

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH A. ZEMBA, JR.,)
)
 Petitioner,)
)
vs.) Case No. 08-4144
)
PHANTOM FIREWORKS,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, on October 28, 2008, a final hearing was conducted in this case before Jeff B. Clark, the duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Viera, Florida.

APPEARANCES

For Petitioner: Joseph A. Zemba, Jr., pro se
39 Burlington Avenue
Rockledge, Florida 32955

For Respondent: Anthony Donofrio, Esquire
Qualified Representative
B.J. Alan Company
555 Martin Luther King, Jr. Boulevard
Youngstown, Ohio 44505

STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner on the basis of his age as stated in the Petition for Relief, in violation of Subsection 760.10(1), Florida Statutes (2007).

PRELIMINARY STATEMENT

On August 13, 2008, Petitioner, Joseph A. Zemba, Jr., filed a Petition for Relief from an Unlawful Employment Practice with the Florida Commission on Human Relations (FCHR), alleging that Respondent, Phantom Fireworks, B.J. Alan Company, discharged him from employment "based on age."

On July 17, 2008, the FCHR had issued a Notice of Determination: No Cause, regarding his claim. The Petition for Relief was timely filed with the FCHR. On August 21, 2008, the FCHR referred the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a hearing on the allegations of employment discrimination made by Petitioner. On the same day, August 21, 2008, an Initial Order was sent to both parties requesting mutually convenient dates for a final hearing. Based on the response of the parties, a final hearing was scheduled on October 28, 2008, in Viera, Florida.

On September 22, 2008, Anthony Donofrio, Esquire, a member of the State of Ohio Bar, sought qualification as a qualified representative and to be allowed to represent Respondent by telephone. The request to appear by telephone was granted by Order dated October 9, 2008. Mr. Donofrio was accepted as a qualified representative by Order dated September 24, 2008.

The hearing was held on October 28, 2008, as scheduled. Petitioner, Joseph A. Zemba, Jr., testified on his own behalf. Respondent presented four witnesses: Joseph Mele, Kimberly Knapp-Mele, Kathy Daley, and Ira Schwartz. The exhibits offered by both parties were not accepted into evidence, because the parties did not provide the other with copies as required by the Pre-hearing Order; both parties objected on this basis.

No transcript of the hearing was ordered. Both parties timely submitted Proposed Recommended Orders.

All references are to Florida Statutes (2007), unless otherwise noted.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following facts were established by clear and convincing evidence:

1. Respondent, Phantom Fireworks, is a retailer and wholesaler of consumer fireworks and employs more than 15 persons.
2. Petitioner, Joseph A. Zemba, Jr., was hired as an assistant manager at the Cocoa, Florida, location on March 21, 2007. At the time he was hired, he was 57 years old and the oldest of four applicants for the position.
3. On or about August 16, 2007, Petitioner was discharged from his employment with Phantom Fireworks by the Cocoa,

Florida, manager, Joseph Mele. Mr. Mele advised Petitioner that he was discharged for violating company policy regarding the unauthorized use of alcohol on company property or while on the job.

4. Petitioner testified that he believes the discharge for alcohol abuse was a "cover up" for the real reason that he was discharged. Petitioner "believed" that he was discharged because of his age.

5. Petitioner presented no direct or circumstantial evidence that his discharge was based on age. He did not deny his use of alcohol while on company premises and on company time.

6. On July 1, 2007, after receiving customer complaints regarding the smell of alcohol on Petitioner's person, Mr. Mele counseled him about the smell of alcohol on his person and raised the issue of the impropriety of drinking alcohol during work hours. Prior to the customers approaching Mr. Mele, two employees told him, independently and at different times, that they observed the odor of alcohol on Petitioner's person. Petitioner acknowledged having used alcohol during working hours and indicated it would not happen again.

7. On August 2, 2007, Mr. Mele again received complaints of Petitioner having the odor of alcohol on his breath. Based on these complaints, Mr. Mele verbally counseled Petitioner a

second time regarding the use of alcohol while on company premises and during company time. Petitioner again acknowledged he was drinking and stated that he "had a beer for lunch" and that it would not happen again.

8. Mr. Mele again verbally counseled Petitioner on August 6, 2007. On August 3, 2007, Kathy Daley, a co-worker whose testimony confirmed the incident, told Mr. Mele that when she and Petitioner worked together on that day, Petitioner left the showroom to do some banking, a task that usually takes ten or 15 minutes. Petitioner, however, was gone for over one hour before he returned. When he returned, Kat Daley smelled a strong odor of alcohol on Petitioner's breath. She reported this after Petitioner had left for the day.

9. Petitioner was next scheduled to work on August 6, 2007, at which time Mr. Mele counseled him for a third time regarding complaints of the smell of alcohol on his person. When questioned about his whereabouts, Petitioner told Mr. Mele that he could not remember where he went.

10. Mr. Mele contacted his regional manager, Ira Schwartz, on August 7, 2007, to discuss the alcohol issue regarding Petitioner. Ira Schwartz advised Mr. Mele to contact Amy Witzeman, director of Human Resources for Phantom Fireworks. After considering the facts and consulting with the director of

Operations and General Counsel, a decision was made to terminate Petitioner based on his abuse of alcohol.

11. Petitioner was terminated from the company, effective August 16, 2007.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. § 120.57(1), Fla. Stat. (2008).

13. Subsection 760.10(1), Florida Statutes, in relevant part, makes it an unlawful employment practice for Respondent to discriminate against Petitioner because of Petitioner's age. Chapter 760, Florida Statutes, entitled the Florida Civil Rights Act, adopts the legal principles and judicial precedent set forth under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000, et seq.; King v. Auto, Truck, Indus. Parts and Supply, Inc., 21 F. Supp. 2d 1370 (N.D. Fla. 1998); Carlson v. WPLG/TV-10, Post-Newsweek Stations of Florida, 956 F. Supp. 994 (S.D. Fla. 1996).

14. The United States Supreme Court has established an analytical framework within which courts should examine claims of discrimination, including claims of age discrimination. In cases alleging discriminatory treatment, Petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's

Honor Center v. Hicks, 509 U.S. 502 (1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

15. Petitioner can establish a prima facie case of discrimination in one of three ways: (1) by producing direct evidence of discriminatory intent; (2) by circumstantial evidence under the McDonnell Douglas framework; or (3) by establishing statistical proof of a pattern of discriminatory conduct. Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989). If Petitioner cannot establish all of the elements necessary to prove a prima facie case, Respondent is entitled to entry of judgment in its favor. Earley v. Champion International Corp., 907 F.2d 1077 (11th Cir. 1990).

16. To establish a prima facie case of discrimination, Petitioner must show: that he is a member of a protected class; that he suffered an adverse employment action; that he received disparate treatment from other similarly situated individuals in a non-protected class; and that there is sufficient evidence of bias to infer a causal connection between his age and the disparate treatment. Andrade v. Morse Operations, Inc., 946 F.Supp. 979 (M.D. Fla. 1996).

17. Petitioner made a prima facie showing that due to his age, he is a member of a protected class and that he suffered an adverse employment action--he was discharged. However, Petitioner failed to make a prima facie showing that he received

dissimilar treatment from individuals in a non-protected class or that there was any bias against Petitioner. Even if evidence of bias did exist, it was insufficient to infer a causal connection between Petitioner's age and the alleged disparate treatment.

18. Petitioner's case is predicated on his statement that he believed he was fired because of his age and that his alleged alcohol abuse was a "cover-up." This was affirmatively denied by his immediate supervisor and reports of Petitioner's use of alcohol confirm that Petitioner's consumption of alcohol during working hours was a recurring problem. Other than his testimony regarding his "belief," Petitioner offered no other evidence, direct, circumstantial, or statistical of the alleged discrimination.

19. If Petitioner had satisfied his burden of establishing a prima facie case of discrimination, an inference would have arisen that the adverse employment action was motivated by a discriminatory intent. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The burden would have then shifted to Respondent to articulate a legitimate, non-discriminatory reason for its action. Id.

20. Respondent articulated a legitimate, non-discriminatory reason for its action. Respondent demonstrated

that Petitioner's abuse of alcohol was the reason for his discharge.

21. Once Respondent successfully articulates a non-discriminatory reason for its action, the burden shifts back to Petitioner to show that the proffered reason is a pretext for unlawful discrimination. Petitioner must provide sufficient evidence to allow a reasonable fact-finder to conclude that the proffered reason is not the actual motivation for the adverse employment action. Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318 (11th Cir. 1998).

22. Petitioner may show that Respondent's articulated reason is a pretext by showing that the non-discriminatory reason should not be believed; or by showing that, in light of all the evidence, discriminatory reasons more likely motivated the decision than the proffered reason. Id. Petitioner did neither. Petitioner failed to present any evidence showing that Respondent either should not be believed or that discriminatory reasons, rather than the proffered reason, more likely motivated the adverse employment action.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Respondent, Phantom Fireworks,

did not discriminate against Petitioner, Joseph A. Zemba, Jr., and dismissing the Petition for Relief.

DONE AND ENTERED this 25th day of November, 2008, in Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 2008.

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.