

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GABRIEL C. GAUDIO, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 13-0091  
 )  
 AAR AIRLIFT GROUP, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case before J. D. Parrish, an Administrative Law Judge of the Division of Administrative Hearings (DOAH) on March 13, 2013, in Viera, Florida.

APPEARANCES

For Petitioner: Gabriel C. Gaudio, pro se  
259 Abernathy Circle, Southeast  
Palm Bay, Florida 32787

For Respondent: Chelsie J. Flynn, Esquire  
Ford and Harrison, LLP  
Suite 1300  
300 South Orange Avenue  
Orlando, Florida 32801

STATEMENT OF THE ISSUES

Whether Respondent, AAR Airlift Group, Inc. (Respondent), committed the unlawful employment practice as alleged in the Petition for Relief filed with the Florida Commission on Human

Relations (FCHR) and, if so, what relief should Petitioner, Gabriel C. Gaudio (Petitioner), be granted.

PRELIMINARY STATEMENT

On May 31, 2012, Petitioner filed a Charge of Discrimination with the FCHR claiming that his employer, Respondent, had discriminated against him and that the cause was Petitioner's age, disability, and retaliation. The complaint alleged:

I am 51 years of age and I am disabled. I have been denied training and disciplined because of my age (51 years of age) and disability. I have been denied reasonable accommodation. I have been terminated in retaliation for complaining about discrimination.

I was hired by AAR Airlift Group on May 9, 2009, as a Technical Publications Librarian. I have had satisfactory performance. I have been denied training while Ms. Rachel Grygier (30s, not disabled), Technical Publications Librarian, has been given training. During March 2012, I asked Mr. Melvin Zahn (late 40s, not disabled), supervisor, for a reasonable accommodation but was denied. On April 13, 2012, I was placed on a performance improvement plan by Mr. Zahn and Ms. Joanne Paul (30s, not disabled), Human Resources Compensation Manager. On April 25, 2012, my security clearance was about to expire. I then found out that I was not on the badge renewal list. I complained to Mr. Zahn about this and also complained about discrimination. On May 9, 2012, I was terminated by Ms. Paul and Mr. Steve Lane (60s, not disabled), Manager. I was told that I was being terminated for breaking policy even though this is not true.

I believe I have been discriminated against because of my age (51 years of age) in

violation of the Age Discrimination in Employment Act of 1967, and specifically section 4(d) that prohibits retaliation. I believe that I have been discriminated against because of my disability in violation of the Americans with Disabilities Act of 1990, as amended, and specifically section 50(a) that prohibits retaliation.

On December 5, 2012, the FCHR issued a Determination: No Cause and advised Petitioner that he was entitled to file a Petition for Relief in accordance with section 760.11, Florida Statutes (2012). Thereafter, Petitioner timely filed a Petition for Relief. In summary, Petitioner claimed he had been harassed and disadvantaged at the company due to his age, his disability, and in retaliation for complaints he raised against co-workers.

At the hearing, Petitioner testified on his own behalf and offered Exhibits 1 through 3, 5, 6, and 8 through 15 that were admitted into evidence. Respondent presented testimony from Jo Anne Paul, Steve Lane, and Melvin Zahn.

A transcript of the proceeding was not filed. On April 19, 2013, Respondent filed an Unopposed Motion for Extension of Time to File Proposed Recommended Order that was granted. The parties were given until April 26, 2013, to file their proposed orders. Respondent's Proposed Recommended Order was timely filed and considered in the preparation of this Recommended Order. Petitioner did not file a proposed order.

## FINDINGS OF FACT

1. Petitioner is a male over 50 years of age. On or about May 9, 2009, a company located in North Carolina hired Petitioner to work as a Technical Publications Clerk. Petitioner was over 40 years of age at the time of his employment. Prior to March 2012, Petitioner relocated to Florida to continue employment with the company that then became known as AAR Airlift Group, Inc.

2. Respondent does business in Melbourne, Brevard County, Florida, and has over 15 employees, one of whom was Petitioner.

3. At all times material to this matter, Respondent employed Steve Lane (Lane) and Melvin Zahn (Zahn) as supervisors with the company.

4. At all times material to the allegations of this case, Respondent had policies that prohibit discrimination on the basis of age, disability, and any other reason prohibited by law. Any employee who believed discrimination had occurred was directed to report to the local Human Resources Department or to the Corporate Vice President of Human Resources.

5. Respondent's employees are considered "at will." Respondent reserves the right to involuntarily terminate any employee for any reason or for no reason unless to do so would violate law. Petitioner maintains he was terminated in retaliation for a complaint he submitted because of his age, or

because of his disability. All of the actions complained of occurred between March 2012 and June 2012 (when Petitioner was terminated).

6. It is undisputed that Petitioner's age would establish he is a member of a protected class.

7. It is undisputed that Petitioner was terminated after he submitted a complaint against his co-workers.

8. Although Petitioner asserted he is disabled, Petitioner presented no evidence to establish the nature of his disability or that Respondent required him to perform tasks contrary to his physical or mental limitations. There is no evidence that Respondent failed to accommodate any claimed limitation Petitioner might have had.

9. In April 2012, Respondent issued a Performance Improvement Plan (PIP) to Petitioner to outline areas of his job performance that needed improvement. It was anticipated that Petitioner would address the areas of concern and make improvement within 90 days. Upon receipt of the PIP Petitioner filed a claim of hostile work environment with the company's human resources office. More specifically, Petitioner claimed two employees, Zahn , technical publications manager, and Rachel Grygier (Grygier), a technical publications librarian, had disparaged him regarding his age and disability.

10. To address Petitioner's complaint, Respondent initiated an internal investigation of the claim. As part of the investigation process, Respondent directed Petitioner not to disclose or discuss the accusations of his claim with anyone.

11. Respondent sought to resolve the matter without having the allegations discussed among employees before individual statements could be taken. Contrary to the directive, Petitioner discussed his complaint against Zahn and Grygier with at least one other employee. That employee (Barnett) e-mailed support for Petitioner to JoAnne Paul (Paul), Respondent's human resources compliance manager.

12. When Paul confronted Petitioner as to whether he had discussed his complaint with Barnett, Petitioner falsely denied knowing Barnett.

13. Paul took Petitioner's failure to maintain confidentiality regarding his complaint to Lane, Respondent's director of quality assurance and internal evaluations. Together, Paul and Lane decided to terminate Petitioner. The basis for the termination was two-fold: the failure to follow a directive not to discuss the complaint; and the lack of truthfulness when asked about knowing Barnett.

14. Petitioner maintains that his termination was in retaliation for his complaint against Zahn and Grygier and that the company wanted him out.

15. Petitioner presented no evidence that after his termination he was replaced with a younger employee.

16. Even though Petitioner did not establish the nature of his disability, Petitioner presented no evidence that he was replaced by a non-disabled person or that his handicap caused Respondent to terminate him. Further, Petitioner did not establish that any area of concern noted in his PIP related to his disability.

17. Neither Zahn or Grygier had anything to do with Petitioner's termination.

18. Finally, Petitioner failed to present credible evidence that filing a complaint against Zahn and Grygier was the genesis for his termination. Petitioner was a long-time employee with the company. He had started in North Carolina and moved to Melbourne with the company. Had Respondent wanted to terminate him for any reason it could have done so prior to the move or after the move. Petitioner's claim that his complaint against Zahn and Grygier caused the termination is not supported by the weight of persuasive evidence.

#### CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.57(1) and 760.11, Fla. Stat. (2012).

20. The Florida Civil Rights Act of 1992 (the Act) is codified in sections 760.01 through 760.11, Florida Statutes (2012). "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." Fla State Univ. v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996); see also 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.").

21. The Act makes certain acts prohibited "unlawful employment practices," including those described in section 760.10, Florida Statutes (2011), 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 antinepotism 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.

22. 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 (2012). 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. (2012). It is concluded Petitioner filed a complaint within the statutory time limitation.

23. Petitioner's complaint alleged that he was discriminated against based upon his age, disability and in retaliation against him for making a complaint against two co-workers. Petitioner believes he was terminated because he asserted his complaint and that the company wanted him out.

24. It is concluded Respondent did not discriminate against Petitioner based upon age or disability. Further, it is concluded Respondent did not retaliate against Petitioner based upon the complaint against Zahn and Grygier.

25. 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).

26. "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) ("Direct evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.'"). "If the [complainant] offers direct evidence and the trier of fact accepts that evidence, then the [complainant] has proven discrimination." Maynard v. Bd of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). In this case, the Petitioner failed to prove discrimination either by direct or indirect evidence.

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

28. Had Petitioner established evidence of discrimination, the burden would have shifted to Respondent to articulate a legitimate, non-discriminatory reason for its action. Respondent explained a rational basis for the company's decision to terminate Petitioner. When, as here, the employer 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, Petitioner failed to address whether

Respondent's explanation was a pretext for discrimination. In light of the foregoing, Petitioner'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 Petitioner, and dismissing his employment discrimination complaint.

DONE AND ENTERED this 31st day of May, 2013, 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.