STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RHONDA S. DOYLE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-0113
	)	
GM APPLIANCE/WILLIAMS CORPORATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on April 25, 2012, in Panama City, Florida.

APPEARANCES

For Petitioner: Robert Christopher Jackson, Esquire
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For Respondent: Daniel Harmon, Esquire
Daniel Harmon, P.A.
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner on the basis of her age in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

On June 3, 2011, Petitioner, Rhonda S. Doyle, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). Petitioner's charge alleged that Respondent, GM Appliance/Williams Corporation, discriminated against her because of her age. Petitioner claimed that GM Appliance had laid her off from her sales position of 21 years and, later, failed to rehire her when it hired a new younger salesperson. FCHR investigated Petitioner's charge.

On November 22, 2011, FCHR issued a "Notice of Determination: Cause" and determined that after investigating Petitioner's complaints there was sufficient cause to believe that an unlawful employment practice had occurred. Thereafter, on December 27, 2011, Petitioner filed a Petition for Relief pursuant to section 760.11(8), Florida Statutes. The petition was forwarded by FCHR to the Division of Administrative Hearings, where it was set for hearing.

At the hearing, Petitioner testified on her own behalf, presented the testimony of two witnesses, and offered two exhibits into evidence. Respondent presented the testimony of five witnesses and offered one exhibit into evidence. The parties offered Joint Exhibits 1, 2, 4, 6, 7, 9, 11, 11A, 12 through 14, 17, 18, and 20, which were admitted into evidence.

A Transcript was filed on May 25, 2012. After the hearing, Petitioner and Respondent filed their proposed findings of fact and conclusions of law on June 8, 2012.

References to statutes are to Florida Statutes (2011) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is a 56-year-old female.

2. Petitioner has over 26 years of retail sales experience. Petitioner had both outside sales and store management experience, but most of her experience was as a retail floor salesperson.

3. Petitioner worked as a salesperson at GM Appliance, a retail appliance business currently owned and operated by Respondent. She had worked for GM Appliance for over 21 years.

4. Petitioner was a good and capable salesperson. She had never been formally reprimanded in her 21 years with GM Appliance. According to Respondent's owner and manager Todd Williams, there were no problems at all with Petitioner's performance. She was qualified as a salesperson.

5. In 2004, Williams Corporation, a single shareholder entity owned by Mr. Williams, purchased GM Appliance from its previous owner, Curtis Murphy. Mr. Murphy was retiring after owning GM Appliance for many years. Mr. Williams had worked with Mr. Murphy as a wholesaler and was relocating to the Panama City

area from Atlanta. At the time of the GM Appliance purchase, Mr. Williams was approximately 40 years old.

6. As would be expected when taking over a business, Mr. Williams made some changes at GM Appliance. He created a new outside sales position. He created and hired a new sales manager. He opened two offices outside of Panama City.

7. Mr. Williams made all the business decisions at GM Appliance. As he was the sole shareholder and owner, Mr. Williams had the sole authority to hire and fire employees.

8. Under Mr. Williams, GM Appliance did not have any formal written employment policies. Respondent has no sexual harassment or anti-discrimination policies and no process on how to handle employment complaints related to age or sex. GM Appliance has no written employee evaluations or job descriptions. If someone had a complaint, he or she needed to "take it to the EEOC," according to Mr. Williams.

9. As a result of Mr. Williams' hiring and firing decisions, the GM Appliance workforce became decidedly younger in Panama City, especially in the sales positions. Since purchasing GM Appliance through 2010, Mr. Williams hired Matt Davis (born 1970) as a sales manager; Ashley Williams (born 1976) in an outside sales position; Kris Westgate (born 1979) as inside sales and delivery; and Amy Farris (born 1982) as inside sales and administrative.

10. In 2010, two sales persons also remained on the staff of GM Appliance from the former owner: Bobby Tew (aged 63) and Petitioner (aged 54). Both primarily worked inside sales.

11. Mr. Williams' hiring decisions made the culture at GM Appliance more "youth" oriented. There was much more juvenile and sexual talk. Mr. Williams was overheard saying that Petitioner wore old women clothes. Some members of GM Appliance's younger workforce often called Petitioner "Mama" or "Old Mama" to her face and behind her back.

12. As a result of the worldwide economic slowdown, the business environment deteriorated for GM Appliance in 2008. To save money, GM Appliance began to cut back on its operations and expenses.

13. In late 2010, unable to stem the tide of losses, Mr. Williams decided he needed to cut additional staff from the sales department in Panama City. Of the six salespeople working in Panama City, he laid off the two oldest: Mr. Tew and Petitioner. The four younger sales persons kept their jobs, but one, Kris Westgate, was reassigned to the warehouse instead of laid off. Also, the two highest paid salespersons, Ashley Williams, Todd Williams' brother, and Matt Davis, remained employed with GM Appliance. Ashley Williams and Davis annually made $45,000 and $80,000, respectfully.

14. Petitioner, at the final hearing, identified the three younger employees retained following her termination as evidence of discriminatory intent: Margaret Walden, Amy Farris, and Matt Davis.

15. Matt Davis, aged 46, was the sales manager and Petitioner's immediate supervisor. Petitioner reported directly to Matt Davis.

16. Amy Farris, aged 30, was originally hired as a secretary to the outside salesman. Although she would sometimes come on the sales floor, her job was to provide support for outside sales. During the course of her employment, her duties expanded to include purchasing agent and SPIFF (manufacturer's incentive program) administrator.

17. Respondent employed outside salespersons and other salespersons (retail sales associates) such as Petitioner, who worked the showroom floor. Outside salespersons reported directly to Respondent's president, Mr. Williams. Margaret Walden, aged 45, was an outside salesperson in Respondent's office in Destin, Florida, and was responsible for developing and maintaining relationships outside the office with client contractors in Destin and South Walton County. A showroom was not maintained at the Destin office.

18. All three identified co-workers held positions with different duties and responsibilities from the position held by

Petitioner. Petitioner was not replaced, and no younger (or older) sales associate was retained in a similar position. In July 2011, Respondent hired 51-year-old Steve Williams as a sales associate. This hire was made after the Charge of Discrimination was filed by Petitioner. Steve Williams, a former Sears appliance salesman and manager, solicited a job with Respondent as Respondent had not advertised an available position. After being told repeatedly that Respondent was not hiring sales associates, he offered to accept compensation on a commissioned sales basis.

19. Prior to terminating Petitioner, Respondent terminated six employees, ages 25 (outside sales), 27 (purchasing agent), 52 (warehouse/delivery), 41 (warehouse manager), 59 (accounting manager), and 45 (outside sales) from a period beginning on May 8, 2008, through July 31, 2009. Prior to discharge, Petitioner and the only other associate salesperson on the retail showroom floor, Mr. Tew, had their hours reduced to four days a week. In addition and during Petitioner's tenure, Respondent made changes in the corporation's 401-K plan, health insurance, paid leave, and overtime compensation all changes designed to save money. Mr. Tew was terminated on the same day as Petitioner, September 7, 2010.

20. Janice Heinze (aged 66), Jeff Reeder (aged 54), and Angus Thomas (aged 70), all employees at the Panama City location

and all older than Petitioner, were retained by the company. Respondent hired his father (a 1099 contractor), aged 68, to assume outside sales duties at the location in Foley, Alabama, and Cindy Powell, aged 54, was hired to answer the telephone there. Kelly Hill, aged 45, was hired to replace Ms. Walden upon her subsequent resignation and relocation.

21. Petitioner and Mr. Tew were laid off with the intent to rehire. There were no performance or other identified issues with their employment. Mr. Williams stated that he wanted to bring them back to work.

22. Petitioner had better objective sales qualifications than the younger salespeople that were retained. According to the latest records that GM Appliance had, Petitioner was the highest profit margin generating salesperson in Panama City. Mr. Tew had the second highest profit margin. Petitioner and Mr. Tew also had more sales experience and seniority than any of the younger retained workers.

23. Petitioner earned approximately $40,000 in total over the past three years of her employment and has been unemployed since she was laid off in 2010.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.11(4)(b), Fla. Stat.

25. Section 760.10(1)(a), Florida Statutes, states as follows:

> (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.

26. Petitioner is an "aggrieved person," and Respondent is an "employer" within the meaning of section 760.02(10) and (7), respectively.

27. The Florida Civil Rights Act (FCRA), sections 760.01 through 760.11, as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 et seq. Federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Green v. Burger King Corp., 728 So. 2d 369, 370-71 (Fla. 3d DCA 1999); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

28. Petitioner has the burden of proving by a preponderance of the evidence that Respondent has discriminated against her. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

29. The United States Supreme Court has established an analytical framework within which courts should examine claims of

discrimination, including claims of age discrimination. In cases alleging discriminatory treatment, Petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

30. Petitioner can establish a prima facie case of discrimination in one of three ways: (1) by producing direct evidence of discriminatory intent; (2) by circumstantial evidence under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); or (3) by establishing statistical proof of a pattern of discriminatory conduct. Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989). If Petitioner cannot establish all of the elements necessary to prove a prima facie case, Respondent is entitled to entry of judgment in its favor. Earley v. Champion Int'l Corp., 907 F.2d 1077 (11th Cir. 1990).

31. To establish a prima facie case of discrimination, Petitioner must show: (1) that she is a member of a protected class; (2) that she suffered an adverse employment action; (3) that she received disparate treatment from other similarly-situated individuals in a non-protected class; and (4) that there is sufficient evidence of bias to infer a causal connection between her age or sex and the disparate treatment. Andrade v. Morse Operations, Inc., 946 F. Supp. 979, 982 (M.D. Fla. 1996).

32. "[N]ot every comment concerning a person's age presents direct evidence of discrimination." Young v. General Foods Corp., 840 F.2d 825, 829 (11th Cir. 1988). "[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. . . . If an alleged statement at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Likewise, a statement "that is subject to more than one interpretation . . . does not constitute direct evidence." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997).

33. "[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 discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

34. In McDonnell Douglas, 411 U.S. 792, 800-803 (1973), the Supreme Court articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where the plaintiff relies upon circumstantial evidence. The McDonnell Douglas decision is persuasive in this case, as is Hicks, 509 U.S. 502, 506-07 (1993), in which the Court reiterated and

refined the McDonnell Douglas analysis. Pursuant to this analysis, the plaintiff (Petitioner herein) has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n. 6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)).

35. If, however, the plaintiff (Petitioner herein) succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent herein) to articulate some legitimate, nondiscriminatory reason for its complained-of conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

36. In Hicks, the Court stressed that even if the trier-of-fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question of whether the defendant intentionally had discriminated against him. 509 U.S. at 511. "It is not enough, in other words, to disbelieve the employer; the fact finder must

believe the plaintiff's explanation of intentional discrimination." Id. at 519.

37. In order to prove intentional discrimination, Petitioner must prove that Respondent intentionally discriminated against her. It is not the role of this tribunal to second-guess Respondent's business judgment. As stated by the court in Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000), "courts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how mistaken the firm's managers, the [Civil Rights Act] does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior (citations omitted). An 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."

38. At the administrative hearing held in this case, Petitioner had the burden of proving that she was the victim of a discriminatorily motivated action. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."); Fla. Dep't of Health & Rehabilitative Servs. v. Career Serv. Comm'n, 289 So. 2d 412, 414 (Fla. 4th DCA 1974)

("The burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'").

39. Petitioner made a prima facie showing that due to her age, 54, she is a member of a protected class, and her termination qualified as an adverse employment action, but failed to make a prima facie case that Petitioner received dissimilar treatment from other similarly situated individuals in a non-protected class and that there was any bias against her.

40. "To show that employees are similarly-situated the Petitioner must show that the 'employees are similarly-situated in all relevant aspects.'" Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003). "The comparator must be nearly identical to the petitioner, to prevent courts from second-guessing a reasonable decision by the employer." Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1091 (11th Cir. 2004). In other words, Petitioner must be "matched with persons having similar job-related characteristics who were similarly situated" to Petitioner. MacPherson v. Univ. of Montevallo, 922 F.2d 766, 775 (11th Cir. 1991).

41. Plainly stated, in order to establish the third element of the prima facie case, Petitioner must produce evidence that would permit the trier of fact to conclude that Respondent treated employees of a different age more favorably than

Petitioner. See Lathem v. Dep't of Children & Youth Servs., 172 F.3d 786, 793 (11th Cir. 1999).

42. Petitioner cannot meet this burden because she has presented no competent evidence of any similarly-situated employees outside of her protected class being treated more favorably. Testimony by Petitioner establishes without equivocation there were two sales associates working on the floor of the Panama City showroom and both sales associates were terminated. See Lathem, 172 F.3d at 793; see also Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997).

43. In Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999), the court noted that courts "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."

44. Based upon the evidence and testimony offered at hearing, Petitioner failed to establish a prima facie case against Respondent for age or any other type of discrimination. Mr. Williams, the owner of the business, articulated several reasons why he made the decisions to terminate Petitioner and Mr. Tew. Among them were the severe downturn in the economy with a concurrent drop in sales; the lack of new construction, which had previously been a large generator of appliance sales; the

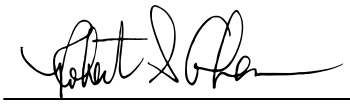
move to more computer-based orders and sales, skills not possessed by Petitioner to a high degree; and the hiring of an employee (aged 51 and therefore a member of the same protected class as Petitioner) to work on 100 percent commission sales without a salary, to name but a few. Accordingly, Respondent cannot be found to have committed the "unlawful employment practice" alleged in the employment discrimination charge, which is the subject of this proceeding. Therefore, the employment discrimination charge should 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 Respondent did not commit the "unlawful employment practice" alleged by Petitioner and dismissing Petitioner's employment discrimination charge.

DONE AND ENTERED this 25th day of June, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.