

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KEVIN D. FISCHER, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 12-1590  
 )  
 UNIVERSAL CITY DEVELOPMENT )  
 PARTNERS, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH), heard this case, as noticed, on July 2, 2012, in Orlando, Florida.

APPEARANCES

For Petitioner: Clifford Geismar, Esquire  
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For Respondent: J. Lester Kaney, Esquire  
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STATEMENT OF THE ISSUES

A. Did Respondent, Universal City Development Partners (Universal), discharge Petitioner, Kevin D. Fischer, because of his age?

B. Did Respondent, Universal City Development Partners (Universal), discharge Petitioner, Kevin D. Fischer, because of a handicap or a perception that he had a handicap?

PRELIMINARY STATEMENT

Mr. Fischer filed a charge of discrimination with the Florida Commission on Human Relations (Commission) against his former employer, Universal, on October 24, 2011. On April 3, 2012, the Commission issued its "Determination: No Cause" concluding that "no reasonable cause exists to believe than an unlawful employment practice occurred, and this complaint is hereby dismissed pursuant to F.S. 760.11(7)." Mr. Fischer filed a Petition for Relief on May 1, 2012. The Commission referred the matter to the Division of Administrative Hearings (DOAH) to conduct a hearing. On June 1, 2012, DOAH issued a notice of hearing, setting the hearing for July 24, 2012. The undersigned conducted the hearing, as scheduled, in Orlando, Florida.

The parties presented opening arguments. Petitioner presented his evidence. Exhibits 1 through 6 offered by Mr. Fischer were accepted into evidence. Respondent's Exhibits 1 through 16 were also admitted into evidence. Respondent rested without offering testimony. The parties presented closing arguments.

At the start and at the end of the hearing, the undersigned advised the parties of their right to submit proposed

recommended orders within ten days of the filing of the transcript of the proceeding. The Transcript was filed on July 18, 2012. Respondent filed its Proposed Recommended Order on July 26, 2012. Petitioner did not file a proposed recommended order.

#### FINDINGS OF FACT

1. Universal operates a theme park in Orlando, Florida.
2. Universal employed Mr. Fischer as an Industrial Automation Technician (Electrical) for approximately 20 years. From May 27, 2011, until June 15, 2011, Mr. Fischer was on approved medical leave. After that, he returned to work with no activity restrictions.
3. Mr. Fischer's date of birth is July 2, 1960.
4. Universal discharged Mr. Fischer on July 11, 2011.
5. Universal discharged Mr. Fischer for failure to properly clean a bilge pump on June 26, 2011, and for falsely certifying that he had cleaned the pump. Cleaning the pump was a preventative maintenance procedure that Mr. Fischer had performed for most of his career with Universal.
7. The pumps are in the bilge or bottom of the boats used in Universal's Jaws ride. Each boat carries approximately 48 passengers around an artificial island in a man-made lagoon. The ride simulates the experience passengers might have boating in the waters depicted in the movies "Jaws" while the shark swam

the waters. The boats ride on rails and are moved about by hydraulic arms.

8. The bilge pumps are important protection for the \$8,500.00, engines in the boats. If the pumps fail, water accumulates in the bilge and can cause very costly damage to the engines.

9. On June 26, 2011, Mr. Fischer worked from 6:00 a.m. until 2:30 p.m. His duties that day included cleaning and servicing three bilge pumps. Mr. Fischer completed Universal's standard preventive maintenance form confirming he had cleaned and serviced the pumps.

10. Mr. Christopher Cole, a former supervisor, examined the pumps after Mr. Fischer's shift ended. They had not been properly cleaned. The float switches were caked with sludge. If properly cleaned, they would not have been.

11. The float switch is critical to operation of the pump. It turns the pump on when water reaches an unacceptable level in the bilge.

12. Ricky Stienker, Mr. Fischer's supervisor at the time, terminated Mr. Fischer on July 11, 2011, for failure to properly clean the pumps and falsely representing that he had cleaned them.

13. In 2008 and 2009, Mr. Fischer's annual reviews rated him as less effective. Then in 2010, the review rated

Mr. Fischer as highly valued. But during his career, Mr. Fischer had received eight different counselings for poor performance.

14. Mr. Fischer used Universal's appeal process to contest his discharge. David Winslow, senior vice president of the Technical Services Division, denied his appeal.

15. There is no credible evidence of offenses committed by other employees of any age or physical condition that were similar to Mr. Fischer's failure to properly clean the pumps and his misrepresentation that he had cleaned them.

16. Universal's employee handbook includes a clear policy requiring employees to be honest and trustworthy in all of their business activities and relationships. It also, clearly states that acts of dishonesty are grounds for immediate discharge.

17. Mr. Fischer received the employee handbook when he began employment with Universal.

18. Mr. Fischer has diabetes. His previous supervisor, Mr. Cole, knew this because he had observed Mr. Fischer taking medication that Mr. Cole also took. Mr. Cole also has diabetes and has had it for approximately 25 years. Mr. Cole did not perceive having diabetes as a handicap.

19. There is no evidence that Mr. Stienker, who made the decision to discharge Mr. Fischer, knew Mr. Fischer had diabetes.

20. There is no persuasive, credible evidence that Mr. Fischer had a handicap or that his supervisors or any management employee of Universal perceived Mr. Fischer as having a handicap. Consequently, there is no persuasive, credible evidence that a handicap or perception of handicap was a factor in Universal's discharge of Mr. Fischer.

21. There is no evidence establishing who filled Mr. Fischer's position or the age of that person.

22. There is no persuasive, credible evidence that Mr. Fischer's age was a factor in Universal's decision to discharge him.

#### CONCLUSIONS OF LAW

23. Sections 120.569 and 120.57(1), Florida Statutes,<sup>1/</sup> grant DOAH jurisdiction over the subject matter of this proceeding and of the parties.

24. Section 760.11(7), Florida Statutes, permits a party who receives a no cause determination to request a formal administrative hearing before DOAH. "If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the Commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back-pay." Id.

25. Section 760.10(1)(a), Florida Statutes, makes it unlawful for an employer to take adverse action against an individual because of the individual's age or handicap.

26. Mr. Fischer claims that Universal disciplined and terminated him because of his age, a handicap, or a perception of a handicap. Mr. Fischer must prove his claims by a preponderance of the evidence. Dep't. of Banking & Fin. Inv. Prot. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996).

27. Employers may not take adverse action against an employee for an unlawful reason, such as age or a handicap. But the law does not prohibit erroneous, irrational, or unfair employment actions. Sunbeam Television Corp. v. Marilyn A. Mitzel, 83 So. 3d 865 (Fla. 3d DCA 2012). In Florida, employers may terminate employees at will. Linafelt v. Bev, Inc., 662 So. 2d 986, 989 (Fla. 1st DCA 1995).

28. An employee may prove a discrimination claim by direct evidence. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004). Direct evidence of discrimination is evidence that, if believed, proves the existence of a fact without inference or presumption. Carter v. City of Miami, 870 F. 2d 578, 581-82 (11th Cir. 1989). Here, there is no persuasive, competent direct evidence proving that Universal discharged Mr. Fischer because of his age, a handicap, or a perception that he had a handicap.

29. An employee may also prove a claim of discrimination by circumstantial evidence establishing that similarly situated employees, who were not in his protected class, were treated more favorably than he was. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004). Here, there is no persuasive, competent circumstantial evidence proving that Universal discharged Mr. Fischer because of his age, a handicap, or a perception that he had a handicap.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations deny Mr. Fischer's Petition for Relief.

DONE AND ENTERED this 17th day of August, 2012, in Tallahassee, Leon County, Florida.



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JOHN D. C. NEWTON, II  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 17th day of August, 2012.



ENDNOTE

<sup>1/</sup> All references to Florida Statutes are to the 2011 edition unless otherwise noted.

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.