STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ZHIJIAN YANG,

Petitioner,

vs. Case No. 14-1916

TRADESTATION TECHNOLOGIES, INC.,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings for final hearing on June 22 and 23, 2015, with the hearing's conclusion on August 19 and 20, 2015, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Zhijian Yang, pro se
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For Respondent: Steven M. Greenbaum, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent engaged in an unlawful employment practice against Petitioner on the basis of national origin, age, and disability, and whether Respondent

retaliated against Petitioner in violation of the Civil Rights Act; and, if so, what remedy should be imposed.

PRELIMINARY STATEMENT

Petitioner Zhijian Yang ("Yang" or "Petitioner") filed a discrimination complaint with the Florida Commission on Human Relations ("FCHR") alleging that Respondent TradeStation Technologies, Inc. ("TradeStation" or "Respondent"), discriminated against Petitioner and retaliated against him.

The FCHR investigated the case and issued a Notice of Determination of No Reasonable Cause on March 20, 2014, which notified the parties that there was "no reasonable cause to believe that an unlawful employment practice occurred." Thereafter, Petitioner elected to contest the decision and pursue administrative remedies by filing a Petition for Relief with the FCHR on or about April 14, 2014.

The FCHR transmitted the Petition for Relief to the Division of Administrative Hearings ("DOAH") on April 24, 2014, and the matter was reassigned twice before the undersigned was assigned to hear the case. The undersigned scheduled and heard the matter on June 22 and 23, 2015. The case was continued and completed on August 19 and 20, 2015.

At the formal hearing, Petitioner testified on his on behalf and presented the testimony of four witnesses: Andrea Maizes ("Maizes"), human resource director of Respondent's

parent company TradeStatiton Group, Inc.("TGI"); Salomon Sredni, TGI CEO; Quoc Tran ("Tran"), data base administrator ("DBA") manager; and Guillermo Garces ("Garces"), vice president of Application Development. Petitioner's Exhibits 1 through 14 were received into evidence. Respondent presented testimony from Maizes, Tran, and Garces. Respondent's Exhibits 1 through 11 were received into evidence.

The proceedings were recorded and transcribed. On July 17, 2015, the Transcripts of June 22 and June 23 were filed at DOAH, and the Transcripts for August 19 and 20 were filed on October 7, 2015.

Both parties timely filed proposed recommended orders, on November 6, 2015, which the undersigned considered in the preparation of this Recommended Order. Petitioner filed a Motion for Extension of Proposed Recommended Order, which Respondent opposed. The undersigned denied the motion by Order dated November 12, 2015. Since the record closed at the final hearing, no additional pleadings filed after November 6, 2015, were considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. TradeStation is a Florida company located in Plantation, Florida, that provides technology services to its affiliates, TradeStation Securities, Inc. ("TSI"), and IBFX,

Inc. ("IBFX"), as well as trading analysis software subscriptions to customers.

2. TradeStation screened candidates to fill a senior level DBA position. Yang's resume stood out because of his previous DBA experience with another financial services firm, experience in other 24/7 on-call environments similar to the one at TradeStation, years of experience, and certifications. Yang was interviewed by telephone and given a video online test to determine his proficiency. Afterwards, TradeStation chose to interview Yang in person, and he was flown from his home in Toronto, Canada, to Plantation, Florida, for the interview.

3. In Yang's in-person interview, he was informed that the DBA team maintains the servers at TradeStation to make sure there are no critical errors, because their customers will be put out of business if the servers are not working properly and customers cannot operate their online brokerage services. All servers have to be maintained so clients can always trade, and their access to trading is never reduced. Tran explained to Yang that the position he was interviewing for was demanding because it was the operational side of the business, which solely supports the databases, and, if there are issues, the DBAs would have to identify them and make the necessary corrections.

4. During the interview, it was also explained to Yang how demanding a DBA position is and that the position would require working way beyond a 40-hour work week expectation. It requires a 24 hours, seven days a week, 365 days a year ("24/7") on-call work support, which includes the whole DBA team working on 24/7 rotations responding to calls, idling the system up, performing maintenance at night, and fully supporting the databases. Yang acknowledged that he understood the requirements of the position and was willing and able to perform them.

5. After Yang's interview, TradeStation chose Yang for the position and extended him an offer of employment as a salaried exempt at will DBA, which Yang accepted.

6. Yang signed an employment agreement that his employment was "at will," which provided either the "employee or employer to terminate the employment relationship at any time, with or without cause, for any or no reason." Exempt employees complete the amount of work required to finish the job assignment without overtime pay. Yang also received an employee handbook, which he acknowledged receipt with his signature on April 30, 2012.

7. TradeStation had to obtain an H-1B Visa to bring Yang to the United States to work from Canada. The H-1B Visa process allows a company to fill a position with a non-United States resident employee if the company cannot find a United States candidate to fill the position. TradeStation invested both time

to complete the H-1B Visa application process and quite a bit of money in Yang to bring him aboard as an employee. The company paid to obtain the H-1B Visa for Yang and also paid Yang's relocation costs from Canada.

8. On April 30, 2012, Yang began employment with TradeStation in the Plantation office. Petitioner was a 40-year-old Chinese national origin male of Asian descent with Chinese citizenship. Yang's age was on his new hire paperwork.

9. Yang started out the first couple of months of employment eager to learn. TradeStation trained Yang during the first three months by having him shadow to learn TradeStation's methods and get up to speed. During that period, Yang was on every call to get exposed to live issues.

10. TradeStation's DBA team consisted of four members: Tran, the part Chinese male manager; Robert Nielson ("Neilson"), a Caucasian male from Salt Lake City, Utah; Amanda Johnson ("Johnson"), an African-American female; and Yang.

11. Soon after Yang started at TradeStation, Johnson went on maternity leave. Since Johnson was on maternity leave, she was removed from the 24/7 schedule, and there was more work for the rest of the DBA team to complete.

12. Tran divided up the job responsibilities. Nielson's main responsibilities were different from Petitioner. Since Nielson was located in Utah with IBFX, he was assigned to all

the IBFX databases full time. Yang was mainly assigned to the SQL servers.

13. The work schedule for the whole DBA team consisted of 8:00 a.m. to 5:00 p.m. office hours, unless the DBA had permission to work from home. After-hours were from 6:00 p.m. to 9:00 p.m., when software updates were typically handled, and 9:00 p.m. to 8:00 a.m., as well as Saturdays and Sundays, which were on-call hours.

14. Tran started to experience problems with Yang's work when he had worked for TradeStation approximately three months. Yang's overall work performance started to deteriorate. Yang failed to complete the database mirroring on time, and Yang would have outbursts raising his voice at Tran. Yang once told Tran with a raised voice, "you do it yourself."

15. TradeStation's leave policy provides employees paid leave after being employed with the company six months. Even though Yang had not accrued any paid leave, when Yang requested personal leave, Tran allowed Yang to take leave several times for personal matters, including traveling to Canada to take his father to the doctor. Yang worked remotely while in Canada. Yang also requested time to go to China to handle family matters. Tran approved the leave without pay, and Yang did not go.

16. Tran continued to be dissatisfied with Yang's work and determined that his skill set was not meeting expectations. On August 20, 2012, the accepted testimony shows Tran and Garces, Tran's supervisor, met with Yang to discuss his poor work performance. Tran documented the meeting by taking notes.[1/] Yang was not performing satisfactorily and needed to improve.

17. During the meeting, Yang was placed on a remediation plan to provide him a chance to perform better. Additionally, Yang's workload was temporarily reduced as part of the plan, and the critical servers were taken from Yang and assigned to Johnson, who was back from maternity leave. Yang was also told that he needed to be a team player. Yang's outbursts were addressed, as well as expectations, personal issues, and failures. The meeting concluded with Yang being placed on a three-week probationary period until his performance peer review.

18. By mid-September, Yang's performance had not improved. Since Yang was still not living up to Tran's expectations, on September 28, 2015, Tran and Garces met with Yang again for performance counseling and informed Yang of his continued work deficiencies. In the meeting, the supervisors informed Yang of the following: he was having problems meeting deadlines; unable to follow through with ownership of issues or resolving issues in a timely manner; lacked respect for authority with

inappropriate outbursts and improper comments; technical knowledge not up to par; took multiple extended breaks during the day; inability to relieve work load from other team members; and inability to understand the business and grasp key concepts. Yang was then given two weeks to improve.

19. When Yang's performance did not improve and meet TradeStation's standards, TradeStation terminated Yang for unsatisfactory job performance on October 9, 2012. Yang requested to switch to another team upon termination. The other team did not accept his transfer request, and, on or about October 15, 2012, Human Resources confirmed Yang's termination.

20. After TradeStation terminated Yang, Yang's DBA position was not filled. Tran divided up Yang's duties among the DBA team instead of replacing Yang with a new employee.

21. Yang never complained about discrimination while working at TradeStation. Yang filed a discrimination complaint alleging national origin, age, disability, and retaliation when he filed his complaint with FCHR.

22. During the final hearing in this cause, the charge of national origin discrimination was not shown. The record is devoid of any evidence, direct or otherwise, suggesting Petitioner's termination was motivated based on Yang's national origin. Petitioner's conclusory assertions have failed to prove that Respondent's proffered reason for terminating Petitioner,

poor work performance, is a mere pretext for national origin discrimination. On the contrary, the undersigned credits Tran and Garces's testimony that the poor work performance was the sole basis for Petitioner's termination.

23. Petitioner also contends that he was subjected to threats, harassment, and inappropriate comments by his manager, Tran, such as: "you Chinese weird"; "one child policy"; "you Chinese only good at cigarettes, the smoke"; and "do you want to go back to China." These assertions were not corroborated by any other evidence, and Tran denied the allegations. The testimony of Tran, a part-Chinese male, is accepted as being more credible on this issue.

24. Petitioner offered no direct evidence in support of his claim of age discrimination. Yang's assertions that supervisors made comments about him being "old" or needing to be "younger" are rejected as not being credible. Moreover, TradeStation did not replace Petitioner's position when he was terminated. Instead, Yang's workload was distributed among other DBAs. Hence, no evidence was presented that Yang was terminated so that a younger individual could take his job position at TradeStation.

25. Petitioner also contends that he has a disability. At hearing, the evidence demonstrated Yang had hemorrhoids while working at TradeStation. The evidence further showed Yang's

hemorrhoids were painful and bothersome, but no credible evidence was presented that TradeStation caused the hemorrhoids or that the hemorrhoids substantially limited any major life activity.

26. Yang informed Garces by email that he had an injury, which is how Yang references his hemorrhoids, and needed to take time off to get medical treatment. Garces allowed Yang time off to get medicine and to stay home. The credible evidence shows Yang continued to work with his hemorrhoids after the leave. Even assuming that Petitioner had a disability, which he does not, the contention that a disability formed a basis for an unlawful employment practice must fail.

27. At hearing, Petitioner also contended that Nielson was treated differently because Nielson had less work assigned to him, and Nielson periodically was able to work from home. No evidence was presented that other members of the DBA team, similarly-situated employees, were treated more favorably than Yang. Instead, the credible evidence at hearing also showed Yang and Nielson's job duties were different. Nielson was the subject matter expert in IBFX, which dealt with foreign currencies, and he was solely assigned to handle IBFX, as well as the on-call responsibilities in Utah. However, Yang handled SQL servers in Plantation. The record also lacks evidence that

Nielson was either having work performance problems or was on probation like Yang.

28. Tran credibly explained on-call hours for DBAs at TradeStation. On-call hours do not require DBAs to work all the time. However, if there was a call or problem, the DBA assigned had to take care of it. If there is not a call, the DBA does not work. The DBA role is reactive like an emergency, and DBAs would need to be available to deal with unforeseen incidents as they arise 24/7 to maintain the databases remotely on their laptops if not in the office. Tran remained on-call as the manager always. Nielson handled the IBFX on-call assignments, and Yang was assigned the SQL on-call assignments while Johnson was out on maternity leave. DBAs were even on-call when on vacation.

29. Yang claims that he was forced to work more than the other DBAs is not credible. Yang's schedule was no different than the other DBAs and all TradeStation DBAs worked hard. All DBAs were on-call and had to resolve any problem that arose at whatever hour. TradeStation's policy regarding working from home was regarded a privilege and based on approval from a supervisor. Since Yang's work performance was not up to par, and he was still trying to learn the job, Tran's denial of Yang's request to work from home during office hours was reasonable.

30. Finally, the record is devoid of any credible evidence of retaliation. No evidence was demonstrated that Tran retaliated against Yang, and there is no evidence regarding the charge that Petitioner was terminated in retaliation for engaging in a protected activity. Petitioner presented no credible proof that he complained to management regarding any alleged discriminatory practices. Yang never complained to Human Resources or anyone else at TradeStation that he believed he was discriminated against because of his age or national origin or any other legally-protected basis.

31. Yang also complained at hearing that he is still owed money and was never paid overtime, holiday, and benefits, which are issues not germane to this matter.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).[2/]

33. The Florida Civil Rights Act of 1992 ("FCRA") is codified in sections 760.01 through 760.11, Florida Statutes. FCRA prohibits discrimination in the workplace.

34. Section 760.10(1)(a) provides, in pertinent part, as follows:

> 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.

35. In the instant case, Yang alleged in his Employment Complaint of Discrimination, which he filed with FCHR, that he was discriminated against by Respondent because of his national origin, age, and disability, as well as he was retaliated against. The undersigned must look at the charges of discrimination Petitioner claimed in his Petition for Relief.

36. 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).

37. "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. Complainants alleging unlawful discrimination may prove their case using direct evidence of discriminatory intent. Petitioner presented no direct evidence

of national origin or age discrimination. The allegations of Chinese-related, as well as old and younger, comments were rejected by the undersigned and not found to be credible as detailed in paragraphs 23 and 24 above.

38. When no direct proof of discrimination exists, complainants may establish a prima facie case circumstantially through the burden-shifting test established by the United States Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973)(The Supreme Court of the United States established the analysis to be used in cases alleging claims under Title VII that rely on circumstantial evidence to establish discrimination.).

39. Under McDonnell-Douglas, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, the burden then shifts to the employer to articulate some legitimate, non-discriminatory reason for the action taken against Petitioner. It is a burden of production, not persuasion. If a non-discriminatory reason is offered by Respondent, the burden of production then shifts back to Petitioner to demonstrate that the offered reason is merely pretext for discrimination. "[T]he factfinder must believe the plaintiff's explanation of intentional discrimination." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

National Origin Discrimination

40. The record is devoid of any direct evidence of national origin discrimination. Accordingly, Petitioner's claim is analyzed pursuant the McDonnell-Douglas burden-shifting analysis. In order to establish a prima facie case of national origin discrimination, Petitioner must prove that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; (3) his employer treated similarly-situated employees, who were not members of the same protected class, more favorably; and (4) he was qualified to do his job.

41. The first two elements for the foregoing test are satisfied, as Respondent stipulates that Petitioner is a member of protected class with an Asian national origin and that Petitioner was subject to an adverse employment action when he was terminated on October 9, 2012.

42. Contrary to Respondent's position, Petitioner also meets criteria (4) and is qualified for the position. See Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001)(holding that a plaintiff "need only make the minimal showing that [he] possesses the basic skills necessary for the performance of [the] job" to satisfy the requirement that the plaintiff was qualified).

43. However, Petitioner failed to prove the third element, that Respondent treated similarly-situated employees not of his

protected class more favorably. In order to make a valid comparison, Petitioner must show that he and the comparators he identifies are similarly-situated in all relevant respects. Conner v. Bell Microproducts-Future Tech, Inc., 492 Fed. Appx. 963, 965 (11th Cir. 2012). See also Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1091 (11th Cir. 2004)(comparator must be nearly identical to petitioner to prevent courts from second-guessing reasonable decisions by an employer).

44. Petitioner's argument that Nielson was similarly-situated to him is rejected. First, Nielson's job was different from Yang's in that he had different job duties solely working for IBFX and that he was located in the Utah office. Hence, Nielson was not nearly identical and should not be the comparator. However, even if Nielson was the proper comparator, the record fails to demonstrate that Nielson or any DBAs were treated more favorably. Everyone on the DBA team worked hard, had a rigorous schedule, was on-call, and had weird hours. Therefore, Petitioner failed to demonstrate that Respondent treated similarly-situated employees who were not of Asian national origin more favorably than he was treated, and, therefore, no prima facie case of discrimination on the basis of national origin has been demonstrated.

Age Discrimination

45. To establish a prima facie case of age discrimination under the federal Age Discrimination in Employment Act ("ADEA"), the complainant must show that: (1) he is a member of a protected age group (i.e., over 40); (2) he was qualified for the job; (3) he was rejected; and (4) he was replaced by a younger person. Benson v. Tocco, Inc., 113 F.3d 1203, 1207 (11th Cir. 1997), citing McDonnell-Douglas, supra (The 11th Circuit has adopted a variation of the McDonnell-Douglas test in ADEA violation claims.).

46. Petitioner's claim of age discrimination is likewise unsupported by any direct evidence; as such, the McDonnell-Douglas framework is applied once again. Even so, the record is also devoid of any evidence of age discrimination in that the prima facie case is not met because Yang did not lose his position to a younger person. His DBA position was not filled or replaced after his termination.

47. Even had Petitioner demonstrated a prima facie case and the burden of production shifted to TradeStation, Respondent has articulated legitimate, non-discriminatory reasons for Petitioner's dismissal. Respondent demonstrated that Yang's work performance was unsatisfactory even though TradeStation tried to work with Yang and provided him the opportunity to improve with the two performance warnings and a remedial plan

before terminating him after he did not improve his work performance.

48. Accordingly, credible evidence shows that Petitioner was terminated not because of age or national origin but, rather, because of TradeStation's reasonable conclusion that Petitioner's work performance was lacking. Petitioner did not credibly refute the progressive discipline or evidence of poor work performance that led to his termination. Accordingly, Petitioner's discrimination claims of national origin and age fail.

Disability

49. Petitioner also alleges that he was subject to discrimination on account of his disability. As a threshold issue to substantiate this charge, Petitioner must first prove that he has a disability.

50. An impairment's impact must be permanent or long-term. If an impairment is readily corrected by medication or other measures such as a diet, it is not an impairment that substantially limits a major life activity. Vande Zande v. Wisc. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995). On this issue, the evidence shows clearly that Petitioner's hemorrhoids were not a physical impairment that substantially limits a major life activity. Therefore, the disability complaint must fail.

Retaliation

51. Petitioner also alleged retaliation in his petition. Section 760.10(7) provides in relevant part:

> (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.

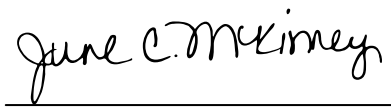
52. Finally, to establish a prima facie case of retaliation, Petitioner must show that: (1) he was engaged in an activity protected by chapter 760; (2) he suffered an adverse employment action by his employer; and (3) there was a causal connection between the protected activity and the adverse employment action. See Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001).

53. Petitioner has failed to satisfy the first prong of the test. Yang's employment charges of discrimination were never addressed with TradeStation. In fact, his complaints were only filed with FCHR almost a year after he was discharged. Hence, there is no evidence whatsoever that Petitioner engaged in a protected activity within the meaning of the law, or that Respondent had any knowledge of such an activity. Accordingly, the charge of retaliation must fail.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 31st day of December, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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ENDNOTES

[1/] Resp. Ex. 9.

[2/] References to Florida Statutes are to the 2012 version, unless otherwise indicated.

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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.