STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IAN SIMPSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-0641
	)	
AUTO NATION/COURTESY CHEVROLET,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, the final hearing was held in this case on May 5, 2011, by video teleconference with sites in Orlando and Tallahassee, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Peggy Underbrink, Esquire[1/]
5737 Lowell Avenue
Indianapolis, Indiana 46219

For Respondent: Richard A. Ivers, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent engaged in an unlawful employment practice by terminating Petitioner because of his age and in retaliation for complaining about age

discrimination, or whether, instead, Respondent had a legitimate non-discriminatory reason for terminating Petitioner that was not a pretext for discrimination or retaliation.

PRELIMINARY STATEMENT

On July 8, 2010, Ian Simpson (Mr. Simpson or Petitioner) filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) against Courtesy Chevrolet, an automobile dealership, and AutoNation, the owner of Courtesy Chevrolet (collectively, Respondents). Petitioner alleged that he was subjected to discrimination and retaliation when he was terminated from employment by Courtesy Chevrolet because of his age and because he complained to Respondents about age discrimination.

Following its investigation of Petitioner's charges, FCHR determined that there was no reasonable cause to believe that an unlawful employment practice had occurred and issued its Notice of Determination: No Cause. The notice advised Petitioner that he had the right to request an administrative hearing, and Petitioner timely exercised that right. On February 8, 2011, the case was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the hearing requested by Petitioner.

At the final hearing, Petitioner testified on his own behalf. Petitioner's Exhibits 1 through 3, 5, 6, and 8 were

received into evidence. Respondents presented the testimony of Ryan Matthews, Michael Stachowicz, Todd Tyree, and Bibi Bickram. Respondents' Exhibits 1 through 3, 5, 7 through 10, 13, 14, 17 through 26, 33 and 34 were received into evidence.

The two-volume Transcript of the final hearing was filed on May 20, 2011. On May 23, 2011, Ms. Underbrink filed a motion to withdraw as counsel of record for Petitioner. After compliance with conditions precedent imposed to ensure that Petitioner was not prejudiced by the withdrawal, the motion to withdraw was granted. Petitioner filed a motion for enlargement of time for filing post-hearing submittals pursuant to Florida Administrative Code Rule 28-106.215, and that motion was granted. Both parties timely filed post-hearing submittals, which have been considered to the extent they are based on matters of record,[2/] in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a male whose date of birth is June 23, 1958. Petitioner completed high school and had specialized training in welding. He has been working since he was 14 years old and has a varied employment history.

2. Before 2006, Petitioner was a welder for a few months with Gencor Industries. He left that position because of what he described as unsafe working conditions. Before working for

Gencor, he was a warehouse manager and shop foreman for Structural Waterproofing, but was terminated when he had a disagreement with the boss. Before that job, he was self-employed in construction and photography.

3. In 2006, Petitioner was hired as a sales consultant with the Holler Classic Group, a car dealership. Petitioner had never had a job in car sales previously, but had worked as a travel agent for 13 years. He explained that there was no money to be made in travel anymore, but he heard that there was money to be made in car sales, so he thought he would try it.

4. Petitioner left Holler Classic after about two years, because he found it was getting hard to compete against salespersons who he claimed "were being given deals by management."

5. Petitioner was hired on July 11, 2008, as a sales associate at Courtesy Chevrolet on West Colonial in Orlando. Courtesy Chevrolet is an employer within the meaning of the Florida Civil Rights Act and is a subsidiary of Respondent AutoNation.

6. Petitioner was hired by Courtesy Chevrolet as an at-will employee. The terms of his employment were that he would be paid by commissions earned on car sales and would be given a draw against commissions so that there would be compensation in case there were periods of low sales. According

to Petitioner, there was no fixed amount of cars he had to sell, except that, as he acknowledged, "[y]our commissions had to outdo your draw[.]" In other words, Petitioner understood that while the draw might cover an occasional low-sales month, there could not be continual low-sales months such that earned commissions were not sufficient to cover the draw.

7. Petitioner also testified that shortly after he started at Courtesy Chevrolet, in August 2008, the manufacturer, General Motors (GM) imposed a rule that required car salesmen to sell at least six cars per month. Petitioner testified that he was aware this rule went into effect in August 2008, but that he did not think that the new rule applied to him, because he believed he was under the "old system."

8. No evidence was presented to establish that certain car salespersons were allowed to continue under an "old system" that was exempt from the new minimum monthly sales quota. Instead, the more credible, consistent testimony of all witnesses, besides Petitioner, was that the six-car minimum monthly sales quota applied to all dealerships with GM franchises and to all car salespersons at Courtesy Chevrolet, including Petitioner.

9. When Petitioner began working at Courtesy Chevrolet, the general manager was Paul Letso, who was eight or nine years older than Petitioner. Shortly thereafter, Mike Taylor was hired as the sales manager, and he was Petitioner's supervisor.

Mike Taylor also was older than Petitioner, approximately 59 years old.

10. Right away, Petitioner had problems working as a car salesman at Courtesy Chevrolet. Within a month or so after starting, he complained of "theft of my commissions" by other employees. He first spoke with the local human resources person at the dealership. She told him to report the problem to Bibi Bickram, who was the head of human resources for the region. Petitioner was given Ms. Bickram's cell phone number, and he contacted her, reaching her while she was at an airport. She got back with him a month later and told him that his manager, Mike Taylor, was handling the complaint. However, Mr. Taylor denied having heard about it, and Petitioner was not happy with the handling of his complaint.

11. When Petitioner was first hired, he underwent training and orientation and was given a large amount of material, including an AutoNation Code of Business Ethics and an Associate Handbook, for which Petitioner signed acknowledgement forms. The form that Petitioner signed to acknowledge receipt of the Code of Business Ethics informed Petitioner that he had a number of options for reporting complaints, problems, or suspected violations of the code, of the law, or of any company policies. These options included notifying a manager, contacting someone in AutoNation's corporate or regional human resources

departments, or calling the ACT-AlertLine. The ACT-AlertLine is a third-party administered, tip/complaint hotline where problems or complaints regarding any AutoNation dealership can be raised, anonymously or otherwise. The toll-free number for the ACT-AlertLine was provided in the document signed by Petitioner. In addition, the undisputed testimony was that flyers with the ACT-AlertLine are on display at the Courtesy Chevrolet employee break room. There was no credible evidence that before Petitioner was notified that he was being terminated, Petitioner ever utilized any of these options to notify anyone of problems or complaints, except for the single instance discussed above when Petitioner called Ms. Bickram's cell phone to complain about theft of his commissions.

12. Petitioner's first full calendar quarter at Courtesy Chevrolet was October to December 2008. Based on his sales figures for his first full quarter, Petitioner was given a documented verbal counseling for inadequate work performance, followed by a written corrective action record. In pertinent part, this record provided:

> Facts and Events:
>
> Your performance for the months of October, November and December of 2008 were below target. They were as follows:
>
> ** October - you saw 20 customers, sold 1 unit - 5% closing

> ** November - you saw 22 customers, sold 3 units - 13.6% closing
>
> ** December - you saw 15 customers, sold 2 units - 15.1% closing
>
> Dealership closing percentage is 27%. Due to your low performance, it has negatively impacted your income and you are currently in the rears [sic: arrears] $2751.54.
>
> Required Improvement:
>
> The level of performance is below target and you must take action to improve. As a Sales Associate of Courtesy Chevrolet West Colonial, you are responsible for utilizing the company's processes and tools while maintaining an acceptable level of performance. You must maintain a 20% closing ratio each month. . . .
>
> Failure to achieve sustained improvement in units sold or other performance issues related to your role as Sales Associate . . . will result in further disciplinary action up to and including termination.

13. Petitioner signed this corrective action record, without commenting in the space provided. At the final hearing, Petitioner claimed that some of the sales figures may have been incorrect, although Petitioner was not specific in this regard and presented no evidence to support his vague claim. Petitioner's claim, more than two years after the fact, is not credible, in light of Petitioner's failure to attempt to correct any errors that may have been in the report at the time he signed it or to otherwise complain about errors in his sales figures.

14. Petitioner acknowledged that he was having trouble meeting his sales goals, but claimed that it was because he "was being harassed" by Paul Letso and Mike Taylor. Petitioner admitted that this asserted harassment had nothing to do with age discrimination, as he was substantially younger than either one of his managers. Petitioner claimed that these two older managers were always trying to blow up his deals, such as by starting arguments with Petitioner in front of potential customers.

15. Business was not good in the auto industry during the time that Petitioner was employed by Courtesy Chevrolet in 2008 and 2009. Overall, there was a lot of consolidation in the industry and staff reductions. Several Chrysler dealerships closed as a result of Chrysler's bankruptcy, including two AutoNation dealerships in the region: Courtesy Chrysler Jeep in Casselberry and Courtesy Chrysler Jeep in Sanford.

16. Other dealerships were under pressure as well. As noted above, one example of how the industry pressures came to bear on the dealerships was the establishment by GM of a new requirement in August 2008 that all car salespersons at its franchise dealerships had to sell at least six cars each month.

17. Courtesy Chevrolet was not doing well. By May 2009, the general manager of Courtesy Chevrolet (one of the managers whom Petitioner claimed had been harassing him), was terminated.

In June 2009, several managers and sales associates from the closed Chrysler dealerships were brought over to Courtesy Chevrolet, consolidating the sales forces.

18. Todd Tyree, former manager of the Casselberry Chrysler dealership, was made general manager of Courtesy Chevrolet. Mr. Tyree, though young--in his 30s--had nearly 20 years of experience in the car dealership business, with substantial managerial experience. He was charged with the task of overhauling the dealership to upgrade its facilities, improve its operations, and conform its processes to AutoNation standards, which had been loosely followed or not followed at all previously.

19. Two former managers from the Sanford Chrysler dealership, Mike Stachowicz and Ryan Matthews, were brought over to serve in managerial/supervisory positions in the sales department. Mr. Stachowicz was in his late 40s, approximately three years younger than Petitioner, with 28 years of experience in the car business. Mr. Matthews was younger, but he still had seven years' experience in the car business.

20. The three managers embarked on an immediate effort to tighten up on procedures, spruce up the facilities, review and evaluate employees, and work with the sales staff to turn around the performance of the dealership.

21. According to Petitioner, a sales meeting was held the day after the new managers arrived at Courtesy Chevrolet. Petitioner claims that at this meeting, Mr. Tyree stated that he wanted a young, aggressive sales staff. Petitioner stated that all three of the new managers were present at this meeting and that there were a number of other witnesses to the statement.

22. Despite Petitioner's claim that there were many witnesses to Mr. Tyree's statement, no witness corroborated Petitioner's claim. Mr. Tyree denied making that statement and his testimony was credible in this regard. Messrs. Stachowicz and Matthews confirmed that they never heard Mr. Tyree make such a statement, although according to Petitioner, they were present at that meeting. Petitioner did not produce any other witness who could support Petitioner's claim that the statement was made.

23. There is no evidence that Petitioner complained to anyone in the human resources department, to someone at the dealership, at a regional or national AutoNation office, or even anonymously to the ACT-AlertLine, right after Petitioner claimed the statement was made by Mr. Tyree on June 6, 2009. The first mention by Petitioner of the alleged statement by Mr. Tyree about a "young, aggressive" sales staff was after Petitioner received a monthly sales associate evaluation on June 15, 2009, putting in writing to him for the second time that improvement

was needed for his sub-par sales performance; after Petitioner received another monthly sales associate evaluation on July 8, 2009, giving him the lowest rating of "below target" in the categories of meeting sales objectives and meeting profit objectives; and after Petitioner received a "final warning" counseling and corrective action record on July 13, 2009, reporting another three-month period of below-par sales and commissions that did not cover Petitioner's draw.

24. Petitioner's June 15, 2009, evaluation was signed by Ryan Matthews, who was the general sales manager. It indicated that Petitioner had only "sometimes" achieved acceptable performance goals for sales and profit margins, a grade of "C" on a scale of "A" to "D." The evaluation comment was that one-on-one training was needed to improve performance. Mr. Matthews confirmed that he conducted one-on-one training sessions with Petitioner, including sales menu training, which focuses on how numbers are presented to customers; and training in product knowledge, an area found to be critically lacking at this dealership when the three new managers arrived.

25. However, Mr. Matthews testified, as did the other new managers, that Petitioner was not at all receptive to training, improvement, or doing anything to change how he was used to doing things. Instead, he was stubbornly resistant to change and very combative with the new managers. Petitioner apparently

resented being told that he was not performing up to standards and needed to improve.

26. Petitioner tacitly acknowledged the new managers' point by testifying that he did not understand how the new managers could come in and evaluate sales associates after only a few short days at the new dealership and expressing skepticism that they could have any kind of meaningful perspective. However, it should have been clear to Petitioner from his prior evaluation, counseling, and corrective action record issued by the prior management team that the focal point for the dealership, and the measure of his performance, would, in large part, be on sales statistics: how many cars were sold and how big was the profit margin.

27. The recent sales information for Petitioner that was available for the new management team to review in June 2009 showed that Petitioner was credited with selling a total of 10.5 cars during the months of February, March, April and May 2009. His best month, and the only month in his employment history with Courtesy Chevrolet in which the evidence showed that he met a six-car sales minimum, was in March 2009, when he sold six and one-half units. In February, he sold three cars; in April, he did not sell a single car; and in May, he sold one car.

28. After Mr. Tyree arrived at Courtesy Chevrolet, he had Petitioner sign a written acknowledgement memorializing the GM

requirement that sales associates had to sell six cars each month, with a rolling average of 18 cars every three months. Mr. Tyree testified that he had all of the Courtesy Chevrolet sales associates sign the form that he had utilized at his prior dealership to impress upon them what they already should have been aware was the requirement imposed by GM for the dealership.[3/] As noted above, Petitioner was indeed aware of this requirement, acknowledging that GM adopted this rule in August 2008, although Petitioner continued to assert that he was somehow exempt.

29. The monthly sales associate evaluation signed by Petitioner on July 8, 2009, was signed by Mike Stachowicz. This evaluation of continued low sales production, as well as low profit-per-vehicle, was based on Petitioner's sales performance in the month of June 2009, during which he sold two cars. By the end of June 2009, Petitioner had the highest amount of arrears (draws exceeding earned commissions), more by far than any other salesperson at Courtesy Chevrolet. Petitioner signed this evaluation and wrote the following comment on it: "WILL BE FILING COMMENTS BY NEXT WEEK." Petitioner did not elaborate, or explain the nature of the comments he intended to file.

30. Petitioner's consistent sub-par performance continued, as did his resistance to changing how he went about his business so as to be open to improving his performance. For example,

despite the fact that Saturdays are the busiest days of the week for car sales, Petitioner took off Saturdays once a month to pursue his hobby of bird-watching. While the new management was willing to accommodate Petitioner's request, the expectation was that Petitioner would be receptive to making changes to improve his car sales, whether it be giving up his bird-watching Saturdays or making up for it in other ways. When this did not happen, Petitioner received his "final warning" and corrective action record on July 13, 2009, from Michael Stachowicz. This record summarized Petitioner's below-target performance in April, May, and June, with an average car sale of only one car per month. The report reminded Petitioner: "You must maintain a level of 6 units sold monthly." Petitioner remained in arrears by several thousands of dollars. Petitioner signed this record, and his sole written comment in the space provided for comments was: "WILL BE FILING COMPLAINT SOON." Petitioner did not explain his comment or volunteer any information about the nature of the complaint he was going to file.

31. The corrective action record signed on July 13, 2009, stated that there would be a meeting in 30 days to evaluate Petitioner's progress and review his "implementation of specific actions to improve units sold." However, after just a few weeks in which the managers saw no sign of any specific actions being taken by Petitioner to improve his overall performance and no

change in his attitude with regard to being resistant to change and combative, Mr. Tyree made the decision to terminate Petitioner's employment. Through the month of July, Petitioner's three-month rolling average was 2.166 units per month, well below the target of six units per month, and Petitioner was still in arrears by several thousands of dollars. Indeed, there was no evidence presented that Petitioner ever earned more commissions, for any period of time, than he took out in draws.[4/] The termination action record was signed July 31, 2009, which was Petitioner's last day of employment, and he was terminated effective August 1, 2009.

32. On August 3, 2009, a written complaint by Petitioner that he sent on July 28, 2009, to the AutoNation Human Resources Department in Fort Lauderdale, Florida, was received and provided to the ACT-AlertLine to log in. The complaint was then turned over to Bibi Bickram, the human resources specialist, to conduct an investigation. This written complaint by Petitioner was a five-page, single-spaced, rambling diatribe, which lobbed assorted accusations of harassment by the three new managers at Courtesy Chevrolet. The complaint alleged that Mr. Tyree "gawked" at another employee; that the female employee who was "gawked" at had violated safety regulations by coming to work in flip flops; that Michael Stachowicz showed favoritism to another female employee; that some salespersons had to work more hours

than other salespersons; that one employee was absent too much; that gay customers had been made fun of; and that some employees have already been given evaluations by the new managers that had "no reflections on actual reality."

33. Ms. Bickram conducted a thorough investigation in which she interviewed numerous sales associates, reviewed records, talked to the managers, contacted Petitioner to see if he wanted to add anything, and then prepared a detailed report that analyzed, point by point, each and every complaint raised in Petitioner's written complaint. Ms. Bickram found all of the complaints unsubstantiated, with the exception of one complaint regarding scheduling inequity, found to be partially substantiated and corrected. None of the complaint issues raised and investigated had anything to do with age discrimination.

34. Months later, in October 2009, in connection with proceedings regarding Petitioner's entitlement to unemployment compensation, Petitioner prepared another detailed document setting forth a timeline of his view of events at Courtesy Chevrolet. This document was also logged in with the ACT-AlertLine and turned over to Ms. Bickram as a follow-up complaint to the written complaint received on August 3, 2009. The October 2009 timeline document included Petitioner's claim that in a June 6, 2009, sales meeting, the day after Mr. Tyree

assumed the position of general manager, he had allegedly stated that he wanted a "young, aggressive sales staff." This claim was investigated for the first time by Ms. Bickram as part of her follow-up complaint investigation; Petitioner did not include this allegation in the July 28, 2009, written complaint.

35. Ms. Bickram's report, issued on December 4, 2009, found that in her interviews of numerous sales associates regarding the sales meetings conducted by the new general manager, none of the associates mentioned anything about inappropriate comments. Ms. Bickram also interviewed Mr. Tyree and reported that he denied making any such statement. Further, Ms. Bickram noted that the "current sales staff ranges in age from 33 to 54," so there had been no youth movement under the new management, as one would assume would have occurred following that alleged statement.

36. Petitioner submitted to the FCHR as part of his complaint in 2010 and offered into evidence at the hearing, a two-page letter from Petitioner to "Bebe" in human resources. On the first page, the date is typed in as "July [day obscured], 2009." On the second page, just above Petitioner's signature, the following date reference is typed in: "Post dated July 9, 2009 to be changed and signed at a later date." In this letter of uncertain actual date, Petitioner reported to "Bebe" that since his first verbal complaint to her "regarding thief [sic]

of my money," he had "been subject [sic] to NON-STOP harassment" including the following itemized examples:

> 1. Deliberately blowing deals by 2 General Managers, 2 General Sales managers and 3 Sales Managers.
>
> 2. Prejudice towards GAY customers. . .
>
> 3. Lying to customers.
>
> 4. Having other employees, who were friends of Ian M. Simpson's, harassed and written up . . .
>
> 5. At a meeting on June 6, 2009, Todd Tyree made a comment which insulted most of the employees at the meeting. He stated that he wanted a young and aggressive, sales staff. . . .

37. Petitioner testified that he hand-wrote the number "13" in the date on the first page so that the letter was dated July 13, 2009. However, a handwritten date, whether 13 or some other number, cannot be discerned on the letter admitted into evidence.

38. Petitioner's testimony was that he put the letter on Ms. Bickram's desk in her office at the Courtesy Chevrolet dealership on July 13, 2009. Petitioner claims to have personally laid the letter on her desk. While Petitioner said that he "never saw [Ms. Bickram] in the office," he also claimed that he "saw her later on that day reading the complaint." He admits he did not discuss the complaint with her at that time,

stating that he "thought she would have to have time to review it."

39. Petitioner's testimony regarding his delivery of the letter on July 13, 2009, was not credible. Ms. Bickram testified that she never received the letter Petitioner claims to have left for her on her desk. Ms. Bickram explained, credibly, that she is in her office that she maintains at Courtesy Chevrolet one or two times per week and that when she is not in the office, even if she is just out for lunch, she keeps the office locked. Others do not enter her office to leave her mail or to take items from her desk; she uses her other office at a different Courtesy location as the primary office where she receives and processes her mail. Therefore, it would not have been possible for Petitioner to have entered her office when she was not there, as he claimed, to leave a letter on her desk.

40. It is also not credible that Petitioner would not have attempted to discuss the complaint with Ms. Bickram if, as Petitioner claimed, he had seen her reading the letter later that day. Petitioner had recently received two sub-par evaluations from the new management, and on that same day, Petitioner had received his "final warning" based on his failure to approach meeting the stated sales target of six cars per month. Petitioner had to know, with nothing but sub-par

performance evaluations, below-target sales, and consistent draws exceeding commissions, his time was running out.

41. The more credible testimony and evidence establish that Petitioner did not lodge his complaint of an age-related comment by Mr. Tyree until well after Petitioner was terminated, and that claim was contrived and not genuine.

42. With the exception of Petitioner's claim of a single age-related comment attributed to Mr. Tyree and found not credible, Petitioner presented no direct or circumstantial evidence of any discrimination against him based on his age. To the contrary, Petitioner complained equally about harassment by former managers who were older than he and by the new management team who were younger than, or about the same age as, Petitioner. Petitioner claimed that younger and older managers alike tried to blow up his sales, started arguments with him while he was with customers, gave deals away to other salespersons, and were to blame for Petitioner's consistent sub-par sales performance and Petitioner's consistent failure to earn enough commissions to cover his draws. Petitioner's complaints have nothing to do with his age; instead, Petitioner's complaints are his attempt to blame all others, young and old alike, for his consistent failure to achieve the work performance standards set by Respondents.

43. No credible evidence was presented to establish that Petitioner's termination was in retaliation for Petitioner's complaint about age discrimination. The more credible evidence established that Petitioner did not communicate any complaint about age discrimination until after he was given his termination notice.

44. After Petitioner was terminated from Courtesy Chevrolet, he was hired as a car salesman at Toyota of Orlando, He started working there on December 15, 2009. After about a month and a-half, he was terminated. The reason for Petitioner's termination was not established in the record.

45. Petitioner has been unemployed since being terminated by Toyota of Orlando and has gone back to school. No evidence was presented regarding Petitioner's efforts, if any, to obtain substantially equivalent employment, besides his brief experience with Toyota of Orlando.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

47. Section 760.10(1), Florida Statutes (2009),[5/] states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of age. Section 760.10(7) provides that it is an unlawful

employment practice for an employer to discriminate against any person because that person has opposed any practice which is an unlawful employment practice.

48. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

49. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

50. "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." Schoenfeld v. Babbitt, supra. Petitioner presented no credible, competent direct evidence of age discrimination.

51. "[D]irect evidence of intent is often unavailable[.]" Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of intentional discrimination "are permitted to establish their

cases through inferential and circumstantial proof." Kline v. Tennessee Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

52. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), is applied. Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. 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 employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991) (discussing shifting burdens of proof in discrimination cases under McDonnell and Burdine). The employer has the burden of production, not persuasion, and need only articulate that the decision was non-discriminatory. Id.; Alexander v. Fulton Cnty, Ga., 207 F.3d 1303, 1339 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. Schoenfeld v. Babbitt, supra, at 1267. 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. Dep't of Corr. v. Chandler, supra, at 1186; Alexander v. Fulton Cnty., Ga., supra. Petitioner has not met this burden.

53. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. BT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

54. To establish a prima facie case of age discrimination under the federal Age Discrimination in Employment Act (ADEA), the complainant must show that: (1) he was a member of a protected age group (i.e., over 40); (2) he was subject to an adverse employment action; (3) he was qualified for the job; and (4) he was replaced by a younger person. Benson v. Tocco, Inc., 113 F.3d 1203, 1207 (11th Cir. 1997), citing McDonnell, supra (the 11th Circuit has adopted a variation of the McDonnell test in ADEA violation claims.).

55. However, in cases alleging age discrimination under section 760.10(1)(a), FCHR has concluded that unlike cases

brought under ADEA, the age of 40 has no significance in the interpretation of the Florida Civil Rights Act of 1992. 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 he was treated less favorably than similarly situated individuals of a "different" age as opposed to a "younger" age. See Marchinko v. The Wittemann Co., Inc., Case No. 05-2062 (Fla. DOAH Nov. 1, 2005), rejected in part, Case No. 2005-00251 (FCHR Jan. 6, 2006), and numerous cases cited therein.

56. As to the first element of proving a prima facie case of age discrimination, Petitioner is, and was at the time of his termination of employment from Respondent, a member of a protected age group for purposes of ADEA. As to the second element, Petitioner was subject to adverse employment action when he was terminated. Thus, Petitioner meets the first two elements of a prima facie case.

57. However, Petitioner failed to prove the third and fourth elements of a prima facie case. As to the third element, although Petitioner was qualified for the job when hired, beginning with the January 2009 counseling and corrective action record, Petitioner failed to meet the minimum performance standards imposed on car sales associates. Petitioner presented no credible evidence to establish that he, in fact, met those

performance standards; he only presented his unsubstantiated accusations that it was the fault of various others that he could not achieve the sales and profit goals. Thus, Petitioner failed to prove that at the time he was terminated, he met the qualifications for a sales associate.

58. As to the fourth element of a prima facie case, no credible evidence was offered to prove that anyone was hired to replace Petitioner, much less from a "different" age group. Additionally, no credible evidence was offered to prove that other similarly situated employees of a different age than Petitioner were treated more favorably than Petitioner. Petitioner presented no evidence that other car salespersons were held to different standards, such as if Petitioner had evidence that other salespersons had failed to meet their sales requirements to the same extent as Petitioner over the same prolonged period of time and had failed to earn sufficient commissions to cover their draws to the same extent as Petitioner over the same prolonged period of time, but were not terminated. Indeed, Petitioner presented no competent evidence as to the actual ages of other car salespersons so as to establish in the first instance that there were salespersons of different age groups, much less than that they were held to different standards. Thus, Petitioner failed to establish a prima facie case of age discrimination.

59. Even if Petitioner had established a prima facie case of age discrimination, Respondent articulated a legitimate, non-discriminatory explanation of the adverse employment action. The decision to terminate Petitioner was based on Petitioner's demonstrated failure to meet sales goals and Petitioner's failure to take specific actions to improve his work performance. Put plainly, Petitioner was a car salesman who was not selling enough cars. Petitioner was not earning enough in commissions to offset the draws he took out of the dealership.

60. Applying the McDonnell analysis outlined above, the burden then shifts to Petitioner to show that a discriminatory reason, more likely than not, motivated the decision or that the proffered reason for the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, supra; Alexander v. Fulton Cnty, Ga., supra. The "pretext analysis focuses on a narrow question: 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 Prop. & Cas. Ins. Co., 286 F.3d 1270, 1276 (11th Cir. 2002). Petitioner has not met its burden of proving pretext.

61. Though Petitioner was quick to blame management or fellow employees for his shortcomings, Petitioner presented no credible evidence that his poor work performance, as shown through consistent evaluations and corrective action records,

was actually the fault of others. No credible evidence was presented to suggest that the articulated reason--not selling enough cars and not earning enough commissions to cover Petitioner's draws--was a pretext to mask age discrimination. Instead, the more credible evidence established that the decision to terminate Petitioner was legitimately based on Petitioner's poor work performance.

62. Petitioner's speculation and personal belief concerning the motives of Respondents are not sufficient to establish intentional discrimination. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001)("[p]laintiffs 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.").

63. Finally, Petitioner argued the additional theory that his termination was an unlawful employment practice because it was retaliation for his complaint of age discrimination. A prima facie case of retaliation contains three elements:
(1) Petitioner engaged in an activity that Title VII protects;
(2) Petitioner suffered an adverse employment action; and
(3) there is a causal connection between participation in a protected activity and the adverse employment decision. Maclean v. City of St. Petersburg, 194 F. Supp. 2d 1290, 1297 (M.D. Fla. 2002). If a prima facie case is established, the burden shifts

to Respondents to rebut the presumption of retaliation by producing legitimate reasons for the adverse employment action. Then the burden would shift back to Petitioner to prove that the proffered reasons were pretextual, to mask retaliation. Id.

64. An employee is protected if he opposes any unlawful employment practice. Id. Petitioner claims this protection, based on his alleged complaint about age discrimination.

65. Although Petitioner has established an adverse employment action, in that he was terminated, Petitioner's attempt to establish a prima facie case of retaliation fails on the issue of proof as to causation. As found above, Petitioner failed to prove that his complaint about age discrimination was communicated to Respondents before Petitioner was terminated. Instead, as found above, the more credible evidence establishes that Petitioner did not make known to Respondents his allegations of age discrimination until well after Petitioner was terminated. Thus, Petitioner failed to prove that his termination was in retaliation for his complaint about age discrimination.

66. Even if Petitioner had established a prima facie case of retaliation for the reasons set forth above with respect to the age discrimination claim, Respondents have established legitimate reasons for the adverse employment action, and Petitioner has failed to prove that such reasons were a mere

pretext for discrimination or for retaliation. Thus, Petitioner's retaliation claim was not proven.

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 Ian Simpson's Petition for Relief.

DONE AND ENTERED this 25th day of August, 2011, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of August, 2011.

ENDNOTES

[1/] Ms. Underbrink represented Petitioner in pre-hearing proceedings, at the final hearing, and for a short time after the final hearing. Ms. Underbrink subsequently moved for and was granted leave to withdraw as counsel for Petitioner, and, thereafter, Petitioner proceeded pro se, filing a motion for extension of the deadline to file post-hearing submittals and,

thereafter, filing a post-hearing submittal by the extended deadline.

[2/] In large part, Petitioner's post-hearing submittal improperly referred to matters that are not in the record of the final hearing. The undersigned did not consider any such references, because Findings of Fact in this Recommended Order "shall be based exclusively on the evidence of record and on matters officially recognized." § 120.57(1)(j), Fla. Stat. (2011). Likewise, the undersigned gave no consideration to a letter filed by Petitioner on August 18, 2011, which appeared to be in the nature of evidence improperly tendered months after the final hearing and evidentiary record were closed.

[3/] The form signed by Mr. Simpson and Mr. Tyree, specifying the monthly six-car sales requirement, had an obvious error on it, in that it stated that it was issued in February 2009. Mr. Tyree acknowledged the error, explaining that he utilized the form he had brought over from the prior dealership and admitting that he must have overlooked changing the date. Petitioner acknowledged that his signature was on the document, but rather than consider the possibility of a date error, he jumped to the conclusion that the document was a forgery, because Mr. Tyree was not at Courtesy Chevrolet in February 2009. Since it is such a clear matter of record that Mr. Tyree was not at Courtesy Chevrolet in February 2009, Mr. Tyree's explanation of the error is accepted as more reasonable and logical than Petitioner's unsubstantiated accusation of "forgery."

[4/] Petitioner claimed that he must have offset his draws by commissions earned in July 2009, when he was credited with the sale of 3.5 units, because his final paycheck paid him several hundred dollars. However, Petitioner did not establish that he had earned enough in commissions to offset his arrearages. Instead, Ms. Bickram explained that AutoNation absorbs the losses of accumulated arrearages when a sales associate leaves.

[5/] Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version, which was the law in effect when the alleged unlawful employment practices took place.

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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.