STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL L. COYLE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-0981
	)	
KAREN E. RUSHING, SARASOTA COUNTY CLERK OF CIRCUIT COURT,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was held in this case before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings, on July 30 and July 31 and August 17, 2009, by video teleconference at sites in Sarasota and Tallahassee, Florida.

APPEARANCES

Petitioner: Gary D. Wilson, Esquire
Jill S. Schwartz and Associates, P.A.
180 North Park Avenue, Suite 200
Winter Park, Florida 32789

Respondent: Maria D. Korn, Esquire
Sarasota County Attorney's Office
1660 Ringling Boulevard, Second Floor
Sarasota, Florida 34236

STATEMENT OF THE ISSUE

The issue is whether Respondent, as a covered employer under the Florida Civil Rights Act, Sections 760.01 through

760.11, Florida Statutes (2008),[1] committed an unlawful employment practice against Petitioner.

PRELIMINARY STATEMENT

On or about July 25, 2008, Petitioner, Michael L. Coyle, ("Petitioner"), filed a Complaint of Discrimination ("Complaint") with the Florida Commission on Human Relations ("Commission"). The Complaint alleged that Respondent, Karen E. Rushing, Clerk of Circuit Court and County Comptroller ("Respondent" or "Clerk"), discriminated against him based on his age and handicap, in violation of the Florida Civil Rights Act of 1992, as amended, Section 760.10, Florida Statutes. On or about January 14, 2009, the Commission issued a No Cause Determination.

Petitioner challenged the No Cause Determination, and on February 16, 2009, filed a Petition for Relief ("Petition") with the Commission. The Petition alleged that Respondent engaged in an unlawful employment practice by discriminating against Petitioner based on his age and disability.

On February 19, 2009, the Commission referred the matter to the Division of Administrative Hearings ("DOAH") to conduct the hearing requested by Petitioner.

The hearing was initially scheduled for April 14 and 15, 2009, but was rescheduled and held as noted above, after the parties' Joint Motion for Continuance was granted.

Prior to hearing, the parties filed a Joint Pre-hearing Stipulation and included "admitted facts," which required no proof at hearing. At the final hearing, Petitioner testified on his own behalf and presented the testimony of seven witnesses; and Respondent presented the testimony of two witnesses. Joint Exhibits A through G, I and J, Petitioner's Exhibits A through C and E through J, and Respondent's Exhibit C were admitted into evidence.

The five-volume Transcript of the hearing was filed on August 31, 2009. At the conclusion of the hearing, the parties agreed to file proposed recommended orders ten days from the date the transcript was filed. Prior to that date, the time for filing post-hearing submittals was extended twice upon the requests of the parties. Petitioner's Proposed Recommended Order and Respondent's Proposed Recommended Order and Post-Hearing Brief were timely filed under the extended time frame and have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Respondent is a constitutional officer and employer subject to the jurisdiction of the Florida Civil Rights Act.

2. On or about July 2, 2001, Respondent, upon the recommendation of Tom Kay, then director of Respondent's

Information Technology ("IT") Department, hired Petitioner as a desktop support analyst in the IT Department. The desktop support analyst position, like all positions with Respondent, is an at-will position.

3. Petitioner was 64 years of age when he was hired by Respondent.

4. During his initial years of employment with Respondent, until about late 2005, Petitioner reported to and was supervised by Mr. Kay. After Mr. Kay resigned in November or December 2005, Petitioner reported to Greg Brock, the IT director.

5. Throughout his employment as an IT desktop support analyst, Petitioner was knowledgeable regarding computer applications and his employer's policies regarding use of computers. The essential functions of the desktop analyst position included adhering to and following the principles of the Clerk's Office, and complying with and supporting the mission of the Clerk's Office and the goals and objectives of the IT Department.

The Policies and Guidelines

6. Respondent established detailed Information Security Policy Guidelines regarding the use of network resources. Section 5.6 of the Security Guidelines prohibits employees from using network resources for "obscene or suggestive messages or offensive graphical images." Additionally, Section 5.7 of the

Guidelines prohibits employees from deliberately downloading or uploading certain materials, including materials of a "sexually explicit nature" or "material which adversely affects the employee's or user's ability to do his or her job or . . . the [Clerk's] office's ability to carry out its assigned mission."

7. Respondent developed and approved a Personnel Handbook which governs, among other matters, employee use of various types of equipment. Section 1.16 addresses the "Care and Use of Equipment," including computers, Internet access and email, which are the property of the Clerk's Office. The policy prohibits employees from using those computers for personal purposes and, specifically, prohibits the use of such equipment in ways "that may be disruptive, offensive, or harmful to morale." Section 1.16 further provides that Respondent's objective with regard to this policy is "to maintain a workplace free from harassment and sensitive to the diversity of its employees."

IT Team Building Exercises

8. While IT director, Mr. Kay instituted sports-based office games for team-building. Mr. Kay believed that these activities would boost morale, promote camaraderie, and facilitate communication among staff in the office. Mr. Kay considered the team-building activities to be an effective tool in leading a group of IT people, who typically are introverted

by nature, prone to going to their "corners," and not interacting very much.

9. JeanMarie Walsh, then assistant to Mr. Kay, coordinated some of the team-building activities, including the fantasy football game. While serving in that capacity, Ms. Walsh prepared football pool ballots at lunchtime on Friday for Monday morning bragging rights and temporary use of a team hat. She also occasionally used the office computer for email reminders and did so at the direction of Mr. Kay, believing it was not inconsistent with the Clerk's Office policies.

10. The sports "picks" were done primarily during off-duty times and involved only incidental (five to ten minutes a day) use of staff time or the Clerk's Office equipment. This incidental use of equipment in connection with authorized team-building activities did not constitute unauthorized personal use of Respondent's equipment.

11. Mr. Kay opined that the team building activities and use of staff and equipment in connection with those activities were within his rights as IT director.

12. The Chief Deputy Clerk, Janet Cantees ("Chief Deputy Cantees"), knew that the IT Department employees participated in the sports-based team-building exercises initiated and implemented by Mr. Kay. Furthermore, at no time were these team-building activities proscribed by the employer.

13. Respondent was generally aware of the team-building exercises in the IT Department and cautioned Mr. Kay to make sure no money was involved in the activities. She also advised him that employee participation in the team-building exercises was to be on a purely voluntary basis.

14. In accordance with Respondent's instructions, no money was exchanged in regard to these sports team-building activities, and no IT employee was required to participate in the sports activities.

15. The team-building sports activities in the IT Department concluded prior to July 2007.

16. The use of team-building exercises is not unique to the IT Department, but is used with other employees in the Clerk's Office. For example, Chief Deputy Cantees had developed and used other team-building exercises for managers and staff who worked in different locations in the county.

17. Some IT employees also participated in a "Clerk Shirt Everyday" activity, which was to encourage employees to wear their official "clerk shirts." The person who wore a "clerk shirt" that was a color not worn by anyone else that day was the winner of the activity. The winner was given one or two dollars by each participating employee to buy donuts the next day for the work group.

Policy Violation Related to Use of Computers

18. In or about early July 2007, Ms. Walsh, an employee in the IT Department telephoned Petitioner from her office. After he did not answer his phone, Ms. Walsh went to Petitioner's work area where she observed him on the computer in the Miami Hurricane football chat rooms. Ms. Walsh then reported to IT Director Brock that Petitioner was not answering his phone and told him what she had observed.

19. On or about July 5, 2007, after Ms. Walsh reported seeing Petitioner in the Miami Hurricane chat rooms, Mr. Brock had Petitioner come to his office. Mr. Brock then told Petitioner that he should not be visiting what Brock believed to be the Miami Hurricanes football web chat rooms on Respondent's computer. During this meeting, Petitioner denied that he had visited such chat room as had been reported.

20. On or about July 25, 2007, while in the area in which Petitioner worked, Ms. Walsh observed Petitioner at his computer. At that time, Ms. Walsh saw an inappropriate image on Petitioner's 24-inch computer screen. The inappropriate image was in clear view of Ms. Walsh and any other employee present in the adjacent working area. When Ms. Walsh saw the inappropriate image, she was concerned that a female vendor working nearby might be exposed to the explicit image.

21. Ms. Walsh was embarrassed and shocked by the image she saw on Petitioner's computer screen and, thus, said nothing to Petitioner. Instead, Ms. Walsh immediately reported what she had witnessed to Mr. Brock.

22. When Ms. Walsh initially told Mr. Brock about the image she had witnessed on Petitioner's computer screen, she described it as "offensive" to "a woman." During their brief conversation about the image on Petitioner's screen, Ms. Walsh was uncomfortable and embarrassed talking about the image. As a result, neither Mr. Brock, nor Ms. Walsh discussed the image in any detail other than confirming it was of a sexual nature.

23. On July 25, 2007, after Ms. Walsh complained about the inappropriate image on Petitioner's computer screen, Mr. Brock conducted an inspection of Petitioner's computer. As a result of that inspection, Mr. Brock found on the hard drive two offensive photos, referenced as "Jugsy.jpg" and "cheappussy.jpg."

24. The "Jugsy.jpg" photo found in Petitioner's computer depicts a young woman, mouth open, clad in a bra or bikini top, clutching her breasts, most of which were exposed, and pushing them together.

25. The "cheappussy.jpg" photo found in Petitioner's computer depicts a man holding or dangling a hairless cat, which appears to be dead, in the air by its head.

26. The offensive photos were found among other photos depicting Petitioner and his friends, and/or acquaintances of his, engaged in social or sports activities, including the University of Miami Hurricane events. The offensive photos found by Mr. Brock were located in a place on Petitioner's computer associated with his user name/login and were copied to the computer into Petitioner's profile or personal directory. Furthermore, based on Mr. Brock's inspection, there was no indication that the offensive pictures had been tampered with or modified by anyone else.

27. At all times relevant hereto, there were ten or eleven employees in the IT Department, all of whom had administrative passwords that allowed them to access any of the Clerk's Office computers. The IT employees needed this access in order to perform their authorized job responsibilities. Because the IT employees had access to all computers, it is possible that any IT employee could have accessed Petitioner's computer. However, there is no evidence that this ever occurred.

28. At all times relevant hereto, Mr. Brock had the experience and expertise to run a report of computer activity and to conduct a forensic analysis of Petitioner's computer to determine the history of the images. However, based on the findings of Mr. Brock's initial investigation of Petitioner's

computer, he determined that such analysis or report was not necessary.

29. On July 26, 2007, Mr. Brock showed Ms. Walsh the images he found saved in Petitioner's computer. At that time, Ms. Walsh identified the picture labeled "Jugsy.jpg" as the offensive image she had seen on Petitioner's computer.

30. At this proceeding, Ms. Walsh testified that the image she saw on Petitioner's computer screen in July 2007 was a topless female in partially unzipped jean shorts.

31. Undoubtedly, there is a difference in the image Ms. Walsh described in her testimony, which was two years after the incident, and the "Jugsy.jpg" photo she identified the day after she saw the image. This difference or discrepancy may be attributed to several factors including the following: (1) the lapse of time, two years, between Ms. Walsh's seeing the image and testifying at this proceeding; (2) the brief time that Ms. Walsh actually saw the image on Petitioner's screen; and/or (3) the brief time she looked at the "Jugsy.jpg" photo when it was shown to her by Mr. Brock.

32. Notwithstanding the foregoing difference in Ms. Walsh's description of the image she saw on Petitioner's computer screen and the photo she identified as that image, Ms. Walsh's testimony that she saw an offensive image of a woman on Petitioner's computer screen is found to be credible.

Significantly, Ms. Walsh's complaint led to an investigation, which found that there were offensive photos stored in Petitioner's computer (the one provided to him by the Clerk's Office).

Decision to Terminate Petitioner's Employment

33. In personnel matters regarding employment termination, the process begins with the unit manager or director discussing and reviewing the situation with Edith Peacher, manager of Human Resources ("HR"). After the matter is reviewed, the director or manager typically makes a recommendation in consultation with HR Manager Peacher. That recommendation is then conveyed to Chief Deputy Cantees, a key decision maker, who reviews the matter and then communicates her decision/recommendation to Respondent. Ultimately, Respondent has "veto authority" over the recommendation and/or decision of the chief deputy clerk.

34. Consistent with Respondent's personnel practices, after Ms. Walsh identified the picture that she believed she saw on Petitioner's computer screen, Mr. Brock conferred with the HR manager. During the meeting with HR Manager Peacher, Mr. Brock advised her of Ms. Walsh's complaint, his investigation, and the photos he had retrieved from Petitioner's computer. Mr. Brock also told HR Manager Peacher that a few weeks before, he had spoken to Petitioner about using his computer to go to chat rooms.

35. HR Manager Peacher, with input from Mr. Brock, drafted a Termination Notice dated July 26, 2007, for violations of the Clerk's Office's policies, procedures and professional conduct and standards. HR Manager Peacher then recommended to Chief Deputy Cantees that Petitioner's employment be involuntarily dismissed from the Clerk's employ.

36. The July 26, 2007, Notice of Termination cited the prior disciplinary action; the July 5, 2007 verbal counseling; and references the two photos/images described in paragraphs 24 and 25 as deliberate and inappropriate use by an IT employee of the Clerk's Office computer equipment, justifying termination of employment.

37. Section 4.02 of the Clerk's Personnel Handbook provides that "[e]mployment with the Clerk . . . is on at will basis," but states that "the Clerk may utilize progressive discipline in an effort to work with the employee." Under this provision, the option of using progressive discipline is discretionary, not mandatory.

38. In the instant case, HR Manager Peacher believed that the display of offensive images on Petitioner's computer screen was an "egregious" situation and one which warranted immediate termination.

39. On July 26, 2007, Mr. Brock and HR Manager Peacher met with Petitioner and reviewed the Notice of Termination and the

pending recommendation for dismissal with Petitioner. When confronted with the allegation regarding the offensive images found in his computer, Petitioner stated "matter of factly" that someone "may" have placed the photos on his computer. However, he offered no reason for his implication that someone else "may" have tampered with his computer. Nonetheless, HR Manager Peacher told Petitioner that Respondent could investigate and find out if someone else had placed the images in his computer, but Petitioner did not request further investigation.

40. At the July 26, 2007, meeting, Petitioner signed the Notice of Termination and indicated that he "read the Notice but did not agree with it in any way, shape or form."

41. HR Manager Peacher conveyed to Chief Deputy Cantees the substance of the meeting with Petitioner and her belief that no errors of fact had occurred. After listening to HR Manager Peacher's presentation of the facts, Chief Deputy Cantees asked HR Manager Peacher and Mr. Brock several follow-up questions about the incident (i.e., the validity of the complaint, if and how Petitioner's computer had been checked, etc.). Chief Deputy Cantees was satisfied with the information HR Manager Peacher provided to her, as well as the responses to her questions that were provided by HR Manager Peacher and Mr. Brock.

42. Both HR Manager Peacher and the Chief Deputy Cantees relied on Mr. Brock's experience and expertise in computer

forensics in determining the origin of the offensive images found on Petitioner's computer.

43. Based on her discussions with HR Manager Peacher and Mr. Brock and her review of the record, Chief Deputy Cantees concurred with the recommendation of termination and the Clerk gave final approval.

44. Petitioner was 71 years old when he was terminated from his employment with Respondent.

45. The person hired to replace Petitioner was an individual estimated to be in the mid-40 to mid-50 range.

46. Prior to the incident involving Petitioner, neither Respondent, nor the HR manager had received reports of, or knew of incidents of, employees having inappropriate (sexual) images on their computers. Therefore, no employees in the Clerk's Office have ever been disciplined for that offense.

Medical Condition of Petitioner

47. In 2002, Petitioner was diagnosed with a melanoma that required office surgery and other pre-cancerous lesions that also required treatment. The surgery and all other treatments were performed in the doctor's office and required no hospitalization.

48. Between 2002, when he was first diagnosed with a melanoma and through July 2007, Petitioner has continued to be treated for skin cancer. During this five-year period,

Petitioner's condition and his treatments for that condition have not significantly affected or, otherwise, limited Petitioner's ability to work or to engage in most activities.

49. During the five-year period since he was diagnosed with skin cancer, Petitioner had regular check-ups, some of which may have resulted in his doctor's performing certain in-office medical procedures. Other than those in-office procedures, Petitioner's treatment for his condition consists of applying various salves, creams, and/or lotions to his skin. Finally, as a result of his medical condition, Petitioner had been directed to stay out of the sun.

50. Because Petitioner must now stay out of the sun, he is no longer able to participate in daytime activities that he previously enjoyed doing and/or had been able to do (i.e., going to the beach and to his grandson's soccer and softball games).

51. During his employment with the Clerk's IT Department, Petitioner never requested leave under the Family Medical Leave Act. Moreover, there is no indication that his medical condition affected his attendance at work. In fact, between January and July 2007, Petitioner saw his physician only about six times.

52. Petitioner never notified Respondent, Mr. Brock, or Chief Deputy Cantees that he had skin cancer. Furthermore, none of them knew or suspected that Petitioner had skin cancer or any

other medical condition. Finally, Petitioner's co-workers were unaware of his medical condition.

53. While employed in the IT Department, Petitioner had several conversations with HR Manager Peacher. Petitioner recalled that during one of those conversations, HR Manager Peacher referred him to a dermatologist or assisted him with a medical referral. At this proceeding, HR Manager Peacher did not recall giving Petitioner the name of a dermatologist, but acknowledged that she may have done so. HR Manager Peacher explained that she speaks to numerous employees throughout the workday about various personnel-related matters and provides them with such assistance when requested to do so.

54. Despite having several discussions with Petitioner during his employment with the Clerk's Office, HR Manager Peacher was unaware of his medical condition.

Alleged Disability Discrimination

55. Respondent conducted general meetings with employees every other month. During those meetings, Respondent covers a variety of topics with employees, all of which are on a printed agenda and later sent to employees by e-mail.

56. The Agenda for the June 22, 2007, employee meeting included a three-page overview of the employee compensation package offered to Respondent's employees that included the following introductory statement: "Part of offering a

competitive benefits plan is being proactive in maintaining a healthy lifestyle. Each of us must take the responsibility to live healthy lives, and, in return, our insurance costs will be minimized." During that meeting, Respondent read that language verbatim.

57. In reading the above-quoted language, Respondent's intent was to encourage employees to address "preventable issues," such as smoking, overeating, and not exercising. However, in the charging document, Petitioner alleges that the above-quoted language meant Respondent wanted to hire only "healthy employees."

58. Petitioner's interpretation distorts and misconstrues the above-quoted comments made by Respondent. Further, there is no evidence to support Petitioner's allegation that Respondent wanted to hire only healthy employees. Also, those comments do not, in any way, relate or refer to employees with disabilities and cannot reasonably be construed to do so.

Claim of Age Discrimination

59. Petitioner received such inquiries periodically and complained about the practice from time to time. For example, in a June 8, 2007, email to HR Manager Peacher, Petitioner complained about a phone call from ACS Recovery Service ("ACS"), a third-party health benefits coordinator. Petitioner perceived

the ACS inquiries regarding Medicare eligibility as age discrimination.

60. Sarasota County Government Benefits Manager Steve Marcinko testified credibly that ACS provides coordination of benefits services for Aetna, Sarasota County Government's third-party administrator. To carry out its responsibility, ACS is authorized to contact the employees to determine whether alternate insurance coverage, including Medicare, may be available to cover a claim that is otherwise the responsibility of the Sarasota County Government.

61. Among those contacted by ACS are group health plan participants who are "post-65 and Medicare-eligible." The purpose of these contacts is to verify whether the participants are "active" or "retired" employees. Such verification assists in determining whether the group health plan or Medicare has primary or secondary responsibility for the benefits of those individuals.

62. The inquiries by ACS are not age-based, except as they relate to an individual's Medicare eligibility, and are not conducted at the direction of the Clerk. When conducting these inquiries, ACS does not copy the individual's employer or former employer about such inquiries.

CONCLUSIONS OF LAW

63. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. See §§ 120.569, 120.57(1) and 760.11, Fla. Stat. (2009).

64. Sections 760.01 through 760.11 and 509.092, Florida Statutes, comprise the Florida Civil Rights Act of 1992. § 760.01(1), Florida Statutes.

65. The Florida Civil Rights Act of 1992, as amended, makes it an unfair employment practice for an employer to discharge or otherwise to discriminate against any individual because of such individual's age or handicap. § 760.10(1)(a), Fla. Stat.

66. Respondent is an "employer" as defined in Subsection 760.02(7), Florida Statutes.

67. Petitioner alleges that Respondent terminated his employment solely because of his handicap/disability and age.

68. The Supreme Court of the United States established the analysis to be used in cases alleging discrimination in McDonnell-Douglas Corporation vs. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs vs. Burdine, 450 U.S. 248 (1981). The analysis was reiterated and refined in St. Mary's Honor Center vs. Hicks, 509 U.S. 502 (1993). Pursuant to this analysis, Petitioner has the burden of

establishing a prima facie case of unlawful discrimination by a preponderance of the evidence. If a prima facie case is established, Respondent, the employer, must articulate some legitimate, non-discriminatory reason for the action it took against Petitioner. After Respondent offers a non-discriminatory reason for its action, the burden then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination.

Claim of Handicap/Disability Discrimination

69. Disability discrimination claims under the Florida Civil Rights Act are analyzed under the same framework as ADA claims made pursuant to the Americans With Disabilities Act of 1990 ("ADA"). D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005). Thus, the provisions of Chapter 760, Florida Statutes, are analogous to those of the ADA.

70. The definition of "handicap" in the Florida Civil Rights Act is similar to the definition of "disability" in the ADA, 42 U.S.C.A. Section 12101 through 12213.[2] Under the ADA, the term "disability" means:

> (a) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (b) A record of such an impairment;

(c) Being regarded as having such an impairment.

See 29 C.F.R. § 1630.2(g); and § 760.22(7), Fla. Stat.

71. In a disability discrimination case, the petitioner has the initial burden of proving a prima facie case of discrimination under the ADA by establishing that: (1) he has a disability under the Florida Civil Rights Act; (2) that he is a qualified individual, meaning he is able to perform the essential functions of the position with or without accommodation; and (3) that he was discharged because of a disability. See Terrell v. US Air, 132 F.3d 621, 624 (11th Cir. 1998).

72. The ADA identifies three categories of disability that place an individual within the statute's protections. In order to be disabled as defined by the ADA, a person: (1) must have a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) must have a record of such impairment; or (3) must be regarded as having such impairment. See 42 U.S.C. § 12102(2).

73. Factors to consider when determining whether an individual is "substantially limited" include: (1) the nature and the severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term

impact, or the expected permanent or long-term impact of or resulting from the impairment." See 29 C.F.R. § 1630.2(j)(2).

74. An impairment that only has a minor interference in major life activities does not qualify as a disability. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).[3] The ADA Amendments Act of 2008 specifically found that this case narrowed the broad scope of protection intended to be afforded by the ADA and rejected the Court's interpretation of the term "substantially limits" to require a greater degree of limitation than was intended by Congress. P.L. 110-325 (a)(7). However, the ADA Amendment Act of 2008 [Public Law 110-325] does not apply retroactively and, thus, does not apply to this case. See Colon-Fontanez v. Municipality of San Juan, 2009 U.S. Dist. 111865.

75. Upon consideration of the evidence, Petitioner failed to establish he has a disability within the meaning of the Florida Civil Rights Act and the ADA.

76. While it is undisputed that Petitioner has skin cancer, Petitioner did not establish that: (1) the skin cancer is a physical or mental impairment that limits one or more of his major life activities of such individual; (2) he had a record of such impairment; or (3) he was regarded as having such impairment. Thus, Petitioner is found not to have a disability.

77. Having failed to satisfy the first prong required to establish a prima facie case of disability discrimination, Petitioner cannot establish that his employment was terminated because of a disability.

78. Even if it is assumed that Petitioner met the first prong of the test required to prove a prima facie case of discrimination based on disability, his claim still fails. Although it is undisputed that Petitioner met the second prong of the test (i.e., he was qualified for the job), there is no proof of the third prong, that Petitioner's employment was terminated because of a disability.

79. Since Petitioner failed to prove a prima facie case of discrimination, Respondent is not required to offer any legitimate reasons for its decision to terminate Petitioner's employment. Nonetheless, Respondent offered a legitimate reason for its decision. That reason is clearly established in the record. Respondent terminated Petitioner because he violated Respondent's policies by having the offensive photos in his computer. Petitioner failed to demonstrate that the reason offered by Respondent was merely a pretext for discrimination.

Claim of Age Discrimination

80. Federal case law interpreting the Age Discrimination in Employment Act ("ADEA") is generally applicable to age discrimination claims arising under the Florida Civil Rights

Act. See Florida State Univ. v. Sondel, 685 So. 2d 923, (Fla. 1st DCA 1996). Accordingly, the United States Supreme Court's McDonnell-Douglas burden-shifting paradigm is applied to cases arising under the Florida Civil Rights Act. See Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991), citing McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

81. Under the McDonnell-Douglas model, an individual claiming that he/she was discharged because of his/her age cannot establish even a prima facie case unless he can prove that he/she was: (1) a member of the protected age group; (2) discharged; (3) qualified to do the job; and (4) replaced by a younger individual. Moreover, even if the claimant was replaced by a younger person, he cannot establish a prima facie case if the replacement was "insignificantly younger." See O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996).

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

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

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

85. Petitioner established a prima facie case of age discrimination under Chapter 760, Florida Statutes: (1) he is a member of a protected class; (2) he was subject to adverse employment action in that he was terminated from his job as a desktop support analyst; (3) he was qualified to do that job; and (4) there was a significant age difference between Petitioner and the person who replaced him.

86. Petitioner having established all four elements required under Chapter 760, Florida Statutes (2006), necessary to prove a prima facie case, Respondent must articulate and substantiate its legitimate reason for Petitioner's dismissal. As noted above in paragraph 79, Respondent established that it had a legitimate, non-discriminatory reason for terminating Petitioner. That is, he was discharged because of violating Respondent's policy regarding the use of computers on the job.

87. Petitioner did not establish that Respondent's articulated and legitimate reason for his termination was a mere pretext for age discrimination. Thus, Petitioner failed to establish that he was discharged from his job because of his age.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner, Michael L. Coyle's, Petition for Relief.

DONE AND ENTERED this 24th day of February, 2010, in Tallahassee, Leon County, Florida.

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of February, 2010.

ENDNOTES

[1/] All statutory references are to Florida Statutes (2008), unless otherwise noted.

[2/] Pursuant to Public Law 110-325, the ADA of 1990 was substantially amended and is now cited as the "ADA Amendments Act of 2008." The ADA Amendments Act of 2008 went into effect on January 1, 2009. Because the ADA of 1990 was effective when the alleged discriminatory act occurred, that provision applies to this case.

[3/] See Endnote 2.

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.