

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ILA SHARPE, )  
)  
Petitioner, )  
)  
vs. ) Case No. 07-3763  
)  
FLORIDA COMMISSION )  
ON HUMAN RELATIONS )  
)  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A hearing was held pursuant to notice, on March 7, 2008, in Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Ila Sharpe, pro se  
1555 Delaney Drive, Number 1014  
Tallahassee, Florida 32309

For Respondent: Kurt E. Ahrendt, Esquire  
Kara Berlin, Esquire  
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged by Petitioner.

PRELIMINARY STATEMENT

Petitioner, Ila Sharpe, completed and submitted a "Technical Assistance Questionnaire on Human Relations" to the Miami Dade Equal Employment Opportunity Office (EEO Office). The fax cover page from Petitioner to the EEO Office shows a date of January 19, 2007. The completed questionnaire contained allegations that Respondent, the Florida Commission on Human Relations (FCHR), violated Section 760.10, Florida Statutes, by discriminating against her on the basis of age.

On January 31, 2007, the EEO Office forwarded the complaint to FCHR. FCHR later sent Petitioner's complaint back to the EEO Office for investigation.

Based upon an investigation by the Office of Employment Investigations, FCHR issued a Determination of "no cause" and Notice of Determination: No Cause on July 30, 2007.

A Petition of Relief was filed by Petitioner with FCHR on or about August 14, 2007. FCHR transmitted the case to the Division of Administrative Hearings (Division) on or about August 21, 2007. The case was assigned to Administrative Law Judge Suzanne Hood. A Notice of Hearing was issued setting the case for formal hearing on October 22, 2007. Two motions for continuance were granted. The hearing was ultimately rescheduled for March 7, 2008.

The case was transferred to the undersigned. The day before the scheduled hearing, Petitioner filed a Motion for Continuance, which was denied. The hearing was heard as scheduled on March 7, 2008.

At hearing, Petitioner testified on her own behalf and presented the testimony of Lisa Sutherland and Julina Dolce Gurganious. Petitioner's Exhibit numbered 1 was admitted into evidence. Respondent presented the testimony of Sherry Taylor, Regina Owens, Rockal Brown Archie, and Petitioner. Respondent offered Exhibits numbered 1 through 18 and 24, which were admitted into evidence.

A transcript consisting of one volume was filed on March 24, 2008. Petitioner timely filed a post-hearing submission and Respondent filed a Proposed Recommended Order, which have been considered in the preparation of this Recommended Order. Petitioner attached a document to her post-hearing submission which is in the nature of a late-filed exhibit. As such, it was not considered in the entry of this Recommended Order. See § 120.57(1)(f), Fla. Stat.

#### FINDINGS OF FACT

##### Age Discrimination

1. Petitioner, Ila Sharpe, was employed by FCHR from June 28, 2002, until February 6, 2006.

2. Regina Owens is the housing investigations manager for FCHR. In approximately May 2004, Ms. Owens hired Petitioner into the housing unit upon the suggestion of the deputy director, Nina Singleton. Ms. Owens placed Petitioner in a vacant Senior Clerk position under her supervision in the housing unit. At the time, Ms. Owens became Petitioner's supervisor, Ms. Owens was 51 years old. Petitioner was approximately 50 years old at that time.

3. After Petitioner was in the Senior Clerk position for six or seven months, Ms. Owens promoted Petitioner to the position of Investigation Specialist I. Ms. Owens waived the requirements of a college degree and investigative writing experience for this new position, because Petitioner already worked for FCHR and had expressed an interest in moving up.

4. The Investigator Specialist I position is a Selected Exempt Service position which included investigating cases, as well as "intake" duties. Ms. Owens explained to Petitioner that she would be doing investigations after about four months on the job. Petitioner was promoted to this position in January 2005.

5. Ms. Owens sent Petitioner to Washington D.C. for training on three occasions in 2005: February, June, and December. Each training session lasted about a week and was conducted by the National Fair Housing Training Academy.

6. After attending the February week-long training session, Petitioner continued to perform solely "intake" duties. Following the February training, Ms. Owens asked Petitioner if she was ready to take on an investigative caseload. Petitioner indicated that she was not ready to do so at that time.

7. After Petitioner attended the June 2005, training session, Ms. Owens again spoke to Petitioner and determined that Petitioner was still not ready to take on investigative duties, although she had been in the position more than four months.

8. In September 2005, Ms. Owens had e-mail communications with Petitioner, which gave her cause for concern that Petitioner might not know the answers to matters on which she had received training. In particular, Ms. Owens was concerned that Petitioner's e-mail responses to her indicated that Petitioner was confused as to whom an investigator should be dealing with in a particular situation.

9. Petitioner attended the third week-long training session in December 2005. After a discussion with Petitioner, Ms. Owens was still concerned about Petitioner's reluctance to take on investigative duties despite her training and length of time on the job. Petitioner had been in the investigator specialist position for nearly a year but never investigated a case.

10. In late December 2005, Ms. Owens developed a test for employees of the housing unit. The purpose of the test was to test employees' working knowledge of the HUD manual and research skills in using the manual, specifically regarding the intake process. The "Housing Unit Intake Test" was based on the HUD manual, which is the book that all investigators have and use. The test was similar to the test the investigators had to take in Washington during training. The test developed by Ms. Owens is now given to all new investigators during their training.

11. On January 5, 2006, Petitioner was first given the test using a "closed book" administration. The test pertained to the HUD manual materials, and Petitioner was given an hour to complete the closed book test. The purpose of the closed book administration was to assess the employee's working knowledge of the subject matter. Petitioner scored ten correct answers out of 34 test questions.

12. On January 6, 2006, Ms. Owens again gave Petitioner the same test questions. However, this second administration of the test was "open book" with two hours allowed to take the test. The open book administration was designed to assess the employee's ability to do research, find the answers in the HUD manual, and to answer the questions correctly. Petitioner scored 11 correct answers out of 34 test questions.

13. Also on January 6, 2006, Ms. Owens administered the same test to investigation specialist Julina Dolce. Ms. Dolce's score on the closed book test is unclear from the record. However, on the open book test, Ms. Dolce received a score of 27 correct answers out of 34 test questions.

14. After taking the test, Petitioner spoke to Ms. Dolce about what was on the test. However, there is no evidence in the record that Ms. Owens was aware that Ms. Dolce had a "heads up" on the test content prior to taking the test.

15. The test was also given to Marshetta Smith on January 6, 2006. At the time she took the test, Ms. Smith was a senior clerk who did not do much intake work, and was approximately 30 years old at the time. While not an investigator, Ms. Smith was given the test to assess her working knowledge and research skills for potential upward mobility. Ms. Smith had 11 correct answers out of 34 test questions. Ms. Smith has since been terminated from employment with Respondent.

16. About two weeks after administering the first test, Ms. Owens administered a different test, the "55+ exam", which pertained to housing regulations for older persons. Petitioner scored 14 correct answers out of 20 test questions on the closed book administration and 16 correct answers out of 20 test questions on the open book administration of the test.

17. Based upon her reluctance to take on an investigative caseload and upon her poor performance on the intake test, it was determined that Petitioner would be demoted to a senior clerk position. A meeting was held on January 26, 2006, with Ms. Owens, Petitioner, and the human resources manager, informing Petitioner of the intended demotion to be effective February 10, 2006.

18. On January 30, 2006, Petitioner submitted her letter of resignation to Ms. Owens effective February 6, 2006. Her resignation was accepted, effective the close of business February 6, 2006. Consequently, the demotion did not take place as Petitioner resigned from employment with Respondent prior to the effective date of the intended demotion.

19. After Petitioner's resignation, Respondent moved Ms. Dolce into Petitioner's position of investigation specialist. At that time, Ms. Dolce was 31 years old.

20. While making a vague assertion that Ms. Owens made innuendos regarding younger people "some time ago", Petitioner acknowledged that Ms. Owens never said anything derogatory to Petitioner about her age.

21. Sherry Taylor began working at FCHR in 1999 as a senior clerk. She moved into an investigator position in April 2000. When Ms. Owens came into the housing unit in 2004, Ms. Taylor was an investigator II.



22. Ms. Taylor was demoted in the fall of 2006 to an investigator I because the quality of her work "went downhill." At the time of her demotion, Ms. Taylor was 30 years old.

23. There is no competent evidence that FCHR used age as a criterion in its decision to demote Petitioner.

#### Timeliness

24. Petitioner sent a document entitled "Technical Assistance Questionnaire for Employment Complaints" to the EEO Office, which alleged that she had been discriminated against by FCHR on the basis of her age. The fax cover sheet shows a date of January 19, 2007, but no "received" stamp appears on the document. The document included a request from Petitioner that the "complaint" not be forwarded to FCHR for investigation.

25. Despite this request, the EEO office forwarded the completed questionnaire to FCHR on January 31, 2007. This date is confirmed by the date stamp indicating receipt, as well as the fax transmittal notation at the top of each page. However, the investigation was conducted by the EEO Office.

26. The Determination: No Cause dated July 30, 2007, issued by FCHR to Petitioner states in part that "the timeliness and all jurisdictional requirements have been met."

#### CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has

jurisdiction over the parties and subject matter in this case.  
§§ 120.569, 120.57 and 760.11(7), Fla. Stat.

28. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of age.

29. Section 760.11(1), Florida Statutes, reads in pertinent part as follows:

(1) Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, naming the employer, employment agency, labor organization, or joint labor-management committee, or, in the case of an alleged violation of s. 760.10(5), the person responsible for the violation and describing the violation. Any person aggrieved by a violation of s. 509.092 may file a complaint with the commission within 365 days of the alleged violation naming the person responsible for the violation and describing the violation. The commission, a commissioner, or the Attorney General may in like manner file such a complaint. On the same day the complaint is filed with the commission, the commission shall clearly stamp on the face of the complaint the date the complaint was filed with the commission. In lieu of filing the complaint with the commission, a complaint under this section may be filed with the federal Equal Employment Opportunity Commission or with any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80. If the date the complaint is filed is clearly stamped on the face of the complaint, that date is the date of filing. The date the complaint is filed

with the commission for purposes of this section is the earliest date of filing with the Equal Employment Opportunity Commission, the fair-employment-practice agency, or the commission. The complaint shall contain a short and plain statement of the facts describing the violation and the relief sought. The commission may require additional information to be in the complaint. The commission, within 5 days of the complaint being filed, shall by registered mail send a copy of the complaint to the person who allegedly committed the violation. The person who allegedly committed the violation may file an answer to the complaint within 25 days of the date the complaint was filed with the commission. Any answer filed shall be mailed to the aggrieved person by the person filing the answer. Both the complaint and the answer shall be verified. (emphasis supplied)

#### Timeliness

30. Respondent raises the issue of timeliness in its Proposed Recommended Order. However, Respondent does not dispute that Petitioner sent the "Technical Assistance Questionnaire for Employment Complaints" to the EEO Office on January 19, 2007. See Respondent's Proposed Recommended Order Preliminary Statement and paragraph 23. Respondent argues that the complaint is untimely because it was not received by FCHR within 365 days of the alleged violation.

31. While there is no clear date stamp showing that the EEO Office received the complaint on January 19, 2007, that date was not disputed by FCHR. Moreover, FCHR affirmatively stated in its Determination: No Cause that all timeliness requirements

had been met. The undersigned concludes that, based upon the above statutory language and FCHR's acknowledgement of the date Petitioner sent the complaint to the EEO Office, the complaint was timely filed when Petitioner sent it to the EEO Office on January 17, 2007. This is less than 365 days after the date Respondent notified Petitioner that she would be demoted.

#### Age Discrimination

32. In order to make out a prima facie case of age discrimination under the federal Age Discrimination in Employment Act (ADEA), the complainant must show that she was a member of a protected age group, was subject to adverse employment action, that she was qualified for the job, and that she was replaced by a younger person. Benson v. Tocco, Inc., 113 F.3d 1203, 1207 (11th Cir. 1997), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (the 11th Circuit has adopted a variation of the McDonnell Douglas Corp. v. Green test in ADEA violation claims.)<sup>1/</sup>

33. However, in cases alleging age discrimination under Section 760.10(1)(a), Florida Statutes, FCHR has concluded that unlike cases brought under ADEA, the age of 40 has no significance. FCHR has determined that to demonstrate the last element of a prima facie case of age discrimination under Florida law, it is sufficient for Petitioner to show that she was treated less favorably than similarly-situated individuals

of a "different" age as opposed to a "younger" age. See Linda Marchinko v. The Wittemann Co., Inc., FCHR Final Order No. 06-005 (January 6, 2006), and numerous cases cited therein.

34. Petitioner has not met her burden of proving a prima facie case of age discrimination under either federal or Florida law. As to the first element of establishing a prima facie case, she is, and was at the time of her employment with Respondent, a member of a protected age group for purposes of ADEA.

35. As to the second element of establishing a prima facie case, Petitioner resigned before the demotion took place. Had she stayed, she would have been subject to an adverse employment decision in that she was informed that she would be demoted.

36. As to the third element, the preponderance of the evidence established that Petitioner was not qualified for the job. Petitioner did not have a college degree or investigative experience when promoted to the investigative specialist position. Moreover, her poor performance on the intake test demonstrated that, despite training, she was not qualified for the job. Accordingly, she does not satisfy the third element of establishing a prima facie case.

37. The person who replaced Petitioner was Ms. Dolce, who was approximately 30 years old at the time, and, therefore, a

"different" age group. Thus, this element of establishing a prima facie case is satisfied.

38. When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the adverse employment action. Walker v. Prudential Property and Casualty Insurance Company, 286 F.3d 1270 (11th Cir. 2002); Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Department of Corrections v. Chandler, supra; Alexander v. Fulton County, GA, 207 F.3d 1303 (11th Cir. 2000).

39. Even if Petitioner had established a prima facie case of age discrimination, Respondent has adequately articulated a legitimate, non-discriminatory explanation for its employment decision regarding Petitioner. Petitioner did not perform well on the intake test and expressed reluctance to take on investigative responsibilities after a period of time in which persons in that position normally do. As such, Respondent has asserted a legitimate, non-discriminatory reason for their intention to demote her to Senior Clerk, the classification she was in prior to her promotion to investigative specialist. The

decision of Respondent regarding Petitioner was based upon legitimate reasons and was not based upon Petitioner's age.

40. Petitioner was replaced by Ms. Dolce who was in a different age group. However, Ms. Dolce scored well on the intake exam. While this may have, in part, been because Petitioner gave Ms. Dolce a "heads up" on the test content, there is nothing in the record to indicate that Ms. Owens had any knowledge of this before Ms. Dolce was placed in Petitioner's position.

41. In an employment discrimination case, the plaintiff must produce sufficient evidence to support an inference that the defendant-employer based its employment decision on an illegal criterion. Benson, supra, 113 F.3d 1203, 1207. Petitioner failed to present sufficient evidence to contradict the evidence presented by Respondent that she was going to be demoted because of her job performance.

42. Once the employer articulates a legitimate non-discriminatory explanation for its actions, the burden shifts back to the charging party to show that the explanation given by the employer was a pretext for intentional discrimination. "Would the proffered evidence allow a reasonable factfinder to conclude that the articulated reason for the decision was not the real one?" Walker v. Prudential, supra. "The employee must 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." Department of Corrections v. Chandler, 582 So. 2d 1183 at 1186; Alexander v. Fulton County, GA, supra. Petitioner has not met this burden.

43. Courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of age discrimination. See, e.g., Barnes v. Southwest Forest Industries, 814 F.2d 607 at 610 (11th Cir. 1987) (remark by personnel manager to terminated security guard that in order to transfer, "you would have to take another physical examination at your age, I don't believe you could pass it" was not considered direct evidence of age discrimination by the court); Williams v. General Motors Corp., 656 F.2d 120 at 130 (5th Cir. Unit B 1981) cert. denied, 455 U.S. 943 (1982) (scrap of paper on which was written "Too old--Lay Off" would constitute direct evidence of discriminatory intent).

44. Other than Petitioner's vague assertions that Ms. Owens made innuendos some time ago related to age, Petitioner presented no evidence establishing that Respondent's reasons were pretextual. Petitioner's speculation and personal belief concerning the motives of Respondent are not sufficient to establish intentional discrimination. See Lizardo v.



Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001) ("plaintiffs have done little more than to cite to their mistreatment and ask the court to conclude it must have been related to their race. This is not sufficient.").

45. In summary, Petitioner has failed to carry her burden of proof that Respondent engaged in discrimination based on age, in its actions regarding her employment.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 11th day of June, 2008, in Tallahassee, Leon County, Florida.



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BARBARA J. STAROS  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of June, 2008.

ENDNOTE

<sup>1/</sup> FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.