Respondent, Mr. Poole earned an AA degree in psychology from Central Florida Community College.

45. Mr. Poole's appointment to the position at issue herein was his fourth promotion by Respondent since 1998. During that time span, he has twice been selected as "staff of the year" (the equivalent of "employee of the year"), and once he was selected "teacher of the year" at Forestry Youth Academy. Mr. Poole also has received an award from DJJ. He was an integral part of the Academy's achieving "Deemed Status" by DJJ in 2005. "Deemed Status" is the second highest ranking that a residential program can receive.

46. At the time of interviewing for the contested position, and currently, Mr. Poole was/is familiar with the policies and procedures of DJJ as they relate to operations of the Forestry Youth Academy. He has helped develop policies for case management, mental health, substance abuse services, emergency mental health, substance abuse crisis intervention, and suicide prevention. Likewise, he was/is familiar with quality assurance codes and standards of DJJ. He also helped develop the Forestry Youth Academy's continuity of operations plan.

47. Petitioner has never worked in a 24-hour residential facility. He has no familiarity with DJJ policies and procedures relative to such facilities. He has no experience developing or monitoring a contract with DJJ. He is unfamiliar with DJJ quality assurance codes and standards. He has no

familiarity with the Forestry Youth Academy or with the Academy's admission or discharge process. Petitioner has never worked with juveniles in the criminal justice system. He has never served on an interdisciplinary staff to develop optimum resolutions. With regard to Petitioner's experience in "review[ing], assess[ing], analyz[ing], and making recommendations to resolve issues or problems presented by administrators," (see Finding of Fact 6) Petitioner's most relevant experience was in the late 1970's.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569, 120.57(1), and Chapter 760, Florida Statutes (2006).

49. The shifting burdens of proof in discrimination cases have been cogently explicated in the seminal case Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) which stated:

Pursuant to the [Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed. 2d 407 (1981)] formula, the employee has the initial burden of establishing a prima facie case of intentional discrimination, which once established raises a presumption that the employer discriminated against the employee. If the presumption arises, the burden shifts to the employer to present sufficient evidence to raise a genuine issue of fact as

to whether the employer discriminated against the employee. The employer may do this by stating a legitimate, nondiscriminatory reason for the employment decision, a reason for which is clear, reasonably specific, and worthy of credence. Because the employer has the burden of production, not of persuasion, which remains with the employee, it is not required to persuade the trier of fact that its decision was actually motivated by the reason given. If the employer satisfies its burden, the employee must then persuade the fact finder that the proffered reason for the employment decision was a pretext for intentional discrimination. The employee may satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. If such proof is adequately presented, the employee satisfies his or her ultimate burden of demonstrating by a preponderance of the evidence that he or she has been a victim of intentional discrimination.

50. Chandler also stands for the peripheral proposition that provided there is no invidious discrimination, then regardless of favoritism, cronyism, or any other maneuvering by the employer to hire a pre-selected candidate, the unsuccessful candidates have no recourse. Likewise, the law is clear that an employer may discriminate for any reason, good or bad, so long as that employer does not discriminate for the reasons prohibited by law. Mehta v. HCA Health Servs. of Fla., (M.D. Fla.) 2007 U.S. Dist. Lexis 79536; Woodbury v. Sears Roebuck & Co., 901 F. Supp. 1560, (M.D. Fla. 1995); and Thompson v. Cmty.

Unit Sch Dist. 200, 2003 U.S. Dist. Lexis 6707; 91 Fair Empl. Prac. Cas (BNA) 1361.

51. Therefore, the theory that Mr. Poole was hired on a late application due to Mr. King's greater familiarity with Poole than with other applicants, or the theory that the "fix" was on to hire from within, even if proven, which they were not, are non-issues.

52. Although case law under other anti-discrimination statutes such as Title VII or the ADA may be instructional in deciding cases brought pursuant to Chapter 760, Florida Statutes, Petitioner's concept that Section 503 of the Rehabilitation Act of 1973 creates a private cause of action is incorrect. See Rogers v. Frito Lay, Inc., 611 F.2d 1074 (5th Cir. 1980). The present case constitutes a de novo proceeding with regard to FCHR's proposed agency action to dismiss the Charge of Discrimination, and this case is bounded by Section 120.57(1) and Chapter 760, Florida Statutes.

53. This is a "failure to hire," not a "failure to accommodate," case, and the first issue is whether or not at the time of application and hiring Petitioner was discriminated against on the basis of handicap.

54. To establish a prima facie case of handicap/disability discrimination, Petitioner must show that "(1) he is disabled; (2) he was a 'qualified individual' at the relevant time,

meaning he could perform the essential functions of the job in question with or without reasonable accommodations; and (3) he was discriminated against because of the disability." Lucas v. W.W. Grainger, Inc., 275 F.3d 1249, 1255 (11th Cir. 2001). It was stipulated that Petitioner met item (2), but Petitioner has failed to establish the first and third parts of a prima facie case.

55. Petitioner failed to establish the first element of the prima facie test, because he did not show that he is currently "handicapped" within the meaning of Chapter 760, Florida Statutes, or that his employer perceived him as handicapped.

56. In Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994), the court adopted the definition of "handicap" found in Section 504 of Title V of the Rehabilitation Act of 1973, and stated:

i. Section 504 specifically refers to 29 U.S.C. Sec. 706(8)(B) for the definition thereof. The latter defines an "individual with handicaps," subject to certain exceptions not applicable to this case, as one "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." Examples of major life activities including caring for oneself, breathing, learning, and working. (Emphasis supplied). Id. at 510, FN 10.

57. Almost the identical definition of "disability" is set out in the Americans With Disabilities Act (ADA). See 42 U.S.C. Section 12102(2).

58. The Americans with Disabilities Act defines "disability" as a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102(2).

59. Petitioner testified that he had been diagnosed 25 to 30 years ago as having schizophrenia and schizoid personality disorder. No competent medical or psychiatric opinion of such diagnoses was admitted in evidence. Petitioner described long periods of time between 1979 and 1996 when he was so disabled that he could not take care of himself or interact with others and testified that this condition precluded him from having a job during these periods. However, moving closer in time to the situation at hand, Petitioner's employment application shows a virtually uninterrupted history of work and educational activities since 1996. Not working for a period while pursuing a higher education or while recovering from some illness or injury does not bespeak of a permanent, legally defined "handicap," and Petitioner's application did not specify that he currently had a permanent handicap. The reason stated by Petitioner for leaving his most recent employment with the State

of Florida was because of a difficult commute and lack of safe, affordable housing, not because of a handicap. At the time Petitioner filed his employment application with Respondent, he indicated that he was in "ready for employment" status, which suggested that any "disability" had been transient in nature. It is well settled law that temporary, nonchronic, impairments of short duration with little or no long-term or permanent impact are not disabilities as defined by the Act. Johnston v. Henderson, 145 F. Supp. 2d 1341, 1352 (S.D. Fla. 2001).

60. Disability can also be demonstrated by an individual having a record of such impairment. The record requirement is satisfied if a record relied on (emphasis added) by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. There are many types of records that could potentially contain this information, including but not limited to education, medical or employment records. 29 C.F.R. § 1630.2(k). Given Petitioner's employment and educational history, as presented in his employment application, the reference to disability and his "ready for employment" status does not constitute a "record" of such impairment. Also, no evidence was presented showing that Petitioner discussed his condition during his employment

interview; that any of Respondent's principals was aware Petitioner had a handicap as Petitioner perceived it, or that any of Respondent's principals relied upon Petitioner having a handicap in making their decision to promote the other candidate.

61. The final definition of "disability" is being regarded as having such an impairment. In order for Petitioner to prove he was regarded as having a mental or physical impairment that substantially limits one or more major life activities, Petitioner must show that Respondent believed he had a permanent or long-term impairment. Sutton v. Lader, 185 F.3d 1203, 1209 (11th Cir. 1999). Petitioner presented no evidence that Respondent's principals believed, or otherwise treated him as disabled.

62. A prospective employee cannot be discriminated against on the basis of his or her disability unless the prospective employer knows of the disability. As stated in Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928, 932 (7th Cir. 1995), "At the most basic level, it is intuitively clear when viewing the [Act's] language in a straight forward manner that an employer cannot [take adverse action against] an employee because of a handicap unless it knows of the [handicap]. If it does not know of the [handicap], the employer is [taking adverse action against] the employee 'because of' some other reason.

Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice." Morisky v. Broward County, 80 F.3d 445, 448 (11th Cir. 1996). Petitioner's two vague references to disability (once on his employment application and once in response to written interview questions) and his failure to specify his impairment are insufficient to impute to Respondent knowledge of the nature and extent of his alleged disability. Absent that knowledge, Respondent's decision not to hire Petitioner must have been "because of some other reason," not because of a disability of Petitioner.

63. Mere speculation or subjective feelings of an applicant, or in this case, Petitioner's assumption, that he was discriminated against due to age or handicap, are insufficient to find that discrimination has occurred. Little Republic v. Refining Co., Ltd., 924 F.2d 93 (5th Cir. 1991); Elliott v. Group Medical & Surgical Service, 714 F.2d 556 (5th Cir. 1983); and Shiflett v. GE Finance Automation, 960 F. Supp. 1022 (W.D. Va. 1977).

64. Exhibit P-3, the list of Respondent's employees which does not track either any temporary inability to work or permanent handicap of any of Respondent's employees is insufficient to show discrimination. Petitioner did not present any statistical evidence of the percentage of disabled persons

who reside in the region surrounding the Forestry Youth Academy. He presented no evidence that any disabled persons applied for the positions filled by those on the list; the percentage of disabled persons who applied to Respondent from any and all regions; the percentage of disabled persons actually offered employment by Respondent; or the percentage of disabled persons actually employed in Respondent's work force. Lacking such evidence, Petitioner has not established a prima facie case based upon statistical evidence. See Evans v. McClain of Georgia, Inc., 131 F.3d 957 (11th Cir. 1977), citing Brown v. American Honda Motor Co., 939 F.2d 946 (11th Cir. 1991) cert. denied 502 U.S. 1058 (1992), and holding that "Statistics" without an analytic foundation are "virtually meaningless"; Culley v. Trak Microwave Co., 117 F. Supp. 2d 1317 (M.D. Fla. 2000); and Villaneuva v. City of Ft. Pierce, Fla., 24 F. Supp. 2d 1364 (S.D. Fla. 1998).

65. A prima facie case for an age discrimination claim can be established by (1) showing that Petitioner was a member of the protected age group; (2) was subjected to adverse employment action; (3) was qualified to do this job; and (4) was replaced or otherwise lost a position to a younger individual. Chapman v. AI Transport, 229 F.3d 1012, 1024 (11th Cir. 2000). The undersigned has accepted the parties' stipulations that Petitioner is a member of a protected age group and that he met

the minimum qualifications for the job. It is likewise undisputed that Petitioner was not hired by Respondent and that Petitioner, along with 16 other applicants, lost the position to an individual younger than Petitioner. Therefore, Petitioner has established a prima facie case of age discrimination.

66. Once a prima facie case of discrimination has been established, the employer must articulate a legitimate, nondiscriminatory reason for the challenged employment action. However, the employer's burden is merely one of production. The employer need not persuade the court that it was actually motivated by the proffered reason. See supra, and Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1993). Respondent asserts that its legitimate, nondiscriminatory reason for not hiring Petitioner was that it hired a more qualified applicant, Dwight Poole.

67. This forum does "not sit as a super-personnel department that re-examines an entity's business decisions." Chapman supra at 1030. Once, as here, the employer articulates a legitimate, nondiscriminatory reason for the challenged action, the presumption of discrimination is eliminated and the [Petitioner] has the opportunity to come forward with evidence sufficient to permit a reasonable fact finder to conclude that the reason given was pretextual and the real reason for the adverse employment decision. Id. at 1528. No competent

evidence was presented herein which would establish that Respondent's reason for not hiring Petitioner was pretextual. See Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436 (11th Cir. 1996), holding that pretext must be shown with "significantly probative evidence."

68. While Respondent's own evidence shows that the successful younger applicant did not have eight years of related service experience with the employer herein, it shows that he did have eight years of related experience overall, plus an AA degree he had earned while employed by Respondent. This set of circumstances met the minimum job requirements advertised. Moreover, Mr. Poole's formidable experience with the employer and DJJ practices and codes, when pitted against Petitioner's lack of any DJJ experience or residential rehabilitation experience, clearly put Mr. Poole ahead in the category of "major duties and responsibilities."

69. Petitioner has not persuaded that his or Mr. Poole's age played any part in Respondent's failure to hire Petitioner or decision to hire Mr. Poole.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief and Charge of Discrimination.

DONE AND ENTERED this 13th day of September, 2007, in
Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
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 13th day of September, 2007.

ENDNOTES

1/ Exhibit P-1, a July 26, 1982, letter, purportedly from a medical physician to a third party, was not admitted in evidence because it was hearsay outside the parameters of Section 120.57(1)(c), Florida Statutes. The letter was not self-authenticating, and neither the writer nor the addressee of this 25-year-old letter appeared so as to be cross-examined.

2/ The parties' stipulation has been accepted and utilized herein, even though FCHR has entered several final orders specifying that it is "age relative to the hired employee that controls," rather than any particular age category, such as "over 40."

3/ Petitioner contends that this document/date should be interpreted to mean that Mr. Poole only applied for the position as of May 28, 2006, instead of before the April 20, 2006, interview date handwritten on his written interview questions and typed as his interview date on Mr. King's summary and prioritization list of all 18 interviews which ranked all candidates, and which was then reviewed by Ms. Vaughn.

COPIES FURNISHED:

Philip Porter
Post Office Box 946
Silver Springs, Florida 34489

Stephen Donelan, Esquire
Department of Agriculture
and Consumer Services
509 Mayo Building
407 South Calhoun Street
Tallahassee, Florida 32399-0800

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

Denise Crawford, Agency Clerk
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.