

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR B. WATERS,

Petitioner,

vs.

Case No. 14-2697

R.H. MOTORS, d/b/a KIA OF ORANGE
PARK,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 6, 2014, in Jacksonville, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Adam J. Kohl, Esquire
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For Respondent: Leonard T. Hackett, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, R.H. Motors, d/b/a Kia of Orange Park ("Kia"), discriminated against

Petitioner, Lamar B. Waters ("Waters"), on the basis of age in derogation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

This matter came to DOAH by way of a letter of transmittal from the Florida Commission on Human Relations (the "Commission") dated June 10, 2014. The Commission found that no cause existed to support Water's claim of age discrimination. Waters timely filed a Petition for Relief, and the matter was forwarded to DOAH and assigned to the undersigned Administrative Law Judge.

At the final hearing in this matter, Waters testified on his own behalf but did not call any other witnesses. No documentary evidence was offered for admission by Waters at final hearing. Kia called two witnesses: Robert Hogan, vice president; and Billy Hutchinson, office manager. Respondent's Exhibit 1 was admitted into evidence.

The parties could not agree as to whether a transcript of the final hearing would be ordered. By rule, the parties have ten days from the date of final hearing or ten days from the date the transcript is filed to submit proposed recommended orders ("PROs"). As of the date of this Recommended Order, no transcript has been filed at DOAH but each party has submitted its PRO.

FINDINGS OF FACT

1. Waters is a 71-year-old Caucasian male who resides in Green Cove Springs, Florida. At all times pertinent hereto, Waters was employed by Kia at its automobile dealership in Orange Park, Florida. By all accounts, Waters was extremely well liked at the dealership. He had a jovial personality and got along well with his co-workers. He was generally seen as a nice, retired man with ample financial wherewithal to enjoy life. Waters himself says that he is financially comfortable, but does not consider himself rich. He lives in a nice house that is valued at around \$900,000 (or was at the time he purchased it). He owns a nice boat that some fellow employees have used for parties and gatherings. Waters is a college football fan and enjoys spending time watching and attending games, especially for his favorite team, the Georgia Bulldogs. In 2013, Waters filed for bankruptcy, but for the purpose of working out a deal on his home mortgage, not--apparently--due to significant financial problems. Waters often said that he was financially sound and was working "only to get away from his wife," but that may have been in jest rather than serious.

2. Kia is a dealership which sells both new and used automobiles. It has been in existence since August 2008. It is owned by R.H. Motors, a Florida corporation. The vice president of operations for R.H. Motors is Robert Hogan. The dealership,

including the car lot, offices, and service department, is located on a large tract of land in Orange Park. The new car section of the dealership is located on a large lot which includes the office building and service area. Across from the new car section there is a smaller lot which was initially used for selling used cars. There is a mobile home or modular building on the used car lot which is used as an office.

3. Waters joined the U.S. Navy at age 17; he later entered flight school with the U.S. Army. He served time in Vietnam during the conflict with that country. Waters was honorably discharged from the service in 1975. He took a job flying airplanes for AFLAC (or its predecessor company) and later became a general manager for the company. Waters retired from AFLAC in 2004 and then went to work for a Volkswagen dealership in Orange Park, Florida. He worked as a floor salesman for the Volkswagen dealership.

4. In November 2009, when Waters was 66 years old, he was offered a job at Kia. He accepted and started work on December 1, 2009, as a floor salesman, selling new and used cars. Waters had been hired by Joe Esposito, the general manager for Kia at that time. Waters was compensated at minimum wage plus commission on cars he sold. While he was a salesman, Waters would take off from work either Tuesday or Thursday of each week and every Sunday.

5. In June 2010--or thereabouts--Waters was offered a different position at Kia. Waters described the position as the "wholesale manager" for the dealership. He said his duties included buying and selling cars at auctions. He also managed the used car lot, did appraisals for cars being traded in, and continued to sell cars.

6. In April 2013, general manager Esposito placed Waters on indefinite leave due to "internal issues" at the dealership. In May 2013, Esposito asked Waters to attend a class on managing customers. The class was to be held at Kia's primary headquarters in South Carolina. Waters and another employee traveled to South Carolina, but there was no training provided. An employee at headquarters talked with the two men briefly, but there were no classes or training. Waters had understood the reason he was sent to South Carolina was so that he could be assigned a new job as some kind of customer manager. There was obviously some disconnect between what Waters was told and what he understood to have been said.

7. When Waters returned from South Carolina, he found that Esposito had been fired as the general manager at Kia. Waters somehow met with Robert Hogan (described by Waters as "the owner") when Hogan came to visit the dealership even though Waters was supposedly on indefinite leave at that time. When Hogan found out Waters had been placed on leave by Esposito, he immediately

reinstated Waters and made sure he was paid back-pay for the time he was out of work.

8. At that time, Hogan also asked Waters to manage the used car side of the dealership. Waters remembers that he was hired as the Used Car Manager. Hogan says he was hired as the Budget Car Manager, i.e., that Waters was only to be responsible for selling the least attractive used cars. Those cars generally came onto the lot as trade-ins by persons purchasing new vehicles. Waters said that as part of this new job, he was tasked with going to auctions for the purpose of obtaining additional used cars for the Kia dealership. Hogan said Waters was never authorized to purchase cars for the dealership, and that the dealership already had too many used cars. No additional testimony was provided to rectify this disparity. Either one of the witnesses was not telling the truth or Waters was mistaken about his duties.

9. A brief explanation of the dealership is warranted: Kia sells both new and used cars. Used cars come from various sources, including trade-ins by customers buying new cars, purchases from rental car fleets, and purchases from auctions. The used cars were for a time sold from a lot adjacent to the main Kia lot. Later, Kia moved all used cars over to the same lot with the new cars. The used car lot was then used as a place to store new car inventory.

10. When Waters was reinstated to his job and began working with used cars, a new general manager--Mr. Record--had been hired. Record was instrumental in the change that moved all used cars over to the new car lot. He was also very harsh and unfriendly with employees at the dealership, so Hogan eventually fired him as general manager as well. He was replaced by Jeff Norman.

11. Norman continued the practice of keeping all the cars, new and used, on one lot--except, it appears, for the cars deemed "budget" cars. Norman also took over some of Waters' tasks and responsibilities, e.g., Norman began doing the appraisals of used automobiles. Norman also took over the acquisition of used cars, although Waters would sometimes disagree with the choices Norman made. Norman told Waters a new policy of Kia was to get rid of the budget cars as quickly as possible rather than trying to repair them for higher re-sale.

12. At some point in time after Waters had been reinstated to his job, Hogan began to have concerns about the number of hours the used car lot office was being manned. He expected that office to be open whenever the main lot office was open, i.e., from 9:00 a.m. until 10:00 p.m. Hogan had called and/or gone by the used car lot on numerous occasions around 5:30 p.m. or 6:00 p.m. in the evening and found it closed.

13. Hogan raised his concerns about Waters' work schedule with the new GM, Norman, and asked him to talk to Waters, get him

back on track, and tell him what was expected of him as an employee of Kia. Norman called Waters into his office on October 16 or October 17 (the date is in dispute) to discuss the matter.

14. Norman told Waters that things were changing at Kia. He said the dealership would be trying to sell 250 cars a month. To do that, employees were going to be expected to work long, 12-hour days, six or even seven days a week. Norman allegedly asked Waters how old he was, and then said Waters was about the same age as Norman's father. Norman allegedly told Waters that the dealership did not want to put him under that kind of stress.

15. Waters told Norman he would not like the proposed new work schedule and hours. Norman allegedly told Waters that he (Norman) was worried that a man Waters' age could not stand the stress of working those hours.^{1/} Waters took Norman's words to mean, in essence, that Waters was being terminated from employment. He replied to Norman only, "I appreciate it," and walked toward the door. As he was exiting, Norman said that he would check with the sister Kia dealership in the Southside area of Jacksonville to see if they had any sales positions open. Waters apparently did not accept that offer.

16. After the meeting with Norman, Waters went to his desk and gathered his personal belongings. He went back into the dealership and said goodbye to Hutchinson, the young office

manager who had been friendly to Waters during his tenure at Kia. Waters hugged Hutchinson, said "I'm out of here," and indicated that he did not want to work on weekends. He then left the premises.^{2/}

17. On the 17th day of October, Hutchinson was instructed to fill out a Separation Notice to reflect Waters' cessation of employment at Kia. The reason given on the form for Waters' leaving was "Voluntary [sic] Quit." Waters' term of employment was listed as December 1, 2009 through October 17, 2013. Waters' work schedule was listed as 9:00 a.m. until 10:00 p.m., seven days a week. Hutchinson said that is simply a statement of when the store is open; each person works the hours necessary to get their job done. In the description of Waters in the Separation Notice, Hutchinson wrote, "Great company guy. None better." There is not dispute that Waters was a well-liked person at the dealership.

18. Waters did not see the Separation Notice until it was sent to his attorney in preparation for final hearing. Waters disagrees with the date of the notice, the work hours listed, and that he voluntarily quit his job.

19. On October 1, 2013, just two weeks before leaving Kia, Waters had been given a raise from \$1,500.00 per month, plus 5% of profits generated by the used car department, to \$4,000.00 per month plus 5% of the profits.

20. Waters did not contact Hogan to inquire as to whether something could be worked out concerning his continued employment. Hogan had been exceptionally nice to Waters in the past, but Waters did not pursue relief with him. Hogan remembers trying to contact Waters once via telephone but never talked to him about the matter. As far as Hogan is concerned, Waters voluntarily terminated his employment with Kia because he did not want to work the hours needed. Hogan had hired Waters at age 66 and did not have any objection to Waters working for as long as he felt healthy enough to do so.

21. After he left his employment with Kia, Waters has sought but been unable to locate another management job. He has no interest in going back into a sales position.

22. No testimony or evidence was presented at final hearing as to whether Waters' position with Kia was filled or, if so, whether a younger person was hired to replace him.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes. Unless otherwise specified herein, all references to Florida Statutes shall be to the 2014 codification.

24. The Florida Civil Rights Act of 1992 (the "Act") is codified in sections 760.01-760.11, Florida Statutes. The Act's

general purpose is "to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state." § 760.01, Fla. Stat. When "a Florida statute [such as the FCRA] is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994). Therefore, the FCRA should be interpreted, where possible, to conform to Title VII of the Civil Rights Act of 1964, which contains the principal federal anti-discrimination laws.

25. Section 760.10, provides, in relevant part:

(1) It is unlawful employment practice for an employer:

(a) To discharge or fail to hire 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.

26. 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); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). But courts have held that "only the most blatant remarks, whose intent could be nothing other than to discriminate" satisfy this definition. Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999) (internal quotations omitted), cert. denied, 529 U.S. 1109 (2000).

27. In the absence of direct evidence, the law permits an inference of discriminatory intent, if complainants can produce sufficient circumstantial evidence of discriminatory animus, such as proof that the charged party treated persons outside of the protected class (who were otherwise similarly situated) more favorably than the complainant was treated. Such circumstantial evidence constitutes a prima facie case.

28. In McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court explained that the complainant has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996, aff'd 679 So. 2d 1183 (Fla. 1996)). If, however, the complainant succeeds in making a prima

facie case, then the burden shifts to the accused employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. This intermediate burden of production, not persuasion, is "exceedingly light." Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 516-518 (1993). At all times, the "ultimate burden of persuading the trier of fact that the [charged party] intentionally discriminated against" him remains with the complainant. Silvera v. Orange Co. Sch. Bd., 244 F.3d 1253, 1258 (11th Cir. 2001).

29. To establish a prima facie case of age discrimination in the present matter, Water is required to show that he "(1) is a member of a protected class; (2) was qualified for the position at issue; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, shows that other similarly situated employees were treated more favorably." Taylor v. On Tap Unlimited, Inc., 282 Fed. Appx. 801, 803 (11th Cir. 2008).

30. There is no dispute that Waters belongs to a protected class due to his age. As such, Waters satisfied the first prong of a prima facie case of employment discrimination.

31. As to the second prong, there is no dispute that Waters had the skills necessary to perform his duties as used car (or budget car) manager and did an admirable job.

32. Termination of his employment would constitute an adverse employment action, but there is insufficient evidence to find that Waters was, indeed, terminated from employment. While he believes he was terminated, his employer believes Waters simply decided to leave voluntarily. The evidence does not support either position sufficiently to determine whether the third prong was satisfied.

33. Nonetheless, with respect to the fourth prong, Waters provided no competent evidence that he was treated any differently than other similarly situated workers. In fact, he was treated favorably by management in various respects. Waters also did not provide proof that he was replaced by a younger or less qualified person.

34. Based upon these facts, Waters failed to establish a prima facie case of age discrimination, and the burden of production never shifted to Kia to articulate a legitimate, non-discriminatory reason for the termination of Water's employment or, in the alternative, that Waters was not fired at all.

35. Waters failed to meet his burden of proving a prima facie case of discrimination based on his age. That failure ends the inquiry. See Ratliff v. State, 666 So. 2 1008, 1012 n.6 (Fla.

1st DCA 1996) (citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)), aff'd 679 So. 2d 1183 (Fla. 1996).

36. Waters is a pleasant, well-dressed man of advanced years, but he appears healthy and able to work for many years to come. There is no reason to believe he cannot find suitable employment if he tries, but there is no evidence that his employment with Kia was terminated--especially on the basis of age discrimination.

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, upholding its determination that no cause exists for a finding of discrimination against Petitioner, Lamar B. Waters, by Respondent, R.H. Motors, d/b/a Kia of Orange Park.

DONE AND ENTERED this 30th day of October, 2014, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October, 2014.

ENDNOTES

^{1/} Unfortunately, Norman did not testify at final hearing. The only evidence of his statements to Waters is uncorroborated hearsay. While such statements could be deemed to be admissions, Waters did not demonstrate sufficiently that the words attributed to Norman were correct. Waters' own response to the alleged statements militates against their veracity.

^{2/} Hutchinson remembers telling Waters goodbye on the morning of October 17 at around 10:00. Waters, on the other hand, remembers doing so on the afternoon of October 16. Whichever day and time the event happened does not affect the findings herein.

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.