STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARGARET G. TAYLOR,

Petitioner,

vs. Case No. 13-1657

UNIVERSAL STUDIOS,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Orlando and Tallahassee, Florida, on November 12, 2013, before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan.

APPEARANCES

For Petitioner: Margaret G. Taylor, pro se
8836 Darlene Drive
Orlando, Florida 32836

For Respondent: J. Lester Kaney, Esquire
Law Office of J. Lester Kaney
Post Office Box 731148
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Charge of Discrimination filed by Petitioner on August 7, 2012.[1/]

PRELIMINARY STATEMENT

On August 7, 2012, Petitioner, Margaret G. Taylor (Petitioner), filed with the Florida Commission on Human Relations (FCHR) a Charge of Discrimination and alleged therein that her former employer, Universal Studios (Respondent), unlawfully discriminated against her on the basis of age in violation of section 760.10, Florida Statutes (2012).[2/] The allegations were investigated, and on April 3, 2013, FCHR issued its Determination: No Cause. A Petition for Relief was filed by Petitioner on May 6, 2013.

FCHR transmitted the case to the Division of Administrative Hearings on May 7, 2013. At the final hearing, Petitioner testified on her own behalf. Respondent presented the testimony of its employees Kira Reis and Raychelle Drew. Petitioner's Exhibits 1 through 4 and 6 through 8 were admitted into evidence. Respondent's Exhibits 1 through 11 were admitted into evidence. Petitioner, after the close of the evidentiary portion of the proceeding, filed several articles related to the treatment of dental abscesses. In that the articles have not been admitted into evidence, the same were not considered by the undersigned in preparation of this Recommended Order.

A Transcript of the proceeding was filed with the Division of Administrative Hearings on December 20, 2013. The parties timely

filed Proposed Recommended Orders, which have been considered by the undersigned.

FINDINGS OF FACT

1. At the time of her termination from employment on August 19, 2011, Petitioner had been employed by Respondent for approximately 18 years. For approximately the last 10 years of her employment, Petitioner was a member of the wait staff at Lombard's restaurant, a full service restaurant located within the Universal Studios theme park.

2. In her Charge of Discrimination, Petitioner alleges that Respondent discriminated against her on the basis of "age." The Charge of Discrimination provides as follows:

> I. I am 65 years old. I was hired by Universal Studios as a [s]erver in March 1994. Starting in June 2011, a new computer system was installed. I made several errors, and received abusive comments from Kira, Assistant Manager. In July 2011, I was belittled in front of other employees and received fewer tables than other employees. I became flustered when Kira spoke to me [and] I complained to Mark, [the] Manager. Kira claimed that she would stop, however, she continued. On August 18, 2011, I was separated from employment.
>
> II. No reason was given for the above named actions.
>
> III. I believe that I was discriminated against due to my age/65. . . .

3. On March 23, 2011, Petitioner's work-related performance was evaluated by Respondent. Petitioner's evaluation noted that

she was a highly valued employee. A considerable portion of Petitioner's evaluation was completed by Ms. Reis, who was Petitioner's immediate supervisor.

4. Respondent has a food product policy which provides in part that "[i]tems presented for guest purchase are not to be consumed by a team member, unless prior purchase is made while the team member is on break. The team member must obtain management signature on their receipt." The food product policy also provides that "[v]iolation of this policy is considered theft and will merit the appropriate disciplinary action per Universal guidelines up to and including termination." The food product policy applied to Petitioner, as a member of the wait staff.

5. On or about August 16, 2011, Kira Reis observed Petitioner carrying a cup of espresso, which is an item that is sold by Lombard's to its guests. Ms. Reis credibly testified that as she walked towards Petitioner, she noticed that Petitioner moved her hand, which was holding the cup of espresso behind her back. Petitioner's conduct reasonably caused Ms. Reis to believe that Petitioner was trying to conceal the espresso. Noting Petitioner's odd behavior, Ms. Reis went to the area where Petitioner got the espresso and questioned the employee working in the area about whether Petitioner paid for the espresso.

Ms. Reis was advised by the employee that Petitioner did not pay for the espresso.

6. Armed with this information, Ms. Reis approached Petitioner and questioned her about the purchase of the espresso. When initially asked by Ms. Reis if she had purchased the espresso, Petitioner stated that she had in fact done so. This was a lie. Upon further questioning, Petitioner admitted that she did not pay for the espresso and that she lied to Ms. Reis when questioned about the same. Respondent terminated Petitioner's employment on August 19, 2011, for violating the food product policy.

7. Petitioner claims that she lied about having purchased the espresso because her judgment was impaired for reasons related to an abscessed tooth. Petitioner also claims that she lied about the espresso because Ms. Reis used a harsh tone of voice when questioning her about the purchase. According to Petitioner, Ms. Reis' tone caused Petitioner's "brain to freeze" and the resulting "frozen brain," when combined with her abscessed tooth, caused her to tell a lie. Petitioner's testimony in this regard is neither credible nor supported by expert opinion testimony.

8. Petitioner offered no direct evidence that age was a factor in Respondent's decision to discharge her from employment.

9. Petitioner's indirect evidence of discrimination consists of allegations that Ms. Reis was unfairly critical of Petitioner's work performance when compared to younger employees. Petitioner testified that she was the oldest person at Lombard's. Petitioner did not, however, offer evidence of the ages of other staff members. Ms. Reis credibly testified that there were other wait staff at Lombard's who are in the "general age category of Ms. Taylor."

10. Petitioner makes only conclusory allegations as to how she was treated in comparison to other employees and these conclusory allegations are insufficient to prove that Respondent harbored impermissible discriminatory animus towards Petitioner.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2012).

12. 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. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

13. Section 760.10(1)(a), Florida Statutes, provides, in part, that it is an unlawful employment practice for an employer

to discharge or otherwise discriminate against an individual on the basis of age.

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. As previously noted, Petitioner presented no direct evidence that age was a factor in Respondent's decision to discharge her from employment.

16. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, 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. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

17. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden

analysis established by the U.S. Supreme Court in McDonnell Douglas 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 charging party bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to establish 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 (Fla. 1st DCA 1991)(court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only present evidence that the decision was non-discriminatory. Id.; Alexander v. Fulton Cnty., 207 F.3d 1303 (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 of demonstrating pretext 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., supra.

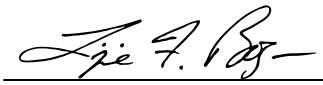
18. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. RT 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."). Once the matter has, as in the instant case, been fully tried, "it is no longer relevant whether the plaintiff actually established a prima facie case [and] . . . the only relevant inquiry is the ultimate, factual issue of intentional discrimination." Green v. Sch. Bd. of Hillsborough Cnty., 25 F.3d 974, 978 (11th Cir. 1994)(citing U.S. Postal Serv. Bd. of Gov. v. Aikens, 460 U.S. 711, 714-15 (1983)).

19. Respondent terminated Petitioner's employment because she violated Respondent's food product policy and lied about the violation when confronted. Petitioner failed to establish that Respondent's proffered reason is a pretext for unlawful discrimination. Petitioner failed to satisfy her burden of proving that Respondent intentionally discriminated against her when terminating her employment on August 19, 2011.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Respondent, Universal Studios, did not commit an unlawful employment practice as alleged by Petitioner, Margaret G. Taylor, and denying Petitioner's Charge of Discrimination.

DONE AND ENTERED this 7th day of January, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of January, 2014.

ENDNOTES

[1/] On June 12, 2012, Petitioner filed a complaint of age discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). By letter dated June 18, 2012, EEOC advised Petitioner that her complaint was being transferred to the Florida Commission on Human Relations "who has jurisdiction to process charges received from 365 days after the date of violation." On August 7, 2012, Petitioner filed a Charge of Discrimination with FCHR and alleged therein that Respondent discriminated against her due to her age as more fully described elsewhere herein.

[2/] All subsequent references to Florida Statutes will be to 2012, unless otherwise indicated.

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.