STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PIRAMIAH ELAYAPERUMAL,

Petitioner,

vs. Case No. 14-2211

PALL CORPORATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a hearing was held before the Honorable Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings, July 14, 2014, and March 26, 2015, in Pensacola, Florida.

APPEARANCES

For Petitioner: Piramiah Elayaperumal
2531 Eagle Trace Lane
Woodbury, Minnesota 55129

For Respondent: Colin A. Thakkar, Esquire
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501 Riverside Avenue
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether the Respondent committed an unlawful employment practice against Petitioner in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

On October 23, 2013, Petitioner filed a Complaint of Employment Discrimination against Respondent, Pall Corporation (Respondent or Pall Corporation), with the Florida Commission on Human Relations (FCHR). The Complaint alleged that Respondent discriminated against Petitioner on the basis of age, when Respondent terminated him as an employee.

FCHR investigated the Complaint. On April 14, 2014, it issued a Notice of Determination finding no cause to believe that an unlawful employment practice had occurred based on age discrimination. The notice also advised Petitioner of his right to file a Petition for Relief.

On May 14, 2014, Petitioner filed a Petition for Relief with FCHR. Thereafter, the Petition for Relief was forwarded to the Division of Administrative Hearings (DOAH) for formal hearing.

At the hearing, Petitioner presented the testimony of two witnesses and offered Petitioner's Exhibits 1 and 2 into evidence of which only Exhibit 1 was admitted.[1/] Respondent presented the testimony of two witnesses and admitted Respondent's Exhibits 8-12 and 27-33 into evidence.

After the hearing, Respondent filed a Proposed Recommended Order on May 12, 2015. Petitioner filed a Proposed Recommended Order on April 30, 2015.

FINDINGS OF FACT

1. Respondent, Pall Corporation, is a company involved in the high-tech filtration, separation, and purification industry, developing products for various businesses and other organizations, including manufacturers, hospitals, laboratories, airlines, and municipal water suppliers.

2. Pall is headquartered in Port Washington, New York, with satellite offices throughout the United States, including Pensacola, Florida. The Pensacola office is home of the Pall Membrane Technology Center which specializes in the creation of microfiltration products. Microfiltration involves the use of a porous membrane to separate bacteria and other particles from water.

3. Petitioner Piramiah Elayaperumal was born in 1952 and at the time of the hearing was 62 years old.

4. On February 18, 2008, Petitioner was hired by Respondent to work at its Pensacola location as the Membrane Research and Development (Membrane R&D) Group's Principal Scientist. Petitioner's supervisor at the commencement of his employment was Dr. Rick Morris. Later in 2008, Dr. Morris was promoted to Senior Vice President of Global Media Product Development, with indirect managerial authority over the Membrane R&D Group. As such, Wilf Wixwat became Petitioner's immediate supervisor.

5. Under Mr. Wixwat, Petitioner exhibited serious and repeated difficulties interacting with his colleagues in the Membrane R&D Group. He often created unnecessary conflicts with colleagues, demonstrated substantial difficulty in communicating with colleagues, and often misinterpreted remarks from his colleagues and instructions from Mr. Wixwat. Petitioner also often refused to follow managerial instruction that did not mirror his own judgement and believed such instructions reflected management's ignorance of the subject matter.

6. Around late August 2009, Mr. Wixwat completed a Performance Appraisal of Petitioner's work during August 1, 2008, through and including July 31, 2009. Mr. Wixwat noted that Petitioner was technically proficient in the subject matter of his work. However, he also noted that Petitioner needed to focus on improving his conduct within the work group.

7. Unfortunately, Petitioner's interpersonal skills did not improve. As a result, Mr. Wixwat, on September 15, 2009, issued Petitioner a Performance Improvement Plan (PIP), formally documenting Petitioner's deficiencies and providing a detailed framework for Petitioner to make necessary corrections. Specifically, the PIP called for significant improvements to be made in the following performance categories: "Teamwork," "Interpersonal Skills," "Following

Direction," "Completing Assignments Timely," "Using Time Effectively," and "Communication (listening & comprehension)." Additionally, because of Petitioner's poor interpersonal skills, Mr. Wixwat reasonably did not feel he could send Petitioner to scientific meetings.

8. On June 28, 2010, Pall transferred Petitioner to the Membrane R&D Group's Virus Team. The Virus Team focused on the development of membranes capable of separating specific viruses from water.

9. Following the transfer, Stanley Kidd, manager of the Virus Team, became Petitioner's direct supervisor. Approximately three years later, on February 4, 2013, Pall promoted Mr. Kidd to the newly-created position of Director, Membrane Development, and appointed, as head of the Virus Team, the Team's current Principal Engineer, Munif Tinwala. Consequently, Petitioner and the Virus Team's other non-managerial personnel reported directly to Mr. Tinwala, and Mr. Tinwala, in turn, reported directly to Mr. Kidd, who reported directly to Dr. Morris.

10. While part of the Virus Group, Petitioner continued to display the same performance deficiencies that plagued his time with the Membrane R&D Group. In Petitioner's 2011 performance appraisal, which reflected his "first full year in the [Virus] Team[,]" Mr. Kidd praised Petitioner's efforts to

correct past performance issues while stressing the need for further improvements, particularly in the areas of communication skills and teamwork. Mr. Kidd noted in the performance appraisal:

> Since virus media development was a new area for Elaya as expected there was a learning curve and it took Elaya a while to get use[d] to the team oriented nature of the Virus Team where all members of the team are working on the same project and also getting to understand Pall's virus media technology. By the later part of the fiscal year there was marked improvement in the quality of his experimental work and his interaction with the rest of the team also improve[d] . . . .
>
> Elaya still has some work to do to become fully integrated into the team. He needs to work harder at fostering a better working relationship with his fellow team members. He also needs to improve his communication skills both written and spoken.

11. Unfortunately, Petitioner's working relationship and interpersonal skills regressed over time. Petitioner again exhibited markedly poor communication skills, frequently clashed with his supervisors, refused to accept instruction, repeatedly attempted to circumvent supervisory authority and unilaterally changed the focus of his assigned projects. His later performance appraisals continued to reflect Petitioner's continued performance issues. Indeed, Petitioner's behavior was severe enough to impede the Virus Team's efforts to

complete its assigned projects, was unacceptable in a team member, and led to Petitioner being the least productive member of the group. Additionally, because of his ongoing behavior, Petitioner was not permitted to complete certain training until he complied more fully with the research requests of his supervisors. Moreover, while Petitioner believed that he was sabotaged in his efforts to produce work, there was no competent or substantial evidence that Petitioner was sabotaged in his work. The better evidence demonstrated that Petitioner's inability to work with others and/or follow directions he disagreed with caused his lack of productivity and directly contributed to his low performance rating.

12. In August 2013, members of Pall's management team, including Dr. Morris and Mr. Kidd, met to discuss the progress, and anticipated profitability, of the Membrane R&D Group's projects. At that time, it was determined that the Group's negative return on investment (ROI) was unsustainable, and that the Group's operational expenses would need to be reduced.

13. As a result of the meeting, Dr. Morris and Mr. Kidd were assigned to identify any unnecessary expenditures within the Virus Team. They determined that the Virus Team could maintain its continuing operations with fewer scientific staff since the team had recently completed one of its two primary projects. Selection of staff for termination was to be based

on the performance rating of each team member and the unique skills that such member contributed to the team.

14. Towards that end, Dr. Morris reviewed performance assessments for each member of the Virus Team, to determine who was least integral to the Team's continuing operation. The employee evaluations demonstrated that Petitioner had the lowest performance rating of the entire group. Further, his skill set was not unique and his job could be easily and fully absorbed by other team members. Based on his evaluation, Dr. Morris selected Petitioner for layoff. There was no evidence that demonstrated the corporate management team's decision to reduce costs, Dr. Morris' review, or the selection of Petitioner for layoff was based on Petitioner's age, was unreasonable, or a pretext for discrimination. Ultimately, Petitioner's selection for layoff was approved by the corporate management team to become effective September 16, 2013. As such, Petitioner was laid off on that date. Again, there was no evidence that Pall's reduction in force or Petitioner's selection for that reduction was based on discrimination or was a pretext for the same. Given these facts, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2014).

16. The Florida Civil Rights Act (FCRA) in section 760.10, Florida Statutes, states in pertinent part as follows:

> (1) It is an unlawful employment practice for an employer:
> (a) To discharge or to fail or refuse to hire an 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.

17. The Florida Civil Rights Act was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200 et seq. As such, FCHR and Florida courts have determined federal case law interpreting Title VII is applicable to cases arising under FCRA. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Green v. Burger King Corp., 728 So. 2d 369, 370—371 (Fla. 3d DCA 1999); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Brand v. Fla. Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

18. Under FCRA, Petitioner has the burden to establish by a preponderance of the evidence that he was the subject of discrimination by Respondent. In order to carry his burden of

proof, Petitioner can establish a case of discrimination through direct or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

19. 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). 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. Evidence that only suggests discrimination, or that is subject to more than one interpretation, is not direct evidence. See Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999), and Carter v. Three Springs Residential Treatment, 132 F.3d 635, 642 (11th Cir. 1998). Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption and must in some way relate to the adverse actions of the employer. Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001); see Jones v. BE&K Eng'g, Inc., 146 Fed. Appx. 356, 358-359 (11th Cir. 2005) ("In order to constitute direct evidence, the evidence must directly relate in time and subject to the adverse employment action at issue."); see also Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318 (11th Cir. 1998) (concluding that the statement

"we'll burn his black a**" was not direct evidence where it was made two-and-a-half years prior to the employee's termination).

20. Herein, Petitioner presented no direct evidence of discriminatory intent on the part of the Respondent. Therefore, Petitioner must establish his case through inferential and circumstantial proof. Walker v. Prudential Prop. & Cas. Ins. Co., 286 F.3d 1270, 1274 (11th Cir. 2002); Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997); Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996).

21. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the United States 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 complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward with the evidence 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). Importantly, the employer has the burden of production, not persuasion, and need only present the finder of fact with evidence that the decision was non-

discriminatory. Id. See also 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 pretexts for discrimination. Schoenfeld v. Babbitt, supra at 1267. The employee must satisfy this burden by showing 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.

22. Notably, "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. BT 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."). Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 148 (2000).

23. On the other hand, this proceeding was not halted based on a summary judgement, but was fully tried before the Division of Administrative Hearings. Where the administrative law judge does not halt the proceedings for

> "lack of a prima facie case and the action has been fully tried, it is no longer relevant whether the [Petitioner] actually established a prima facie case. At that point, the only relevant inquiry is the ultimate, factual issue of intentional discrimination . . . . [W]hether or not [the Petitioner] actually established a prima facie case is relevant only in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination."

Green v. Sch. Bd. Of Hillsborough Cnty., 25 F.3d 974, 978 (11th Cir. 1994); Beaver v. Rayonier, Inc., 200 F.3d 723, 727 (11th Cir. 1999). See also U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-715:

> Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non . . . . [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact-finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell–Burdine presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity." (citations omitted).

24. In this case, Petitioner alleged that Respondent discriminated against him on the basis of age in violation of the Florida Civil Rights Act.

25. In order to establish a prima facie case of age discrimination under FCRA, Petitioner must show: 1) that he was subject to an adverse employment action; 2) that he was qualified for the job at the time; and 3) that the adverse action took place in circumstances raising a reasonable inference that age was a determining factor in the decision. Gross v. FBL Fin. Servs, Inc., 557 U.S. 167 (2009); Mora v. Jackson Mem'l Found., Inc., 597 F.3d 1201 (11th Cir. 2010). See also Luna v. Walgreen Co., 347 Fed. Appx. 469, 471 (11th Cir. 2009); Nadler v. Harvey, No. 06-12692, 2007 U.S. App. LEXIS 20272, at *17 (11th Cir. 2007).

26. In this case, while Petitioner was a member of a protected class (over 40) and suffered an adverse employment action (termination), Petitioner presented no evidence that he was treated differently than other employees outside his age group who did not meet Respondent's expectations or that his age of 62 had any impact on his termination by Respondent.

27. Notably, Petitioner did not dispute the evidence that his performance ratings were the lowest in his team. Further, Petitioner did not offer substantive or credible evidence to indicate that his multiple supervisors critiqued his

performance under a more difficult standard than other employees.

28. More importantly, Respondent had a legitimate, non-discriminatory reason for ending his employment. Respondent determined that its Membrane R&D Group had an unacceptably low return on investment, making cuts in the group's operating expenses necessary. In order to reduce those expenses Respondent reasonably elected to reduce the number of scientific personnel in the Virus Team based on the performance rating and unique skills of such personnel. Petitioner was selected for layoff based on the fact that he had the lowest performance rating of any member of the Virus Team and his skills could easily be absorbed by other team members. There was no credible evidence that this decision was a pretext for discrimination.

29. As in other discrimination settings, once the employer has offered a legitimate, nondiscriminatory reason for its action, the charging party must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find [all of those reasons] unworthy of credence." See Standard v. A.B.E.L. Servs, Inc., 161 F.3d 1318, 1333 (11th Cir. 1998). In evaluating the plausibility of the employer's explanation, "the

relevant inquiry is not whether [the employer's] proffered reasons were wise, fair, or correct, but whether [the employer] honestly believed those reasons and acted in good faith upon those beliefs." Stover v. Martinez, 382 F.3d 1064, 1076 (10th Cir. 2004). See also Valenzuela, 18 So. 3d at 26 ("The inquiry into pretext centers upon the employer's beliefs, and not the employee's own perception of [her] performance.")

30. As the court said in Chapman v. AI Transp., 229 F.3d 1012, 0030 (11th Cir. 2000) (en banc):

> A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgement for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.

31. Moreover, absent evidence of intentional discrimination, it is not the role of administrative agencies or the courts to micro-manage internal business decisions. See Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991) (federal courts do not sit as "super-personnel department" to reexamine an entity's business decisions); Nix v. WLCY Radio/Rehall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984) ("[t]he employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no

reason at all, as long as its action is not for a discriminatory reason").

32. In this case, Respondent was a poor team member, possessed skills which could easily be absorbed by the remaining team members, and had the lowest performance rating. As indicated, his selection for termination was reasonable and unrelated to his age. Given these facts, Petitioner has failed to establish that he was discriminated against on the basis of age by Respondent. Therefore, the Petition for Relief should be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter an order dismissing the Petition for Relief.

DONE AND ENTERED this 16th day of July, 2015, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 2015.

ENDNOTE

[1/] Petitioner filed numerous documents referenced as "exhibits" in this matter, but did not offer those documents into evidence during the hearing.

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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.