STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHRISTOPHER BRIAN EDWARDS,

Petitioner,

vs. Case No. 14-6042

SAPA PRECISION TUBING ROCKLEDGE, LLC,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on April 17, 2015, before J. D. Parrish, Administrative Law Judge, Division of Administrative Hearings (DOAH), in Orlando, Florida.

APPEARANCES

For Petitioner: Christopher Brian Edwards, pro se
4605 Ocean Beach Boulevard
Cocoa Beach, Florida 32931

For Respondent: Mary Susan Sacco, Esquire
Ford Harrison, LLP
Suite 1300
300 South Orange Avenue
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Sapa Precision Tubing Rockledge, LLC (Respondent), discriminated against Christopher Brian Edwards (Petitioner) on the basis of age.

PRELIMINARY STATEMENT

The Florida Commission on Human Relations (FCHR) forwarded this case to DOAH in order to conduct an administrative hearing based upon Petitioner's claim of discrimination. Petitioner alleged that Respondent discriminated against him on the basis of his age when he was terminated from employment. Petitioner maintains he had performed well in his position with the company and that the company wanted to dismiss him for either his age or in retaliation for statements he made challenging the company's manner of doing business. After its investigation of the claim of discrimination based upon age (Petitioner did not raise the claim of retaliation until later), FCHR rendered a determination of no cause. Petitioner timely challenged that decision and the matter was referred to DOAH.

At the hearing, Petitioner testified on his own behalf and presented the testimony of Leonard Stetson Clarke, Lisa Chapman, Jamie Spindler, and Brenda Lawrence. Petitioner's Exhibits 1 and 2 were admitted into evidence. Respondent called the same witnesses as Petitioner, and its Exhibits 1 through 11 were also received in evidence.

The Transcript of the proceeding was filed with DOAH on May 26, 2015. Both parties timely filed proposed orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is over 40 years of age, and was employed by Respondent from 2009 until May 21, 2013. Prior to his termination, Petitioner received favorable work evaluations and demonstrated good work attendance.

2. Respondent is a manufacturing company that makes aluminum tubing for commercial purposes. Safety in the work environment is critical to Respondent's success.

3. Part of Respondent's safety regimen includes maintaining a drug-free workplace. To that end, Respondent retains an outside company, Edge Information Management, Inc. (Edge), to conduct random drug tests of Respondent's employees.

4. Respondent's drug-free policy is set forth in its employee handbook that is provided to all employees. Petitioner received a copy of the handbook and knew or should have known of the company's drug-free policy upon his employment.

5. In order to screen Respondent's employees, Edge creates a random matrix that assigns all employees a number. The computer program used by Edge then generates a random sampling of employees for the given test date. In this case, approximately one month before the test date, Edge randomly selected employees who were to be tested on May 14, 2013. Petitioner was named among the randomly selected employees.

6. Edge is accredited by the Drug and Alcohol Testing Industry Association and is fully authorized to conduct drug screenings. Edge employee, Leonard Clarke, was fully trained in the process of collecting samples to assure conformance with all applicable testing standards.

7. Prior to the test date, Petitioner attended a meeting with other employees and voiced concerns to Respondent regarding working conditions by "bringing up stuff that they were not comfortable with." Although not part of his original claim of discrimination, Petitioner now maintains that his termination was also in retaliation for his comments during that meeting.

8. On May 14, 2013, based upon the employees randomly selected by Edge, Respondent notified supervisors to send the employees to a conference room for drug testing. Clarke prepared the paperwork and waited for the 27 employees to report for the screening. No one at Respondent selected the employees to be screened, conducted the collection of samples, or tested the samples taken. Clarke was solely responsible for the drug testing.

9. All of the employees were required to review the testing form, sign, and date it before returning it to Clarke. Each was given a lollypop stick with a sponge attached to one end. By placing the sponge in the mouth and collecting saliva, the sample can then be tested to issue a preliminary result for drugs.

10. Clarke had a difficult time collecting a saliva sample from Petitioner. Eventually, on the second or third attempt Petitioner produced enough saliva to place the sponge in the vial to allow the test strip to render a result. The test strips are designed to react to substances such as marijuana, cocaine, or amphetamines. In Petitioner's case, the test strip showed positive for drug metabolites and/or alcohol.

11. After testing positive on the saliva test (the only employee who did), Clarke asked Petitioner to give a urine sample so that a complete drug analysis could be performed by the Edge lab. Petitioner consented to all testing procedures and the collection of samples on May 14, 2013.

12. For the purpose of the urine sample, Petitioner was given a cup and asked to go into the adjacent bathroom to produce the sample. When Petitioner returned the cup to Clarke it was noted that the cold, clear liquid did not register a temperature. Based upon his training, Clarke suspected that Petitioner had not urinated into the cup and discarded the sample.

13. Next, Clarke accompanied Petitioner while a second sample was collected for urinalysis. Clarke marked the sample, packaged it in accordance with all applicable standards, and sent it by FedEx to Edge's lab. Petitioner's testing went from "random" to "reasonable suspicion/cause" based upon his saliva

test and behavior with Clarke. It appeared to Clarke that Petitioner attempted to evade the drug testing process.

14. Based upon the preliminary test results, Petitioner was suspended from work. Petitioner knew he had tested positive for drugs and that his urine sample would be further evaluated.

15. It is undisputed that Petitioner's urine tested positive for cocaine. Prior to notifying Respondent of the test results, Edge notified Petitioner that the sample tested positive for cocaine and gave Petitioner an opportunity to contest or explain how the result might be erroneous. Petitioner did not contest the result and has not disputed the presence of drugs in his saliva and urine on May 14, 2013.

16. On May 21, 2013, Edge sent Petitioner's drug results to Respondent. At that time, Respondent decided to terminate Petitioner's employment with the company, and Chapman notified Petitioner by telephone that he was terminated because he tested positive for cocaine.

17. Respondent gave Petitioner an opportunity to contest the drug results, but he did not. At hearing, Petitioner did not contest the drug results.

18. Of the persons tested with Petitioner, twenty were younger than he and six were older. Only Petitioner tested positive for drugs.

19. In the last ten years, all employees at Respondent who have tested positive for drugs have been terminated. No one younger or older than Petitioner has been retained if they tested positive for drugs. Petitioner's age did not impact Respondent's decision to terminate his employment.

20. None of Petitioner's comments were considered in the termination of his employment. Petitioner did not raise retaliation with FCHR and has not established that Respondent retaliated against him because of comments he made during a company meeting. In short, Petitioner was terminated because he tested positive for cocaine. There was no competent, substantial evidence that persons younger than Petitioner were treated differently from Petitioner or were subject to dissimilar policies or practices. All of Respondent's employees who tested positive for drugs have been terminated.

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the subject matter and the parties of his proceeding. See §§ 760.11, 120.569, and 120.57, Fla. Stat. (2014).

22. Section 760.10, Florida Statutes, provides, in pertinent part:

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

23. Petitioner maintains he was discriminated against based upon his age.

24. In accordance with section 760.11, Florida Statutes, Petitioner timely filed his claim with FCHR. The original complaint investigated by FCHR claimed only age as the grounds for Respondent's alleged unlawful act. Petitioner did not timely claim retaliation as a basis for his termination. Regardless, as explained below, Petitioner's claim must fail on both accounts.

25. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3rd DCA 2011); Fla. Dep't of Transp. v. J.W.C. & Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

26. In accordance with law, Petitioner may establish his case by direct, statistical, or circumstantial evidence. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009).

27. In this case, Petitioner presented no direct evidence of discrimination. There is nothing in the record to suggest Respondent maintained any bias for or against any employee based

upon age. Respondent has employees older and younger than Petitioner and all are subject to random drug testing.

28. Petitioner presented no statistical evidence of discrimination. The only personnel policy or decision utilized in Petitioner's termination was the company's drug-free workplace policy. That policy is enforced regardless of any employee's age. The statistical evidence presented in this case could only suggest that zero employees who tested positive for drugs have been retained by Respondent.

29. In this case, to establish discrimination by circumstantial evidence, Petitioner must demonstrate he is a member of a protected class, that he was qualified for his position, that he was subjected to an adverse employment action, and that his employer treated similarly situated employees outside of his protected class more favorably than he was treated. See Burke-Fowler v. Orange Cnty., 447 F.3d 1319 (11th Cir. 2006).

30. Respondent did not treat any employee more favorably than Petitioner. Younger employees were required to take drug screening tests. Younger employees would be terminated for positive drug results. All employees with positive drug results were terminated. Petitioner's age had nothing to do with his termination. Respondent's policy of maintaining a drug-free workplace has nothing to do with any employee's age and has

everything to do with safety in the workplace. Employees under the influence of drugs may cause safety hazards. Insurance claims and rates can be adversely affected by allowing employees who have tested positive for drugs to remain employed. Respondent's policy was clear and unrelated to the age of any employee. Not giving employees who test positive for drugs a "second chance" is not an employment decision that may be challenged. Fairness and loyalty to long-time employees play no part in determining whether an employer's decision was tainted by discrimination. If discrimination was not the factor to motivate the employment decision, companies are entitled to reach their own decisions "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." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). In this case, Respondent made a legitimate employment decision unrelated to discrimination.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's claim of discrimination.

DONE AND ENTERED this 8th day of July, 2015, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of July, 2015.

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.