

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEVIN MURPHY,)
)
 Petitioner,)
)
 vs.) Case No. 12-2310
)
 KNITES OF REDINGTON, d/b/a FORT)
 KNOX BAR,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on January 10, 2012, in St. Petersburg, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings. The parties were represented as set forth below.

APPEARANCES

For Petitioner: Kevin Murphy, pro se
310 129th Avenue, East
Madeira Beach, Florida 33708

For Respondent: Brian E. Johnson, Esquire
7150 Seminole Boulevard
Seminole, Florida 33772

STATEMENT OF THE ISSUES

The issue in this case is whether Respondent, Knites of Redington, d/b/a Fort Knox Bar (the "Bar"), discriminated against Petitioner, Kevin Murphy ("Murphy"), on the basis of his

age or, alternatively, for retaliation, in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

Petitioner filed a formal Charge of Discrimination with the Pinellas County Office of Human Rights (the "PCOHR"). Upon review and consideration of the complaint, the PCOHR found reasonable cause. It then conducted a conciliation meeting to try to resolve the matter. The conciliation was not successful. Pursuant to the Pinellas County Code and a contract between the Division of Administrative Hearings (DOAH) and Pinellas County, the matter was forwarded to DOAH for the purpose of conducting a de novo formal administrative hearing to determine whether there was discrimination. The request for a hearing was sent from the PCOHR to DOAH on July 6, 2012.

At the final hearing held at the time and place indicated above, Murphy did not testify during his case-in-chief, nor did he call any witnesses. Murphy asked that the PCOHR complaint investigation file be entered into evidence, but because he could not authenticate it and the file was replete with hearsay, it was not admitted. Murphy's Exhibit 1, a printout from the Florida Division of Corporations dated May 12, 2011, was admitted. Respondent called two witnesses: George Bachert, owner of the Bar; and Kevin Murphy. Respondent's Exhibit 1, the

original articles of incorporation for the Bar, was admitted into evidence.

The final hearing was recorded digitally by the undersigned. The parties were allowed ten days from the date of final hearing to file proposed recommended orders with findings of fact and conclusions of law. Neither party filed a proposed recommended order.

FINDINGS OF FACT

1. Murphy is a 56-year-old male. At all times relevant hereto, he was employed as a bartender at the Bar. He had been hired at the Bar initially by its former owners, the Smiths, in approximately March 2009. In December 2009, Bachert purchased the Bar and retained Murphy as an employee.

2. When he purchased the Bar, Bachert formed a corporation, Knites of Redington, Inc., to own the assets. Bachert was listed as the only officer, director, or owner of the corporation. The corporation was formed on December 17, 2009.

3. Murphy was one of several bartenders working at the Bar. Under the prior owners, Murphy was paid \$25.00 per shift, plus tips. When Bachert took over, Murphy was paid \$40.00 per shift, plus tips. By his own admission, Murphy did not report all of his tips to the Internal Revenue Service.

4. Bachert's sister, Elizabeth Horton, also worked at the Bar, helping out with accounting services. Apparently, she and Murphy did not get along. Murphy testified that Ms. Horton called Murphy names and said he was "old, fat, and slow." Murphy also claims that Ms. Horton was a cocaine user, used the Bar's money as her own, and caused "problems" at the Bar with customers. There was no other competent, substantial evidence presented to support those claims.

5. Some time in February 2011, Bachert became aware that Murphy had an extensive criminal background. Bachert had not done a criminal background check on Murphy because he (Murphy) was already an employee of the Bar when Bachert took over operations. When he found out about Murphy's background, Bachert placed Murphy on a temporary leave of absence to further investigate Murphy's past.

6. Bachert expressed a concern that he did not believe persons with criminal backgrounds are allowed to work as bartenders. Murphy said no such prohibition exists. Neither party introduced support for their position.

7. After a couple of weeks, Bachert called Murphy in and told him that "things just aren't going to work." Bachert said that because of Murphy's criminal past, and the fact he was "running sheets" from behind the bar, his employment at the Bar was being terminated. ("Running sheets" refers to the practice

of betting on football games, car races, and other events. It was common for such bets to be going on in the Bar, and in fact Bachert took part. The problem was that Murphy was running sheets from behind the bar while on duty, and Bachert had asked him not to do that. Despite that request, Murphy continued to run sheets from behind the bar.)

8. During Murphy's entire period of employment, he had never heard Bachert make any disparaging or discriminatory remarks about him. The only person who allegedly made such remarks was Ms. Horton. The evidence does not prove that Ms. Horton had any authority over Murphy. At the onset of the corporation, she was not listed as an officer. On the Division of Corporations printout produced by Murphy, however, Ms. Horton is shown as secretary of the corporation. However, that document was dated May 12, 2011, i.e., some three months after Murphy was terminated. Thus, the evidence does not support that Ms. Horton had authority over Murphy at the time she allegedly made disparaging comments.

9. The average age of bartenders and employees at the Bar was about 49 years of age.

10. Murphy refused to testify during his case-in-chief. He reluctantly testified during the Bar's case-in-chief, but did not, during his testimony, establish any evidence of discriminatory behavior by the Bar or its owners.

CONCLUSIONS OF LAW

11. The DOAH has jurisdiction over this matter pursuant to section 120.65(7), Florida Statutes,^{1/} and the contract between DOAH and the county, and Pinellas County Code.

12. Murphy claims discrimination under the Pinellas County Code section 70-54 states that it is unlawful for an employer to discharge or otherwise discriminate against an employee on the basis of his or her handicap or other disability, or because the employee complained about a discriminatory practice.

13. Murphy has the burden of proving by a preponderance of the evidence that the Bar committed an unlawful employment practice. Fla. Dep't of Transp. V. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Murphy is claiming intentional discrimination by the Bar, an unlawful employment practice.

14. 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).

15. "Direct 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. There is no direct evidence of discrimination in this case.

16. In order for Murphy, in this action, to establish a prima facie case of discrimination, he must show that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he was subjected to an adverse employment action; and (4) his employer treated similarly situated employees, outside of his protected class, more favorably than he was treated. See McDonnell, supra; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2004); Maynard v. Bd. of Regents of the Div. of Univs. of the Fla. Dep't of Educ., 342 F.3d 1281 (11th Cir. 2003); Dep't of Child. & Fams. v. Garcia, 911 So. 2d 171 (Fla. 3d DCA 2005).

17. There is insufficient evidence in this case to establish even a prima facie case of discrimination. Murphy did provide evidence - direct testimony - that he was a member of a protected class, i.e., as a 56-year-old male, he was "elderly" for purposes of discrimination claims. He provided scant evidence that he was qualified for his position. Murphy was subjected to an adverse employment action; he was terminated from employment. However, there was absolutely no evidence that other employees outside Murphy's protected class were treated differently.

18. Even though Murphy did not establish a prima facie case of discrimination, the Bar put on some evidence as to the reason for Murphy's termination from employment, i.e., that Murphy had a criminal background and refused to stop running sheets from behind the bar. That evidence was credible.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the claim for relief filed by Petitioner, Kevin Murphy, should be denied.

DONE AND ENTERED this 25th day of January, 2013, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2013.

ENDNOTE

^{1/} Unless specifically stated otherwise herein, all references to the Florida Statutes will be to the 2012 version.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

The parties have ten days from the date of this Recommended Order to submit written exceptions to the Recommended Order. The undersigned Administrative Law Judge will rule on any timely exceptions and issue a Final Order.