

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOMINIC A. GRASSO,

Petitioner,

vs.

Case No. 14-2523

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge Jessica E. Varn held a final hearing in this case by video teleconference between sites in Tallahassee and West Palm Beach, Florida, on September 9, 2014.

APPEARANCES

For Petitioner: Dominic Grasso, pro se
22500 Middleton Drive
Boca Raton, Florida 33428

For Respondent: William H. Roberts, Esquire
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether Respondent committed the unlawful employment practices alleged in the Employment Complaint of Discrimination filed with the Florida Commission on Human Relations (FCHR), and if so, what relief should be granted.

PRELIMINARY STATEMENT

On January 21, 2014, Petitioner, Dominic A. Grasso, filed an Employment Complaint of Discrimination (Complaint) with FCHR alleging that Respondent, Agency for Health Care Administration (Agency), had engaged in an unlawful employment practice based on his age and that the Agency had retaliated against him for having filed the Complaint. The Complaint alleges that he was denied a raise because of his age and that he was then subjected to retaliation in the form of impossible performance measures and questions regarding his hours. Following its investigation of the Complaint, FCHR notified the parties that there was no reasonable cause to believe that an unlawful employment practice had occurred. Mr. Grasso had previously filed a complaint in October 2013, alleging age discrimination, and then filed the amended complaint alleging retaliation.

On May 28, 2014, Mr. Grasso filed a Petition for Relief, seeking an administrative remedy. On that same day, FCHR transmitted the Petition for Relief to the Division of Administrative Hearings (DOAH). The final hearing was scheduled for July 15, 2014. On July 2, 2014, a Motion for Jamison Jessup to Serve as Petitioner's Qualified Representative was filed, and the motion was granted on July 8, 2014. Mr. Grasso also requested a continuance, which was granted. After the parties

filed a Status Report with mutually-agreeable hearing dates, the hearing was re-scheduled for September 9, 2014.

On August 19, 2014, Mr. Jessup filed a Motion to Withdraw as qualified representative for Petitioner, which was granted. On September 4, 2014, Mr. Grasso filed a Motion to Extend Hearing Date, which was denied on that same date.

During the final hearing, Mr. Grasso renewed his request for a continuance, stating that he had forgotten his exhibits and had not had adequate time to prepare for the hearing; the ore tenus motion to continue was denied, and the hearing proceeded.

At the final hearing, Mr. Grasso testified on his own behalf and introduced Exhibit 1. The Agency presented the testimony of Lorna Howell, Arlene Mayo-Davis, and Polly Weaver; Exhibits 2 through 7, 9 through 16, 18, and 20 through 23 were introduced.

The final hearing Transcript was filed with DOAH on September 24, 2014. Both parties filed proposed recommended orders, which the undersigned has considered in the preparation of the Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2013 codification.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Mr. Grasso was employed by the Agency as a fire protection specialist.

2. Mr. Grasso was born on December 27, 1953. When he was 46 years old, he was hired by the Agency as a health facility evaluator, above base salary. When he was 48 years old, Mr. Grasso was promoted to the fire protection specialist position, above base salary. When he was 54 years old, he received a special pay increase.

3. Fire protection specialists survey health care facilities for fire safety. These surveys can be pursuant to federal guidelines and state guidelines; they include off-site preparation, entrance conferences, a tour of the facility, records review, and staff and resident interviews. Fire protection specialists also must adhere to the Agency's protocol, which provides guidelines as to the amount of time that should be devoted to a facility, given its type and size.

4. By all accounts, Mr. Grasso is passionate about his work, but is difficult to manage because he challenges management directives at every turn.

5. In the summer of 2010, after Mr. Grasso was transferred from the Bureau of Plans and Construction to the Bureau of Field Operations, the management team noticed some deficiencies in Mr. Grasso's job performance. In this new assignment, his direct supervisor was Lorna Howell, who reported to Arlene Mayo-Davis, who in turn reported to Bureau Chief Polly Weaver.

6. On one occasion, Ms. Davis asked Mr. Grasso to assist with a survey in Tampa, although Mr. Grasso was stationed in the Delray Beach office. Mr. Grasso indicated that he was unavailable for the dates requested and that, if he did do the work, he wanted additional compensation.

7. In September 2010, problems arose regarding Mr. Grasso's upcoming October schedule; he was requesting overtime pay for the work he was scheduled to complete. The Agency responded that no overtime was necessary because his schedule could be adjusted to limit his work to regular work hours. Mr. Grasso threatened to file a grievance.

8. The three management witnesses credibly testified to a pattern that existed: Mr. Grasso failed to properly manage his time. He frequently took longer to conduct surveys than his colleagues could complete in shorter timeframes, he often had logged in 40 hours of work by the fourth day of a five-day work week, he requested changes to his survey schedules and deviated from the schedule without seeking permission, and he often failed to adhere to the scheduling and staffing protocols. He requested overtime almost weekly, and his colleagues rarely did so.

9. His requests were often found in emails sent to management that were written in such a way as to reflect disdain for management and an inability to accept a management decision.

10. In August of 2013, Mr. Grasso requested a pay raise based on the fact that he had received a competitive job offer. Ms. Weaver, who processes these types of requests, decided not to recommend Mr. Grasso for a pay raise because he did not exhibit team player attributes, he often challenged management decisions, and he had yet to resolve his time management issues. Ms. Weaver found Mr. Grasso to be unwilling to perform his job as requested by the Agency; therefore, he was denied the pay raise.

11. Ms. Weaver had, in 2012, recommended a pay raise for a different fire protection specialist, Mr. Pescatrice. Mr. Pescatrice worked in a different field office than Mr. Grasso, had perfect evaluations, worked well with others, had garnered positive feedback from everyone he worked with, and had received a competitive job offer. His supervisor had expressed a need to keep Mr. Pescatrice in the Agency's employ.

12. Ms. Weaver, when deciding whether to recommend both Mr. Grasso and Mr. Pescatrice for a competitive pay raise, was unaware of their respective ages. At the time they requested the raises, Mr. Grasso was 59, and Mr. Pescatrice was 51.

13. In October 2013, Mr. Grasso exchanged emails with management questioning the decision to not send staff to a seminar. Management viewed Mr. Grasso's emails as disrespectful, and asked Mr. Grasso to cease communication regarding the subject.

14. Later that month, pursuant to the Agency's leave policy, Mr. Grasso was asked to provide a doctor's note to document the need for sick leave, as he had been absent four days in a 30-day period. He was unable to provide a medical note; management asked him to consider the request a reminder of the Agency's leave policy; and no discipline was imposed.

15. In November 2013, Ms. Davis convened an informal counseling session with Mr. Grasso. She was unaware that Mr. Grasso had filed a Complaint with FCHR. At the session, Mr. Grasso was notified of the Agency's concerns regarding time management and disrespectful communications with management. He was given counseling and a plan to correct the behavior in those areas.

16. Two days after the counseling session, Mr. Grasso notified his supervisor that he would be adjusting his work hours, despite the fact that he had not followed Agency policy seeking prior approval.

17. The record is replete with emails from Mr. Grasso to management that are argumentative and reflect a disdain for management decisions.

18. Mr. Grasso's rendition of the alleged age discrimination presented through his testimony at hearing is not found credible and is belied by the credible testimony provided by the Agency's witnesses. He was denied a pay raise for

legitimate reasons and not due to his age. His documentary evidence, a "statistical" report purporting to reflect age discrimination, was created by Mr. Grasso himself and was not supported by testimony to provide some statistical context; the undersigned finds it wholly unreliable.

19. Similarly, absent from the record is any credible evidence that Mr. Grasso was subjected to retaliation after filing the Complaint.

CONCLUSIONS OF LAW

20. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

21. The Florida Civil Rights Act of 1992 (FCRA), chapter 760, Florida Statutes, prohibits discrimination in the workplace. Among other things, the FCRA makes it unlawful for an employer:

To discharge or to fail or refuse to hire 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.

§ 760.10(1)(a), Fla. Stat.

22. The FCRA, as amended, was patterned after Title VII of the Civil Rights Act of 1964 and 1991 (Title VII), as well as the Age Discrimination in Employment Act (ADEA). Thus, federal

decisional authority interpreting Title VII and the ADEA is applicable to cases arising under the FCRA. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009).

23. The ADEA prohibits an employer from discriminating against an employee who is at least 40 years old on the basis of his/her age. 29 U.S.C. §§ 623(a)(1) & 631(a).

24. Complainants alleging unlawful discrimination may prove their case using direct evidence of discriminatory intent. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001).

25. When no direct proof of discrimination exists, the employee may attempt to establish a prima facie case circumstantially through the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

26. Under the McDonnell Douglas framework, Mr. Grasso could establish a prima facie case of age discrimination by showing that: (1) he was a member of the protected age group; (2) he was subjected to adverse employment action; (3) he was qualified to do the job; and (4) the Agency treated a similarly-situated employee outside his protected class more favorably. Knight v.

Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003).

27. In Mr. Grasso's case, he did establish the first three elements of a prima facie case, but failed to establish the fourth prong. First, Mr. Pescatrice is in the same protected class as Mr. Grasso (over age 40); therefore, Mr. Grasso was unable to produce a comparator who was outside his protected class. Furthermore, Mr. Pescatrice was not similarly situated to Mr. Grasso. Mr. Pescatrice reported to a different field office and to a different supervisor than Mr. Grasso, his evaluations were perfect, he worked well with others, had garnered positive feedback from everyone he worked with, he was an exemplary employee, and his competitive pay raise request came with a recommendation from his direct supervisor. Mr. Grasso, on the other hand, did not exhibit team player attributes, he often challenged management decisions, and he had time management issues. Mr. Grasso was unwilling to perform his job as requested by the Agency, he was not recommended by his supervisor for a raise, and his evaluations were not perfect.

28. Having failed to establish a prima facie case, the inquiry need not go further. However, even if Mr. Grasso had met his initial burden of establishing a prima facie case, and the burden had shifted to the Agency to articulate a legitimate, nondiscriminatory reason for denying him a competitive pay raise,

the Agency successfully met its burden at the hearing. The Agency's witnesses credibly testified that Mr. Grasso was a difficult employee to manage, had time management issues, and did not perform his job duties as the Agency requested. He was denied the pay raise for those legitimate reasons.

29. Furthermore, Mr. Grasso failed to prove, by a preponderance of the evidence, any causal link between his age and the denial of his competitive pay raise, and hence cannot prove that his age was the but-for cause of the adverse employment action. Hawthorne v. Baptist Hosp., Inc., 448 Fed. Appx. 965 (11th Cir. 2011).

30. Turning to Mr. Grasso's retaliation claim, which is loosely described in his Complaint, section 760.10(7), Florida Statutes, provides:

It is unlawful for an employer . . . 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.

31. To establish a prima facie case of retaliation, Mr. Grasso must show that: (1) he engaged in statutorily-protected expression; (2) he suffered an adverse employment action; and (3) there was some causal relation between the two events. If Mr. Grasso establishes a prima facie case, the Agency

could offer a legitimate, nondiscriminatory reason for the employment action(s) as an affirmative defense. If the Agency articulates a legitimate reason, the burden of proof shifts to Mr. Grasso to offer evidence that the alleged reason is a pretext for illegal discrimination. Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2009).

32. Mr. Grasso failed to establish a prima facie case of retaliation because he failed to establish any adverse employment actions. His attempts to cast a request for a doctor's note, the effort to help him manage his time better, and his counseling session as adverse employment actions are not found credible. The Agency provided abundant credible testimony that each action was taken for legitimate, nondiscriminatory reasons.

33. Even if Mr. Grasso had established a prima facie case, the Agency, as stated in the previous paragraph, provided legitimate, nondiscriminatory reasons for each action taken. Lastly, Mr. Grasso provided no evidence that the Agency's actions were pretextual.


34. Mr. Grasso's charge of age discrimination and retaliation 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 a final order adopting the Findings of Fact and

Conclusions of Law contained in this Recommended Order. Further, it is RECOMMENDED that the final order dismiss the Petition for Relief.

DONE AND ENTERED this 27th day of October, 2014, in Tallahassee, Leon County, Florida.



JESSICA E. VARN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 27th day of October, 2014.

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.