STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JESSE BLOUNT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-1212
	)	
CEMEX/RINKER MATERIALS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on May 6, 2009, in Gainesville, Florida.

APPEARANCES

For Petitioner: Jesse Blount, pro se
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Hawthorne, Florida 32640

For Respondent: David A. Young, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice against Petitioner.

PRELIMINARY STATEMENT

On August 11, 2008, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations

(Commission). The charge alleged that Respondent discriminated against Petitioner based upon his age and disability.

On January 29, 2009, the Commission issued a "no cause" determination based upon its investigation of Petitioner's allegations. On March 4, 2009, Petitioner timely filed a Petition for Relief with the Commission. The petition alleged that Respondent discriminated against Petitioner based upon his age and a perceived disability.

On March 4, 2009, the Commission referred this matter to the Division of Administrative Hearings (DOAH) to conduct the hearing requested by Petitioner. The referral was received by DOAH on March 6, 2009.

The final hearing was scheduled for and held on May 6, 2009. Petitioner testified at the hearing in his own behalf, and Respondent presented the testimony of Jeremy Howard and Jennifer Anderson. Petitioner's Exhibits 1 through 3 and Respondent's Exhibits 1 through 10 were received into evidence.

Contrary to clearly-established law,[1/] the Commission did not make arrangements to preserve the testimony at the final hearing, either by sending a court reporter or a recording device and someone to operate it. The parties were informed in the Notice of Hearing that the Commission would likely not comply with its duty to preserve the final hearing testimony, but neither party hired a court reporter to do so. Therefore,

there is no record of the final hearing, except for the exhibits received into evidence and this Recommended Order.

The parties were given until May 18, 2009, to file proposed recommended orders. Petitioner filed a written closing argument on May 13, 2009. Respondent filed its Proposed Findings of Fact and Brief in Support on May 18, 2009. These filings have been given due consideration.

All statutory references in this Recommended Order are to the 2008 version of the Florida Statutes.

FINDINGS OF FACT

1. On May 23, 2005, Petitioner was hired by Respondent as a ready-mix concrete truck driver at Respondent's Gainesville plant.

2. Petitioner was a good employee. He had a clean driving record, and he did not have any disciplinary problems while working for Respondent.

3. On or about July 27, 2007, Petitioner had a "mild" heart attack and was placed on medical leave by Respondent.

4. In September 2007, Petitioner was released by his personal physician to return to work.

5. Thereafter, Petitioner returned to work for a couple of days and began the process of being recertified for his driving duties. He reviewed safety materials and videos and did "ride-alongs" with other drivers.

6. Before Petitioner could return to his driving duties, he was required by federal Department of Transportation (DOT) regulations to pass a physical and be certified as "physically qualified." Recertification is required every 24 months and after an injury that impairs the driver's ability to perform his/her normal duties, such as the heart attack suffered by Petitioner.

7. Petitioner understood that he could not return to his job as a ready-mix concrete truck driver until he passed a physical and received his DOT certification.

8. On September 12, 2007, Respondent sent Petitioner to a DOT-approved physician in Ocala for his physical.

9. Petitioner did not pass the physical. The DOT-approved physician expressed concerns about Petitioner's cardiac surgery, possible sleep apnea (based upon a questionnaire filled out by Petitioner), and blood pressure issues.

10. There is no credible evidence that Respondent influenced the DOT-approved physician's decision in any way. Petitioner's suspicion that Respondent had something to do with the decision is unfounded.

11. Petitioner's personal physician disagreed with the concerns expressed by the DOT-approved physician, and after Petitioner underwent a series of tests, it was determined that he did not have sleep apnea.

12. On November 9, 2007, Respondent laid Petitioner off based upon his "failure to meet job qualifications."

13. Petitioner was 48 years old at the time of the lay-off.

14. There is no credible evidence that Petitioner's age or medical condition played any role in Respondent's decision to lay Petitioner off. Rather, the decision was based solely upon Petitioner's failure to have the DOT certification that was required for him to drive a ready-mix concrete truck.

15. Respondent gave Petitioner ample time to obtain his DOT certification before it laid him off. Approximately two months passed between the time that Petitioner was cleared to return to work by his personal physician and the time that he was laid off for not having his DOT certification.

16. Petitioner did not obtain his DOT certification until some point in January 2008.

17. Petitioner was treated no differently by Respondent than other drivers -- both older and younger than Petitioner -- who lost their DOT certification. Like Petitioner, those drivers were fired because they did not meet the applicable job qualifications.

18. Petitioner testified that he was told that he would be rehired when he got his DOT certification. This testimony is corroborated by the comment on the Employee Separation Notice

for Petitioner, which stated “Jesse has been unable to get his DOT card/when he does he will be rehired.”

19. By the time Petitioner obtained his DOT certification in January 2008, Respondent’s business had declined due to the slow-down in the economy and the building industry, and it did not have any work for Petitioner.

20. Respondent laid off three drivers at its Gainesville plant in December 2007, and it laid off an additional five drivers at the plant in February 2008 because of the decline in its business. Six of the eight drivers who were laid-off were younger than Petitioner.

21. After these lay-offs, there were still three drivers employed at Respondent’s Gainesville plant who had less seniority than Petitioner, but in order to rehire Petitioner, Respondent would have had to fire one of those drivers. There were also a number of drivers still employed at Respondent’s Gainesville plant who were older and had more seniority than Petitioner.

22. Respondent’s decision not to fire one of the other drivers in order to re-hire Petitioner was reasonable under the circumstances. And, more importantly, there is no credible evidence that this decision was motivated in any way by Petitioner’s age or a perceived disability based upon his heart attack.

23. Respondent has not hired any drivers at its Gainesville plant since the lay-offs described above.

24. Petitioner has not worked since he was laid off by Respondent. He testified that he has tried to find another truck-driving job, but that like Respondent, most companies are not hiring drivers because of the slow-down in the economy and the building industry.

25. Petitioner would likely still be employed by Respondent if he had obtained his DOT certification before Respondent started laying off drivers because Petitioner was a good employee with more seniority than all but one of the drivers who were laid off in December 2007 and February 2008.

26. Petitioner believes that Respondent could have put him to work in the warehouse or on the yard until he obtained his DOT certification and could return to driving duties. However, the record does not reflect whether any positions were available in the warehouse or on the yard or whether Petitioner was qualified for those positions.

27. Petitioner testified that he was told by other employees that they overheard Respondent's managers stating that they did not intend to return Petitioner to his driving duties because his heart attack made him a "high risk driver." No evidence was presented to corroborate this hearsay-based testimony.

28. Petitioner also testified that a supervisor made a critical comment to him regarding his use of a cane immediately after he returned to work. The supervisor denied making the comment, and even if the comment was made, there is no credible evidence that it was anything more than an isolated comment.

CONCLUSIONS OF LAW

29. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11(7), Florida Statutes.

30. It is an unlawful employment practice under the Florida Civil Rights Act (FCRA) to:

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

§ 760.10(1)(a), Fla. Stat. (emphasis supplied).

31. It is not enough for Petitioner to show that he was treated unfairly by Respondent or to claim that Respondent should have done more to keep him on the company's payroll because the FCRA, like the federal anti-discrimination laws, is not concerned with whether an employment decision is prudent or fair, but rather only with whether the decision was motivated by unlawful discrimination. See Damon v. Fleming Supermarkets,

Inc., 196 F.3d 1354, 1361 (11th Cir. 1999) (“We are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision.”); Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991) (“Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the [law] does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior." (internal quotations omitted)); Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) ("The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination.” (citations and internal quotations omitted)).

32. Petitioner has the burden to prove that Respondent unlawfully discriminated against him. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor

Center v. Hicks, 509 U.S. 502 (1993); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See also City of Hollywood v. Hogan, 986 So. 2d 634, 641-42 (Fla. 4th DCA 2008) (discussing the elements of, and the analytical process applicable to, age discrimination claims under the FCRA); St. Johns County School Dist. v. O'Brien, 973 So. 2d 535, 540-43 (Fla. 5th DCA 2007) (discussing the elements of, and the analytical process applicable to, disability discrimination claims under the FCRA).

33. Petitioner did not establish a prima facie case of unlawful discrimination or meet his ultimate burden of proof based upon the standards set forth in the cases cited above. See also Albertson's, Inc. v. Kirkinburg, 527 U.S. 555 (1999) (employer did not discriminate against commercial driver who failed to meet the visual acuity standards in the DOT regulations because compliance with the regulations was a necessary qualification of the driver's job).

34. First, Petitioner was not qualified for the driver position from which he was laid-off by virtue of his failure to pass the required physical and obtain the necessary DOT certification. Second, Petitioner was not replaced by a person outside of his protected class (i.e., younger or non-disabled) because Respondent did not fill his position or the positions of any of the other laid-off drivers. Third, there is no credible

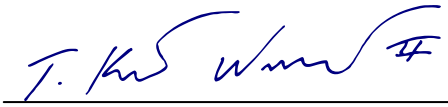
evidence that the reasons given by Respondent for its decision to lay off Petitioner in November 2007 and for its refusal to rehire him in January 2008 were merely pretexts for discrimination against Petitioner based upon his age or a perceived disability.

RECOMMENDATION

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

RECOMMENDED that the Commission issue a final order dismissing the Petition for Relief with prejudice.

DONE AND ENTERED this 28th day of May, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 28th day of May, 2009.

ENDNOTE

[1/] See § 120.57(1)(g), Fla. Stat.; Fla. Admin. Code R. 28-106.214; North Dade Security Ltd. Corp. v. Dept. of State, 530 So. 2d 1040, 1041 (Fla. 1st DCA 1988). And cf. Fla. CS/HB 1007, at § 8 (2009) and Fla. SB 2176, at § 10 (2009), which would have added language to Section 760.11, Florida Statutes, to provide that "the commission is not liable for any costs, fees, expenses, including court reporting or recordation fees associated with the proceeding to which it is not a party," but which failed to pass the Legislature. The Commission is not required to preserve the final hearing testimony by using a court reporter rather than a mechanical device such as a tape recorder (see Poirier v. Dept. of Health & Rehab. Servs., 351 So. 2d 50, 53 (Fla. 1st DCA 1977)), but it does not have any authority whatsoever to shift its legal duty to preserve the testimony to the parties, DOAH, or the Administrative Law Judge (ALJ) assigned to conduct the hearing. Moreover, in the undersigned's view, the Commission's recently-implemented policy of not making any arrangements to preserve the final hearing testimony is bad public policy because it has the effect of precluding any meaningful review of the case by the Commission or an appellate court, and because shifting the burden to the parties imposes additional costs that they should not have to bear because they did not initiate the proceeding (in the case of the Respondent) and that they likely cannot afford (in the case of a pro se Petitioner). The undersigned is aware that some other ALJs are recording their final hearings with digital tape recorders, but those recordings do not serve as an official record of the proceeding, and in the undersigned's view, it is not the proper function or duty of the ALJ to be responsible for making sure that a tape recorder is working correctly while he or she is trying to conduct the hearing.

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.