STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROLF BIERMAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-3950
	)	
BRUNSWICK BOAT GROUP,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case before J. D. Parrish, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on December 10, 2009, in Viera, Florida.

APPEARANCES

For Petitioner: Rolf Bierman, pro se
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For Respondent: Brian Koji, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent committed the unlawful employment practice alleged in the Employment Complaint of Discrimination

filed with the Florida Commission on Human Relations (FCHR) and, if so, the appropriate relief for such action.

PRELIMINARY STATEMENT

On February 6, 2009, Rolf Bierman (Petitioner), filed an Employment Complaint of Discrimination with the FCHR, alleging that his former employer, Brunswick Boat Group (Respondent), had discriminated against him based on his age and disability or handicap. The complaint contained the following "discrimination statement," and asserted that the "most recent discrimination took place" on January 8, 2009:

> I believe I was laid-off because of my age (60) and because of my disabilities (heart impairment and diabetes). I also believe the Respondent regarded me as being disabled. I began employment with Respondent in July 2007 and worked as Engineering Supervisor. I made the Respondent aware of my heart transplant at the hiring interview. From November 2007 to December 2008, I spent three days per month in the hospital for blood transfusions, after undergoing a heart transplant. During my employment, I had several fainting and low blood sugar episodes which were recorded by the plant nurse. My medical bills were approximately $500,000 and I believe part of the reason for my termination was that Respondent wanted to avoid paying unusually high medical costs. In the last year, Respondent has laid-off an excessive number of employees that were over 50 years old and retained young lower paid workers. On January 8, 2009, I was informed that I was being laid-off because my position was being eliminated.

On July 1, 2009, the FCHR issued a Notice of Determination: No Cause, advising the Petitioner that a determination had been made that "no reasonable cause exists to believe that an unlawful employment practice occurred." Thereafter, on or about July 13, 2009, the Petitioner filed a Petition for Relief. The case was forwarded to the Division of Administrative Hearings (DOAH) for formal proceedings on July 23, 2009.

At the hearing, the Petitioner testified in his own behalf and presented testimony from Kevin Shaw, an engineering manager for the Respondent at its Sykes Creek facility; Patricia Shoemaker, the human resources manager for Respondent's Sykes Creek facility; Richard Pettit, an engineering tech employed by the Respondent; and Steve Fielder, general manager of the Sykes Creek facility. The Petitioner's Exhibits 3, 4, 5, 6, and 9 have been admitted into evidence. The Respondent's Exhibits 1-5 and 20 were also received in evidence.

The Transcript of the proceeding was filed with DOAH on December 29, 2009. In accordance with the directions of the undersigned at the conclusion of the hearing, the parties' proposed recommended orders were to be filed within ten days of the filing of the transcript. Both parties timely filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. For purposes of this case, the Petitioner began his employment with the Respondent in July of 2007. Although the Petitioner had worked for the Respondent in prior years (at another location), he had voluntarily left the company to pursue other opportunities. When the Petitioner returned to employment with the Respondent in connection with this case, it was ten years after a heart transplant.

2. At the time of hiring, the Respondent knew the Petitioner's medical condition and age. The Petitioner is approximately 61 years of age.

3. The Respondent is a national corporation with several sites for engineering and manufacture of its products. The Respondent is an equal opportunity employer and maintains policies prohibiting unlawful discrimination.

4. One of the Respondent's facilities, Sykes Creek, is located in Brevard County, Florida. The Petitioner was hired to work at the Sykes Creek facility in the role of engineering supervisor.

5. The Sykes Creek site builds luxury power yachts ranging from 50–to-60 feet in length. The price of these yachts runs from approximately $900,000 to $2,000,000 each. Typically, the yacht is ordered and customized to the buyer's specification.

6. The Petitioner was responsible for supervising and directing work at Sykes Creek and reported to Kevin Shaw, his immediate supervisor. Mr. Shaw in turn reported to the plant manager, Steven Fielder. The Petitioner reviewed the work and attendance of approximately 21 hourly employees.

7. When the Petitioner was hired (2007), the Sykes Creek facility produced 116 yachts and employed approximately 575 people. Within the Petitioner's department (engineering) there were 26 people; four others like Petitioner were salaried employees.

8. The economic crunch that struck most of the nation drastically reduced the Respondent's business. In 2008 the Respondent instituted unpaid furloughs and layoffs due to the lack of business. By 2009 the economic condition in the industry had not improved. Accordingly, the Respondent had to make additional cuts to its staff.

9. To that end, Mr. Fielder advised Mr. Shaw that the Petitioner's department would have to be cut to reduce the number of hourly employees and one salaried employee.

10. To determine who should be cut, the Respondent looked to the number of years of service with the company and the skill set/education they provided for the facility. The Petitioner had the shortest length of service with the Respondent except for an employee named Julie Halesma. That person was not chosen

for lay-off because she was a credentialed industrial engineer. The Petitioner did not have those credentials.

11. The Petitioner was not offered a lower, hourly paid position because he did not have the skill set to perform the work as well as the hourly employees who were already doing the jobs.

12. A number of employees were laid off the same day the Petitioner was dismissed. The Petitioner's job position was eliminated and has not, as of the date of hearing, been restored.

13. The Respondent has continued to lay off workers. In 2009 the Sykes Creek facility was down to 175 employees. The engineering department was down to 15 people. Absent a return to more prosperous times, it is not expected that the facility will be able to rehire employees. The job tasks that the Petitioner performed are now shared by other employees at the facility.

14. Throughout his time at the Sykes Creek facility, the Petitioner was allowed to take time off as needed to attend to medical issues. Based upon the frequency of the medical leave, the Respondent knew or should have known that the Petitioner's medical condition required monthly treatment. The extent of the medical treatment, however, was unknown to the Respondent. As a salaried employee the Petitioner did not have to "punch the

clock." The Respondent allowed the Petitioner to complete his work as he might dictate so that he was free to leave the facility to attend to his medical needs. Clearly, the Respondent knew the Petitioner had had the heart transplant at the time of hiring but that medical condition did not impede the Petitioner's ability to perform his job assignments. The medical situation required that he be absent, but there is no indication that Petitioner could not perform his job.

15. The cost of the Petitioner's medical care was unknown to the persons charged with making the lay-off decisions. The cost of the Petitioner's medical care played no part in the decision to eliminate the Petitioner's job.

16. Similarly, the Petitioner's age did not play a part of the Respondent's decision to eliminate the Petitioner's job. The Respondent articulated legitimate business reasons for eliminating the Petitioner's job position. Clearly the Respondent knew of the Petitioner's age at the time of hiring. The Respondent did not replace the Petitioner with a younger employee. The Respondent's explanation for whom it chose to retain in employment was not based upon an employee's age but rather legitimate business interests.

17. Episodes during which the Petitioner required medical attention at the facility did not rise to a level to cause the Respondent to be concerned for Petitioner's medical well-being.

Incidents of the Petitioner being light headed or with low blood sugar did not cause the Respondent to seek to eliminate the Petitioner's job position.

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 120.57(1) and 760.11, Fla. Stat. (2009).

19. The Florida Civil Rights Act of 1992 (the Act) is codified in Sections 760.01 through 760.11, Florida Statutes (2009). "The Act, as amended, was [generally] patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Federal case law interpreting [provisions of] Title VII and the ADEA is [therefore] applicable to cases [involving counterpart provisions of] the Florida Act." Florida State University v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996); see Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)("The [Act's] stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964.").

20. The Act makes certain acts prohibited "unlawful employment practices," including those described in Section 760.10, Florida Statutes (2009), which provides:

(1) It is an unlawful employment practice for an employer:

(a) 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.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(2) It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, national origin, age, handicap, or marital status or to classify or refer for employment any individual on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.

(3) It is an unlawful employment practice for a labor organization:

(a) To exclude or to expel from its membership, or otherwise to discriminate against, any individual because of race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any

individual of employment opportunities, or adversely affect any individual's status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(c) To cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(4) It is an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of race, color, religion, sex, national origin, age, handicap, or marital status in admission to, or employment in, any program established to provide apprenticeship or other training.

(5) Whenever, in order to engage in a profession, occupation, or trade, it is required that a person receive a license, certification, or other credential, become a member or an associate of any club, association, or other organization, or pass any examination, it is an unlawful employment practice for any person to discriminate against any other person seeking such license, certification, or other credential, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, national origin, age, handicap, or marital status.

(6) It is an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee to print, or cause to be printed or published, any notice or advertisement relating to employment, membership,

classification, referral for employment, or apprenticeship or other training, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, national origin, age, absence of handicap, or marital status.

(7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

(8) Notwithstanding any other provision of this section, it is not an unlawful employment practice under ss. 760.01 - 760.10 for an employer, employment agency, labor organization, or joint labor-management committee to:

(a) Take or fail to take any action on the basis of religion, sex, national origin, age, handicap, or marital status in those certain instances in which religion, sex, national origin, age, absence of a particular handicap, or marital status is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

(b) Observe the terms of a bona fide seniority system, a bona fide employee benefit plan such as a retirement, pension, or insurance plan, or a system which measures earnings by quantity or quality of production, which is not designed, intended, or used to evade the purposes of ss. 760.01 - 760.10. However, no such employee benefit plan or system which measures earnings shall excuse the failure to hire, and no such seniority

system, employee benefit plan, or system which measures earnings shall excuse the involuntary retirement of, any individual on the basis of any factor not related to the ability of such individual to perform the particular employment for which such individual has applied or in which such individual is engaged. This subsection shall not be construed to make unlawful the rejection or termination of employment when the individual applicant or employee has failed to meet bona fide requirements for the job or position sought or held or to require any changes in any bona fide retirement or pension programs or existing collective bargaining agreements during the life of the contract, or for 2 years after October 1, 1981, whichever occurs first, nor shall this act preclude such physical and medical examinations of applicants and employees as an employer may require of applicants and employees to determine fitness for the job or position sought or held.

(c) Take or fail to take any action on the basis of age, pursuant to law or regulation governing any employment or training program designed to benefit persons of a particular age group.

(d) Take or fail to take any action on the basis of marital status if that status is prohibited under its anti-nepotism policy.

(9) This section shall not apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public accommodation to members of that religious corporation, association, educational institution, or society or to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to

> perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities.
>
> (10) Each employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice provided by the commission setting forth such information as the commission deems appropriate to effectuate the purposes of ss. 760.01 - 760.10.

21. The Act gives the FCHR the authority to issue an order prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay, if it finds following an administrative hearing that an unlawful employment practice has occurred. See § 760.11, Fla. Stat. (2009). To obtain relief from the FCHR, a person who claims to have been the victim of an "unlawful employment practice" must, "within 365 days of the alleged violation," file a complaint ("contain[ing] a short and plain statement of the facts describing the violation and the relief sought") with the FCHR. § 760.11(1), Fla. Stat. (2009). It is concluded that the Petitioner filed a complaint within the statutory time limitation.

22. The Petitioner’s complaint alleged that he was subjected to discrimination based upon his handicap or age in that the Respondent terminated his employment. As each claim

stands alone as a basis for discriminatory conduct, each claim is addressed individually.

23. For purposes of a claim of discrimination based upon handicap, Florida courts have recognized that actions under the Florida Civil Rights Act are analyzed under the same framework as the Americans with Disabilities Act found at 42 U.S.C. §§ 12101, et seq. (ADA). See Chanda v. Engelhard/ICC, f.k.a. Ciba-Geigy, 234 F.3d 1219 (11th Cir. 2000). Accordingly, the Petitioner must establish that he is a qualified individual with a disability. A disability is an impairment that substantially limits a major life activity. Whether someone is substantially limited requires that the individual be unable to perform a major life activity that the average person in the general population can perform or be significantly restricted as to the condition, manner or duration under which the individual can perform a particular major life activity as compared to the manner in which the average person can perform the same major life activity. Life activities are considered daily skills that one performs to care for oneself. Major life activities include, but are not limited to, dressing oneself, feeding oneself, manual tasks such as combing one’s hair, walking, speaking, seeing, hearing, breathing, learning, and working. A diminished ability for normal daily activities such as lifting,

running, or performing manual tasks does not constitute a disability under the ADA. See Chanda, supra.

24. It is concluded the Petitioner was not discriminated against on the basis of handicap. The Petitioner did not have a handicap that impaired his ability to perform his employment tasks or any known life skill. Clearly, the Petitioner performed his job tasks without the need for an accommodation. Had the Petitioner needed an accommodation that the Respondent refused to provide (facts not in evidence in this case), there is no evidence that the Petitioner's condition left him unable to attend to his daily life skills. See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). The need for medical leave alone (which was granted) does not suggest the Petitioner did not perform his job adequately or that he could have performed it better had the Respondent afforded him some accommodation. The Petitioner was not discharged because he took too much leave or failed to adequately perform his job. The job position was eliminated when the lay offs were instituted by the Respondent.

25. Next, as to a claim of discrimination based upon age, the Petitioner failed to present any evidence that he was discharged in favor of a younger person or that younger, less qualified persons were retained over him. In fact, no one took over the Petitioner's job position. The position was eliminated

and the tasks associated with it were distributed to others. The Petitioner's age had no bearing in the decision.

26. Petitioner has the burden of proving the allegations asserted. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001).

27. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. See Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004). In this case, the Petitioner failed to prove discrimination either by direct or indirect evidence.

28. Moreover, although victims of discrimination may be "permitted to establish their cases through inferential and circumstantial proof," the Petitioner similarly failed to present credible inferential or circumstantial proof. See Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997).

29. Had the Petitioner established circumstantial evidence of discrimination, the burden would have shifted to the Respondent to articulate a legitimate, non-discriminatory reason for its action. If the employer successfully articulates a reason for its action, then the burden shifts back to the complainant to establish that the proffered reason was a pretext

for the unlawful discrimination. See Malu v. City of Gainesville, 270 Fed. Appx. 945; 2008 U.S. App. LEXIS 6775 (11th Cir. 2008). In this case, the persuasive evidence established that the Petitioner was laid off due to a legitimate business decision and his position was eliminated. It had nothing to do with the Petitioner's health (handicap or disability) or age.

30. In light of the foregoing, Respondent's employment discrimination complaint must be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding no cause for an unlawful employment practice as alleged by the Petitioner, and dismissing his employment discrimination complaint.

DONE AND ENTERED this 9th day of March, 2009, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 9th day of March, 2009.

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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.