

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TANYA CHUN,

Petitioner,

vs.

Case No. 13-3717

DILLARD'S,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division) heard this case by video teleconference on March 11, 2014, at sites in Tampa and Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue presented for determination is whether Respondent, Dillard's, discriminated against Petitioner, Tanya Chun, based on her age, in violation of section 760.101, Florida Statutes (2012),^{1/} when it did not hire her for a sales associate position.

PRELIMINARY STATEMENT

Ms. Chun sought employment at Dillard's on June 7, 2012. She was interviewed for one of several open positions. But she was not hired. On March 22, 2013, Ms. Chun filed a charge in which she alleged Dillard's discriminated against her because of her age when it did not hire her. Specifically, she claimed that Dillard's did not hire her because management thought she was too old.

The Florida Commission on Human Relations (Commission) investigated the charge. On August 22, 2013, the Commission issued its determination that no reasonable cause existed to believe that an unlawful employment practice occurred and dismissed the charge.

Ms. Chun filed her Petition for Relief with the Commission on September 25, 2013. The Commission referred the matter to the Division for assignment of an Administrative Law Judge to conduct a formal administrative hearing. The undersigned originally scheduled the final hearing for November 25, 2013. A motion for continuance was granted, and the hearing was

rescheduled to March 11, 2014. The undersigned conducted the hearing as re-scheduled. The parties appeared and were represented by counsel.

Ms. Chun testified on her own behalf. She presented one additional witness, Donald Frankenfeld, an economist who testified about damages. Petitioner's Exhibits 1 through 21 were admitted into evidence.

Dillard's presented the testimony of Walter Soto, a store manager for Dillard's. Mr. Soto interviewed Ms. Chun and made the decision not to hire her. Respondent's Exhibits 6, 11 through 15, 18, 20, 28 through 30, 32, and 33 were admitted into evidence. The following excerpts from the deposition of Walter Soto were admitted into evidence. Page 31, lines 9 through 11 and 19 through 25; Page 33, lines 13 through 15; and page 59, lines 14 through 24.

A Transcript of the final hearing was ordered and filed. The parties timely filed proposed recommended orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Ms. Chun was born April 4, 1957.
2. Ms. Chun applied for a position as a sales associate at Dillard's Department Store No. 209 in Lakeland, Florida, on June 7, 2012. At the time, she was 55 years old. Ms. Chun completed the employment application at a kiosk in the store

linked to Dillard's personnel system. Ms. Chun's application disclosed only two periods of employment. The most recent was with Golf Plus, Inc., as a bookkeeper handling accounts receivable and accounts payable from January 1998 to May 2012. The other was employment at Macy's in New York City from April 1993 to October 1994 in clothing sales and customer services as a retail sales associate.

3. At the time, the Lakeland Dillard's store had five openings--two in cosmetics, two in ladies' shoes, and one in men's shoes. At all times relevant to this proceeding, Walter Soto was operation sales manager at the store with authority to hire people to fill the openings.

4. Mr. Soto interviewed Ms. Chun and seven other applicants for the five positions. During the interview and hiring process, Mr. Soto relied upon the information the applicants provided in their applications and the interviews.

5. Mr. Soto hired five of the applicants. He did not hire Ms. Chun.

6. During Ms. Chun's interview, Mr. Soto asked her a number of questions about Macy's sales procedures and common sales procedures and practices. Ms. Chun was not familiar with common concepts, such as sales per hour and items per transaction. These are concepts with which someone with retail experience and knowledge should be familiar.

7. The five people Mr. Soto hired are Emil Pancorbo, Angelique Schoenmakers, Taylor Swallow, Ashley Thirion, and David Tilton. All were younger than Ms. Chun, although Ms. Schoenmakers was only three years younger.

8. The information available to Mr. Soto about Emil Pancorbo, which he relied upon, indicated that Mr. Pancorbo had recent retail experience at large retailers, JCPenney from October 2008 to April 2011, and Guitar Center from April 2011 to September 2011. Mr. Soto considered this experience in deciding to hire Mr. Pancorbo, instead of Ms. Chun.

9. The information available to Mr. Soto about Angelique Schoenmakers, which he relied upon, indicated that she had recent retail experience as a counter manager for Elizabeth Arden and that she worked for Macy's from October 2010 to April 2012. Ms. Schoenmakers was recruited to work for Dillard's. Mr. Soto considered Ms. Schoenmakers' employment history in deciding to hire Ms. Schoenmakers, instead of Ms. Chun. Ms. Schoenmakers was born January 15, 1960, making her only three years younger than Ms. Chun.

10. The information available to Mr. Soto about Taylor Swallow, which he relied upon, indicated she had recent retail experience, working for Kohl's from August 2011 to June 2012. Ms. Swallow also had cosmetic experience. She had applied makeup

on clients. Mr. Soto considered Ms. Swallow's employment history in deciding to hire Ms. Swallow, instead of Ms. Chun.

11. The information available to Mr. Soto about Ashley Thirion, which he relied upon, indicated she had recent retail experience working at a Clinique cosmetics counter at Macy's from June 2011 to November 2011. Clinique is a cosmetics line that Dillard's also carries. Mr. Soto considered Ms. Thirion's employment history in deciding to hire Ms. Thirion, instead of Ms. Chun.

12. The information available to Mr. Soto about David Tilton, which he relied upon, indicated that Mr. Tilton had recent retail experience at a large retailer, Bealls from May 2010 to May 2012. Mr. Tilton worked in the shoe department for Bealls. Mr. Soto considered Mr. Tilton's employment history in deciding to hire Mr. Tilton, instead of Ms. Chun.

13. Based on the information from the applications and interviews available to him, Mr. Soto made a fair and rational decision to hire applicants other than Ms. Chun. In particular, the fact that the retail experience of each of the applicants was more recent than that of Ms. Chun supports Mr. Soto's decision. All of the applicants, except Ms. Swallow and Ms. Thirion, also had more retail experience than Ms. Chun. Ms. Swallow and Ms. Thirion both had cosmetics experience, and two of the

positions that Mr. Soto was filling were for the cosmetics department.

14. The Dillard's employment procedure includes preparing an applicant summary for each individual interviewed. For the hiring cycle involved here, eight of the applicant summaries, including Ms. Chun's, indicate the person was hired.

15. In order for the Dillard's system to permit obtaining a background check, Mr. Soto had to change an applicant's status on the applicant summaries to "hired."

16. At the time, Mr. Soto was not following the Dillard's procedure of only conducting a background check for an employee after the employee was hired. He did not think the procedure was fair to the applicants, who may be hired and then "un-hired" after the background check. Mr. Soto chose to conduct background checks before extending job offers.

17. The status on Ms. Chun's applicant summary states "hired." But she was not hired, just as Ricky Davis and William Guadalupe, whose summaries state "hired," were not hired. The status for all the applicants said "hired," only because Mr. Soto changed the status in order to run a background check.

18. If Dillard's hires an employee, a Basic Employee Information sheet is prepared. There is no Basic Employee Sheet for Tanya Chun because she was not hired. There are Basic

Employee Information sheets for Emil Pancorbo, Angelique Schoenmakers, Taylor Swallow, Ashley Thirion, and David Tilton.

19. If an employee is hired, Mr. Soto conducts reference checks. He did not conduct a reference check for Ms. Chun because she was not hired.

20. Ms. Chun maintains that Mr. Soto told her at the interview's conclusion that she was hired and that they agreed to a start date and compensation of \$10.00 per hour with full medical and dental insurance.

21. She also maintains that Mr. Soto told her she would undergo a routine background check and requested that she sign a consent form and provide her identification card for the background check.

22. Ms. Chun says that Mr. Soto stated that she did not "look that old" after he looked at her identification. She also claims he then said he had to talk to someone else and left the room for about five minutes.

23. Mr. Soto denies Ms. Chun's descriptions of the conversation.

24. Ms. Chun, according to her own testimony, called for Mr. Soto a few times in the days following the interview to check on her employment status. She was correctly told that he had been transferred.

25. On June 18, 2012, Ms. Chun sent a letter with the following text to Mr. Soto:

I am writing to inquire the status of my employment application and I would like to receive your written response.

Early last week, I applied for employment at Human Resources. The next day I was called in for an interview by you and when we met, before you offered a position you stated that I seemed to be a good candidate, and requested my identification and social security card, made photocopies, then stated that you will do a background check. As you reviewed my identification papers, your tenor changed and you stated that you will get back to me. I am writing to ask the status.

I would like to request a copy of the documents I completed, as I do not have them for myself--both the application and the background disclosure form. And I would like to know why my identification with date of birth was requested before I was offered a position, and why my identification became the basis of your change of discussion.

Thank you for your prompt attention.

26. She did not receive a response. On February 28, 2013, Ms. Chun sent another letter, this one to the Dillard's Human Resource Department. It states:

I wrote the attached letter [June 18, 2012, letter] to your company more than six months ago, and I have received no response.

My discussion with Walter at the interview, before being requested to provide my ID showing my age, was that I was going to be hired. Then, when my ID revealed my age I

was told "we will get back to you" and I have requested an explanation and copies of the documents pertaining to my application, but you have totally disregarded my letter.

I am writing to reiterate my request, and I request that you respond within five business days.

27. Neither letter, both of which are specific and articulate, includes the claim Ms. Chun now makes that Mr. Soto said she did not "look that old" after seeing her identification.

28. Dillard's did not respond until March 11, 2013. A woman named "Arlie" called that day and told Ms. Chun it was Dillard's policy to obtain identification and again advised that Mr. Soto had been transferred to another location.

29. The weight of the credible, persuasive evidence does not establish Ms. Chun's version of the events. The factors resulting in this determination include the fact that she testified that Mr. Soto told her she was hired and that they agreed upon a start date. Yet, she also testified that she called several times to check on the status of her application. Calling to check on the application's status is inconsistent with having accepted a job and having agreed to a start date. If Ms. Chun had been offered and accepted a job, she would have reported for work, not called to check on the status of her application.

30. In addition, Mr. Soto's testimony about the process and the events is consistent with the documents for the applicants he interviewed.

31. Finally, Ms. Chun did not make her very specific claim about what Mr. Soto said, "you don't look that old," in either of her letters or her initial Complaint of Discrimination filed with the Commission.

32. From April to November of 2013, Mr. Soto hired at least ten individuals born in 1957, like Ms. Chun, or born earlier. This is persuasive evidence corroborating Mr. Soto's testimony that he does not weigh an applicant's age against the applicant when making his hiring decisions.

33. Mr. Soto hired five applicants other than Ms. Chun because he found their qualifications superior for the open positions. Ms. Chun's age was not a factor in Mr. Soto's decision.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties. §§ 120.569 and 120.57(1), Fla. Stat. (2013).

35. Ms. Chun must prove her claim that Dillard's discriminated against her by a preponderance of the evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996).

36. Sections 760.10(1)(a) and (b) make it unlawful for an employer to discriminate against an applicant or employee because of the individual's age. Sunbeam Television Corp. v. Mitzel, 37 Fla. L. Weekly D183 (Fla. 3rd DCA 2012); Miami-Dade Cnty. v. Eghbal, 54 So. 3d 525 (Fla. 3rd DCA 2011), reh. Denied, No. 3D10-1596 (Fla. 3d DCA 2011), rev. denied, 71 So. 3d 117 (Fla. 2011); Bratcher v. City of High Springs, Case No. 11-2999 (Fla. DOAH Sept. 28, 2011), rejected in part, Case No. 2011-358, Final Order No. 11-91 (Fla. FCHR Dec. 7, 2011).

37. Section 760.11(7) permits a party who receives a "no cause" determination to request a formal administrative hearing before the Division. "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.

38. The Florida Legislature patterned chapter 760 after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting chapter 760. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009).

39. A party may prove unlawful discrimination through either "direct or circumstantial evidence of discrimination."

City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008), reh. denied, City of Hollywood v. Hogan, Case No. 4D07-392 (Fla. Dist. Ct. App. 4th Dist. Aug. 21, 2008). Direct evidence is something like a discriminatory statement by a supervisor that requires no interpretation or inferences to manifest the discrimination. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). The record does not establish by the weight of the credible, persuasive direct evidence that Dillard's discriminated against Ms. Chun because of her age.

40. Florida and federal courts apply the McDonnell-Douglas v. Green^{2/} process to analyze circumstantial evidence of employment discrimination. This process requires a party to establish a prima facie case of discrimination by a preponderance of the evidence. A prima facie case creates a presumption of discrimination. The burden of evidence production then shifts to the employer to offer a legitimate, clear, and reasonably specific non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption and the McDonnell-Douglas framework disappear. The employee may prove that the legitimate reasons were a pretext. The ultimate burden of proving intentional discrimination remains with the employee. City of Hollywood v. Hogan, supra; Valenzuela v. GlobeGround N. Am., LLC, supra at 21.

41. The Fourth District Court of Appeal described the elements of a prima facie showing as follows:

The plaintiff must first make a prima facie showing of discriminatory treatment. He or she does that by proving: 1) the plaintiff is a member of a protected class, i.e., at least forty years of age; 2) the plaintiff is otherwise qualified for the positions sought; 3) the plaintiff was rejected for the position; 4) the position was filled by a worker who was substantially younger than the plaintiff. Reeves, 530 U.S. at 142; McDonnell Douglas, 411 U.S. at 802; O'Connor. This may also be accomplished by showing direct evidence of discrimination such as a discriminatory statement by the decision-maker. Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1359 (11th Cir. 1999).

City of Hollywood v. Hogan, supra.^{3/}

42. The evidence proves the four elements of the McDonnell-Douglas test. In light of Ms. Chun's age and claim that Dillard's discriminated against her in favor of younger applicants, the protected class of individuals at least 55 years of age may be used in this analysis.^{4/} Ms. Chun is a member of the protected class. She qualified for the position and was rejected. All of the people hired for the positions were younger than Ms. Chun. The facts support a prima facie case of age discrimination.

43. The weight of the persuasive, credible testimony, however, establishes that the superior qualifications of the applicants hired were the reason they were hired and that

Ms. Chun's age was not a factor. Dillard's has proven a non-discriminatory explanation for not hiring Ms. Chun. Cooper v. Southern Co., 390 F.3d 695, 725 (11th Cir. 2004); see also Reeves v. Sanderson Plumbing Prods. Inc., 120 S. Ct. 2097, 2106 (2000).

44. There is no persuasive, credible evidence that the reasons given for hiring applicants other than Ms. Chun are a pretext for not hiring her.

RECOMMENDATION

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

DONE AND ENTERED this 19th day of June, 2014, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
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Filed with the Clerk of the
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this 19th day of June, 2014.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2012), unless otherwise noted.

^{2/} In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the Supreme Court established the order and allocation of proof for discrimination cases. Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008), reh. denied, City of Hollywood v. Hogan, Case No. 4D07-392.

^{3/} The Florida Commission on Human Relations holds in final orders, like the one in Bratcher v. City of High Springs, that Florida law prohibits discrimination on account of any age, not just over 40. This makes the rationality of using the McDonnell-Douglas analytical process questionable. Effectively, application of the Commission's interpretation coupled with use of the McDonnell-Douglas process would create a protected class consisting only of people born in the same year, if not on the same day, as the complaining employee. That does not become an issue here since there is no persuasive evidence of age-based discrimination, and Ms. Chun maintained that the discrimination was in favor of a younger employee.

^{4/} See Endnote 3.

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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.