STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANET J. LEWIS,

Petitioner,

vs. Case No. 14-6127

ROYAL AMERICAN MANAGEMENT, INC.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, this case was heard on December 15 and 16, 2015, and January 12, 2016, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven R. Andrews, Esquire
Brian O. Finnerty, Esquire
The Law Offices of Steven R. Andrews, P.A.
822 North Monroe Street
Tallahassee, Florida 32303

For Respondent: Ryan B. Hobbs, Esquire
Brooks LeBoeuf Bennett Foster and Gwartney, P.A.
909 East Park Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Petitioner, Janet J. Lewis, was subject to an unlawful employment practice by Respondent, Royal American

Management, Inc., on account of her race or her age in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On May 23, 2014, Petitioner filed a complaint of discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent violated section 760.10, Florida Statutes, by discriminating against her on the basis of her race or her age.

On November 19, 2014, the FCHR issued a Determination: No Cause and a Notice of Determination: No Cause, by which the FCHR determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On December 23, 2014, Petitioner filed a Petition for Relief from Unlawful Employment Practices and Request for Administrative Hearing with the FCHR. The Petition was transmitted to the Division of Administrative Hearings to conduct a final hearing.

The final hearing was set for April 22, 2015, and was continued several times, being finally rescheduled for December 15 and 16, 2015. The hearing was convened as scheduled. Having not been completed within the scheduled period, the hearing was adjourned until January 12, 2016, and completed on that date.

The parties filed a Joint Pre-hearing Stipulation in which they identified stipulated facts for which no further proof

would be necessary. The stipulated facts have been accepted and considered in the preparation of this Recommended Order.

At the final hearing, Petitioner testified on her own behalf, and presented the testimony of Teresa Dykes, who was, at all times relevant hereto, an employee of Respondent; Denise Ost, Respondent's senior vice-president of operations; Judith Williams, Respondent's regional vice-president; and Jennifer Anderson, Respondent's human resource manager. Petitioner's Exhibits 1-12, 14, 16, 18-34, 36-38, 40, 43 (pages 540 and 543 only), 47-52, 56, 58, 61, and 62, were received into evidence. In addition, Petitioner proffered Petitioner Proffer Exhibit 1, which is not being received in evidence or considered by the undersigned, but will accompany the record of this proceeding.

Respondent presented the testimony of Ms. Williams in its case-in-chief. Respondent's Exhibit 1 was received into evidence.

Ms. Williams was recalled by Petitioner in rebuttal.

A five-volume Transcript of the final hearing was filed on January 26, 2016. The parties requested 20 days from the filing of the Transcript to file their post-hearing submittals. Two consented motions to extend the filing deadline were granted, which served to extend the filing deadline to February 29, 2016. The parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

On March 7, 2016, Respondent filed a Motion to Strike directed at Answers to Interrogatories attached as an exhibit to Petitioner's Proposed Recommended Order. The exhibit had not been offered in evidence at the hearing. The Motion to Strike is granted, and the undersigned has not given the exhibit any consideration.

References to statutes are to Florida Statutes (2015), unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, who was at all times relevant to this matter an employee of Respondent, is Caucasian. She was, at the time of her termination from employment, 54 years of age.

2. Respondent is a property management company based in Panama City, Florida. Respondent owns and manages numerous rental properties in the southeastern United States. Respondent owned and managed the Spinnaker Reach apartment complex in Jacksonville, Florida, during the entire duration of Petitioner's employment with Respondent. Respondent, at all times material to this matter, employed more than 15 full-time employees.

3. Spinnaker Reach is a "tax credit" property. In exchange for federal tax credits, Respondent is required to offer apartments at below-market rate rents for moderate to low-income tenants. Tenants qualifying for reduced rent apartments

must meet certain income and eligibility requirements. Not all applicants for housing meet the requirements, and therefore not all applications ultimately result in apartment occupancy.

4. Kerri Toth is Respondent's president, and held that position during the entire period of Petitioner's employment with Respondent. Ms. Toth is Caucasian and over the age of 40.

5. Denise Ost is Respondent's senior vice-president of operations, and held that position during the entire period of Petitioner's employment with Respondent. Ms. Ost is Caucasian and over the age of 40.

6. Judith Williams is Respondent's regional vice-president, and held that position during the entire period of Petitioner's employment with Respondent. Ms. Williams is Caucasian and over the age of 40.

7. Teresa Dykes was Respondent's regional manager for the region that included Spinnaker Reach from the date upon which Petitioner's employment began until April 30, 2013.

8. Petitioner was hired by Respondent on June 19, 2012, as the property manager at Spinnaker Reach, a position that she held for the full period of her employment. Petitioner had property management experience, though none was at tax-credit properties. Petitioner's base salary was $42,000.00 per year, plus benefits and the rent-free use of an apartment at Spinnaker Reach.

9. The decision to hire Petitioner came at the recommendation of Ms. Dykes, who was a close friend of Petitioner's sister. The interview was done through Respondent's Orlando office due to the relationship between Ms. Dykes and Petitioner. Ms. Dykes testified that she actually did the hiring.

10. When Petitioner was hired as property manager at Spinnaker Reach, occupancy stood at 94 percent.[1/]

11. When Petitioner was hired, Spinnaker Reach was short-staffed. In addition to the property manager position which was filled by Petitioner, vacant positions included the leasing agent, assistant manager, and several maintenance positions. The evidence was not clear regarding the extent to which those vacancies overlapped. However, Respondent sent property managers from its other facilities in Jacksonville to Spinnaker Reach to assist Petitioner in the performance of her tasks until replacements could be hired. Though not full-time, the other property managers were on-site for at least two days per week for several hours each day.

12. On August 20, 2012, Ms. Dykes provided Petitioner with her 90 Day Performance Review.[2/] The Performance Review was intended to correspond to Petitioner's probationary period. Ms. Dykes gave Petitioner high marks, with the only area needing improvement being Petitioner's knowledge of the tax credit

program. Respondent was having difficulty understanding the tax credit concept because she had not worked with tax credit housing when she was hired. Ms. Dykes indicated that "compliance is offering training" regarding the program.

13. By December 2012, occupancy at Spinnaker Reach had fallen to 81 percent.

14. On December 18, 2012, Ms. Dykes sent an email to Petitioner describing a number of perceived deficiencies in Petitioner's job performance. On December 19, 2012, Petitioner responded to the email, denying some statements and explaining others. Ms. Dykes testified that as of the date of her email, Petitioner did not know all aspects of her job.

15. By the week ending on February 3, 2013, occupancy at Spinnaker Reach had fallen to 79 percent, a rate duplicated for the weeks ending on March 3 and March 10, 2013.

16. At some time prior to March 18, 2013, Ms. Williams asked "the property" to conduct a market survey of apartment complexes that were comparable to Spinnaker Reach. Ms. Williams could not recall whether the request was made directly to Petitioner, or was channeled through Ms. Dykes. Although Petitioner identified Kim Tompkins, the Spinnaker Reach leasing agent as having been delegated the responsibility to prepare the survey, Petitioner, as property manager, was ultimately responsible for accurately providing the requested information.

The purpose of the survey was to get an up-to-date analysis of occupancy rates and information about the comparable properties.

17. The market survey report submitted on March 18, 2013, bore an incorrect date of October 2012. Ms. Williams then audited the properties identified in the market survey report to determine the accuracy of the information. Her verification audit included calling the comparator properties to verify apartment features, and reviewing apartment features from the comparator's websites. Ms. Williams discovered numerous errors in the market survey report, which indicated that comparable apartment complexes were not contacted to get the accurate information. Ms. Williams had never reviewed a market survey with the number of errors that were contained in the March 18, 2013, report.

18. Ms. Williams did not forward her notes to Petitioner with a request that Petitioner input the correct information gathered by Ms. Williams. Rather, Ms. Williams advised Petitioner to call the properties, get the correct information, and submit an accurate report.

19. The market survey was sent to Ms. Williams on several subsequent occasions with incorrect information. Finally, Ms. Williams contacted Ms. Dykes to advise her of the errors. On the third or fourth revision of the report, errors were

corrected, and Petitioner provided a correct survey to Respondent.

20. Effective April 30, 2013, Ms. Dykes was transferred to another position with Respondent. As of that date, Ms. Dykes was no longer responsible for Spinnaker Reach, and no longer supervised Petitioner.

21. On May 1, 2013, Sheena Reeves, an existing employee of Respondent, replaced Ms. Dykes as regional manager. Ms. Reeves is African-American.

22. Petitioner, having been hired on June 19, 2012, was due for her annual evaluation on June 19, 2013.

23. On May 10, 2013, after Ms. Dykes had resigned her position as Respondent's regional manager, she was asked by Ms. Williams to prepare Petitioner's annual evaluation, since she was most familiar with Petitioner during her evaluation period. Ms. Dykes would not have done Petitioner's annual evaluation had she not been asked to do so.

24. Ms. Williams considered herself to be Petitioner's supervisor, though not her direct supervisor. She wanted to be included in Petitioner's evaluation since Ms. Reeves was new to Respondent and to Spinnaker Reach. Ms. Williams was heavily involved with Spinnaker Reach due to the performance of the property. She considers herself to be heavily involved in monitoring properties, which gave her sufficient knowledge of

Petitioner's performance to provide direct input into her evaluation. Thus, she believed it to be important for her to have direct input and direction on the evaluation.

25. The annual evaluation consists of 15 items requiring numeric scores from 1 to 4, with space for written comments and recommendations for improvement. Ms. Dykes awarded numeric scores with an average rating of 2.87, a score based on how she perceived Petitioner's work. Ms. Dykes identified tax credit compliance and Timberscan as areas requiring improvement. Timberscan is the software program used by Respondent for logging invoices into the system to be paid. The "Evaluation Date" was not provided, though Ms. Dykes signed the evaluation as the regional manager, and dated her signature as May 10, 2013.

26. Ms. Dykes could not recall whether her evaluation was to be Petitioner's final evaluation or a draft evaluation. Though asked by Respondent to do so, Ms. Dykes understood that she did not have authority to evaluate Petitioner, who was no longer under her supervision. She could not recall whether she ever discussed her evaluation with Ms. Williams or Ms. Ost. She did not discuss it with Ms. Reeves.

27. After she had completed the evaluation, Ms. Dykes emailed a copy to Petitioner and Ms. Reeves.

28. Petitioner testified that she received Ms. Dykes' evaluation, printed it, took it home, and signed it. The date on which she signed Ms. Dykes' evaluation was unclear. Petitioner did not send a copy of the signed evaluation to Respondent.

29. Petitioner argued that section 8.15 of Respondent's employee manual required that an employee's annual evaluation should be performed "two to three weeks before the employee's anniversary," thus leading her to believe that the May 10, 2013, evaluation sent by Ms. Dykes was her "official" evaluation. Since Ms. Dykes' evaluation was emailed to Petitioner almost six weeks prior to her anniversary date, the employee manual does not warrant such a belief.

30. Ms. Reeves visited Spinnaker Reach on June 27, 2013. Upon her arrival, Petitioner's first question to her was "[a]re you here to do my evaluation?" Petitioner reminded Ms. Reeves that June 19 was her anniversary date and, "according to the handbook, [the evaluation] would be done before or, you know, up to that time." Ms. Reeves advised Petitioner that her evaluation had not yet been done.

31. Under the circumstances, it is most plausible that the May 10, 2013, evaluation, having been prepared by a person who was no longer in Respondent's employ, was to be a draft evaluation, subject to review and approval by Respondent. The

evidence also supports a finding that, despite her efforts to make it appear to be "official," Petitioner knew that the May 10, 2013, evaluation emailed to her by Ms. Dykes was not her final annual evaluation.

32. Ms. Reeves returned to her office after the June 27, 2013, trip to Spinnaker Reach prepared to address the matter of Petitioner's annual evaluation. In late June or July 1, 2013, Ms. Williams reviewed Ms. Dykes' draft evaluation, line-by-line, and revised the scores based on her experience and knowledge of Petitioner and the performance of Spinnaker Reach. Although Ms. Reeves was in Ms. Williams' office during the review, and offered input based on occupancy and financial reports, Timberscan inputs, and property maintenance reports, the preponderance of the evidence indicates that Ms. Williams, who "was aware of any issues that were going on on that site," was responsible for the revisions to Ms. Dykes' draft evaluation. As a result of her review, Ms. Williams directed that changes be made in the evaluation scores, such that the numeric scores had an average rating of 2.06.

33. After Ms. Williams' review, a revised evaluation was prepared. Ms. Dykes' comments were retained, with Ms. Reeves adding additional areas for improvement, including her handling of resident issues and complaints.

34. Ms. Dykes' dated signature was retained on the second page of the evaluation. Since Ms. Dykes was involved in the process, retaining her signature does not seem to be unwarranted. However, keeping her signature was confusing, and gave the implication that she agreed with the revised scores. Regardless of whether the revised evaluation was misleading as to Ms. Dykes' participation in the development of the final scores, it provides no evidence of racial or age discrimination towards Petitioner.

35. On or about July 2, 2013, Ms. Reeves called Petitioner to advise that her final annual evaluation was being emailed to her. Ms. Reeves remained on the telephone while Petitioner retrieved the evaluation, and the two of them went over it.

36. Also on July 2, 2013, Petitioner was provided with a written counseling form. The counseling form was prepared by Ms. Reeves at the instruction of Ms. Williams and Ms. Ost and reviewed by Respondent's human resources department before being presented to Petitioner.

37. The counseling form identified a number of issues, including occupancy and housing application processing, responsiveness to resident concerns, and a lack of teamwork and professionalism with staff. That portion of the counseling form was prepared by Ms. Reeves in conjunction with Ms. Williams, and was based on information provided to Ms. Reeves by employees,

review of company records, and telephone calls from Spinnaker Reach residents.

38. At the time the counseling form was prepared, the most recent data available to Respondent, i.e., the occupancy report for the week ending June 30, 2013, indicated that occupancy stood at 84 percent. Among items identified in the specific plan for improvement was "I would like to see the occupancy increase to 93% occupancy by August 1, 2013." The selection of a 93-percent occupancy rate as part of Petitioner's performance plan was made by Ms. Williams with guidance from Ms. Ost. The counseling form concluded with "[i]f these goals listed above are not met, this will lead to immediate termination."

39. Petitioner was understandably upset by the counseling form, believing it to be "completely fabricated." She believed it to be discriminatory because of "information [Ms. Reeves] could had [sic] gotten from speaking to my disgruntled maintenance man that I had just gotten onto for not doing his work, and she would have no knowledge of anything that's in this email or in this write-up. Because as she said, she didn't know me, and she didn't." The fact that Respondent, and in particular Ms. Williams, would have believed the word of the "disgruntled" Caucasian maintenance man provides no foundation for a finding of discriminatory intent.

40. On July 2, 2013, Ms. Ost sent an email to Joey Chapman, Respondent's CEO and owner of Spinnaker Reach, providing an update on Spinnaker Reach residential applications. The email concluded that "[w]e are also running a blind ad for manager, I don't feel Jan is the right fit so we are taking steps to make the change." Ms. Ost testified credibly that her concerns expressed in the email were related solely to occupancy, delinquency, and the condition of the property, and had nothing to do with Petitioner's race or age.

41. It is evident that by July 2, 2013, Respondent was primed to move forward with terminating Petitioner. However, Ms. Ost testified that had Petitioner managed to increase occupancy to the 93 percent specified in the July 2, 2013, written counseling form, Respondent would not have followed through with replacing her. Ms. Ost's testimony was credible, and is accepted.

42. On July 30, 2013, Petitioner advised Respondent of her expectation that by the end of the day, Spinnaker Reach would be at 90-percent occupancy. For the week ending on August 4, 2013, occupancy at Spinnaker Reach stood at 89 percent.

43. Petitioner argued at length that it was unreasonable, if not unprecedented for Respondent to require what she calculated to be the rental of 20 apartments, without attrition, in the month between July 2, 2013 and August 1, 2013.

Furthermore, Petitioner argued that her occupancy numbers were "trending" towards 93 percent when she was terminated. Those facts, even if true, which Respondent disputed, are not sufficient to establish a discriminatory animus that led to Petitioner's termination. Rather, the evidence is persuasive that Respondent's decision to set a 93-percent occupancy goal, and the ultimate decision to terminate Petitioner, was grounded on a general dissatisfaction with Petitioner's performance, and a specific dissatisfaction with issues related to occupancy and rent collection.

44. On August 8, 2013, Ms. Reeves presented Petitioner with another written counseling form. The gravamen of the counseling form was Petitioner's failure to enter invoices from vendors and suppliers which were in excess of $16,000 into Respondent's Timberscan vendor/vendee accounting system by the end of July. As a result, the expenses for July were artificially lowered, "which means it's going to hit the August financials." Ms. Reeves testified credibly that the issue had been raised with Petitioner in the past, without the issuance of a counseling form, but had not previously been as bad. The decision to proceed with the written counseling form was jointly made by Ms. Reeves and Ms. Williams.

45. Petitioner testified that any failure to timely submit invoices would have been the fault of her assistant, John

Escobar. The position description for the assistant community manager included performing other related duties and responsibilities as assigned by the community manager. Petitioner was not told that she could not delegate invoice submissions to her assistant, so she did so. Despite her efforts to disclaim responsibility, Petitioner and Respondent understood that, as the property manager, she had the responsibility to ensure that invoices were properly inputted and accounted for.

46. The evidence is persuasive that, despite her job description that she was to "submit invoices daily, as instructed, into the Timberscan manual," Petitioner was not well-versed in how she was to operate Timberscan, thus her reliance on Mr. Escobar. Petitioner did not feel that the training provided to her was sufficient, but did not ask for additional training.

47. Petitioner further argued that, in any event, the failure to timely enter invoices into Timberscan was of no consequence, since by the end of the year, the financial statements for the property would be correct.

48. That expenses may have been accounted for by the end of the tax year does not diminish the impact of the failure to timely enter data on Respondent's monthly reports. Respondent believed monthly accounting to be important for reasons other

than annual tax compliance, a belief that was unrelated to Petitioner's race or age. More to the point, whether the failure to make timely entries was of little or of great consequence, the evidence established that Petitioner had difficulty using Timberscan and, as a result, invoices were inputted too late to be accurately reflected in the monthly accounting system.

49. Despite Petitioner's testimony that she felt that Ms. Reeves was acting in a discriminatory manner towards her by virtue of her annual evaluation and the written counseling forms, Petitioner did not contact Respondent's human resources department as required by the employee handbook.

50. By August 14, 2013, occupancy at Spinnaker Reach had not reached 93 percent, with Respondent's business records indicating that occupancy was closer to 89 percent.

51. On August 14, 2013, Petitioner was terminated from employment with Respondent. Ms. Ost and Ms. Williams were solely responsible for the decision to terminate Petitioner from employment, with Ms. Toth giving final approval. By that time, there had been too many issues going on for too long of a time, and they were ready to make the change. Ms. Reeves, although she signed the termination form as regional manager, did not recommend Petitioner's termination, or play any part in that decision other than messenger.

52. Ms. Ost testified that the primary reasons behind the decision to terminate Petitioner were the decline in occupancy, the "out of control" delinquency, and problems with the condition of the property. She further testified that Petitioner's race and age played no part in her decision. Ms. Ost's testimony was credible, and is accepted.

53. Ms. Williams also testified that the decline in occupancy and matters pertaining to delinquency of rent payments drove her decision. Ms. Williams testified that Petitioner was allowing tenants to remain on "promises to pay," and allowed partial payments to be accepted, which precluded Respondent from filing for eviction. She further testified that Petitioner's race and age played no part in her decision. Ms. Williams' testimony was credible, and is accepted.

54. Ms. Reeves was tasked with the duty of informing Petitioner of her termination. Petitioner testified that Ms. Reeves appeared at her office and advised that "I'm here to let you go." She further testified that, upon being asked the reason, Ms. Reeves said "[y]ou just don't fit in with the property," giving no other reason.

55. Ms. Reeves testified that she advised Petitioner that she was being terminated for the reasons set forth in the previous counseling forms, including occupancy and performance. It is Ms. Reeves' practice when terminating employees to read to

them the information on the termination form, to not go into detail, and to keep it as short as possible. While it is likely that Ms. Reeves indicated that Petitioner did not "fit in with the property," the most credible evidence indicates that she also advised Petitioner of the more specific bases for the decision.

56. Ms. Reeves asked for the petty cash and the keys, and at Petitioner's request, provided her with the number for the human resources department. Ms. Reeves had no further conversation with Petitioner.

57. Petitioner testified that she took Ms. Reeves' facially-innocuous statement that Petitioner did not "fit in with the property" to mean that "I just wasn't a little, cute black girl is the way I took it," and that "immediately it was like my property 75 percent, I always say, African American. As far as age, the residents probably average around 30, 35 years old." Petitioner believed that Ms. Reeves' statement meant that Petitioner did not "fit in" with the property because she was different than the tenants. She further testified that "the only thing she could have meant by that was the demographics of the property being 75 percent African American there-about, young, professionals." To the contrary, there is nothing in the statement that is suggestive of any racial or age bias.

58. Given the lack of involvement on the part of Ms. Reeves in the decision to terminate Petitioner, and in light of Ms. Reeves' testimony as to her practice of delivering the news of termination to an employee, it is more plausible that, instead of reflecting some discriminatory animus, her statement was designed to end her unpleasant task in as perfunctory a manner possible.

59. It is clear that Petitioner felt that she was treated poorly by Respondent, and by Ms. Reeves in particular. She was upset that Ms. Reeves "didn't give me the time of day," and did not treat Petitioner with respect. When Ms. Reeves came to the office, she "sat in my office, and did no interaction with anyone, even when something was going on on the property, she would just sit in that office . . . . She acted like she was better than me and it wasn't her job."

60. Petitioner asserted that Ms. Reeves treated her differently than she did other people, based on Petitioner being "an old white woman." However, Petitioner only observed Ms. Reeves interact with Spinnaker Reach's two leasing agents, and "that was in a group session when we were asking her to -- for information about getting the leases approved." When asked about how Ms. Reeves acted around residents of Spinnaker Reach, Petitioner testified that "I didn't see her interact with anybody else." Petitioner had no point of reference to support

her assertion, and offered no example of Ms. Reeves treating her any differently than she treated anyone else. Petitioner's case can be boiled down to her testimony that "I have my rights, and I didn't like the way I was treated. I mean, that's just how she treated me."

61. In mid-July 2013, Ms. Williams was contacted by Debra Sutton, who called to inquire about employment opportunities with the company. Ms. Sutton is African-American and under the age of 40.

62. Ms. Sutton had previously worked for Respondent as a property manager for the Good Bread Hills tax credit property in Tallahassee, Florida. She resigned in good standing to move to the U.S. Virgin Islands. At the time of her resignation, Ms. Sutton was deemed "eligible for rehire."

63. Ms. Sutton had decided to return to the continental United States and, having worked for Respondent in the past, decided a call was worthwhile. Ms. Williams recalled Ms. Sutton, and her recollection of her performance was favorable. Ms. Williams advised Ms. Sutton that there may be an opening, but did not tell her a location.

64. Although Ms. Sutton had been the subject of rumors of improprieties with residents of Good Bread Hills, she had denied those rumors during her previous employment. A record of the discussions with Respondent and Ms. Sutton was retained, and

indicated that the issue was resolved. No action was taken with regard to the unsubstantiated accusations, and Ms. Sutton completed her term of employment without incident.

65. After Petitioner was terminated, Ms. Reeves was tasked with finding a replacement. The blind application published during the first week of July had produced a number of applications, and Ms. Reeves conducted interviews with six applicants for the job, one of which was with Ms. Sutton.

66. After the interviews for the Spinnaker Reach property manager position were completed, and with approval from Respondent's upper management, Ms. Reeves extended an offer to Ms. Sutton to fill the position, which Ms. Sutton accepted. Although Ms. Williams urged Ms. Reeves to hire Ms. Sutton, Ms. Sutton was already Ms. Reeves' top candidate due to her experience with tax credit properties. There is no competent, substantial evidence that Ms. Sutton's race or age played any role in Respondent's hiring decision.

67. Ms. Sutton's starting salary was several thousand dollars less than that of Petitioner.

68. During her employment as the Spinnaker Reach property manager, Ms. Sutton had an incident of her failure to timely enter invoices into Timberscan, resulting in late payment of waste collection bills. Respondent issued a written counseling form to Ms. Sutton, citing her for the problem. The written

counseling form concluded by advising Ms. Sutton that further problems would result in "further counseling or immediate termination." The problem did not recur.

69. The issues of occupancy and delinquency that plagued Petitioner were largely resolved while Ms. Sutton was the Spinnaker Reach property manager.

70. Respondent sold Spinnaker Reach on June 19, 2014. Respondent continued to provide property management services for Spinnaker Reach until November 4, 2014, when the property management agreement between Respondent and Spinnaker Reach's new owners was terminated.

Ultimate Findings of Fact

71. Petitioner identified no instance of any racially-disparaging comments or behavior directed at herself, or at any other employee, by anyone affiliated with Respondent. Although Petitioner was replaced in her position by a person who was African-American, there was no evidence of any other similar employment decisions having been made at any of Respondent's other properties from which a pattern of conduct could be discerned, or an inference of racial discrimination could be drawn.

72. Petitioner identified no direct instance of any ill-treatment directed at her due to her age. Although Petitioner was replaced in her position by a person who was younger, there

was no evidence of any other similar employment decisions having been made at any of Respondent's other properties from which a pattern of conduct could be discerned, or an inference of age discrimination could be drawn.

73. There was no competent, substantial evidence adduced at the hearing to support a finding that the decision to terminate Petitioner from employment was made due to Petitioner's race or age. Rather, the decision was based on dissatisfaction with Petitioner's job performance, and a specific inability to bring Spinnaker Reach to a level of occupancy deemed suitable and achievable by Respondent.

74. There was no competent, substantial evidence adduced at the hearing of persons of different races or ages than Petitioner, but who were otherwise similarly-situated to Petitioner, who were treated differently from Petitioner, or were subject to dissimilar personnel policies and practices.

75. Regardless of the perceived fairness of the sanction of termination, Respondent's decision to fire Petitioner was not based on racial animus or age bias.

CONCLUSIONS OF LAW

76. Sections 120.569 and 120.57(1), Florida Statutes, grant the Division of Administrative Hearings jurisdiction over the subject matter of this proceeding and of the parties.

Discrimination

77. Section 760.10 provides, in pertinent part:

> (1) It is an 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.

78. Petitioner maintains that Respondent discriminated against her on account of her race and her age.

79. Section 760.11(1) provides, in pertinent part, that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [FCHR] within 365 days of the alleged violation." Petitioner timely filed her complaint.

80. Section 760.11(7) provides that upon a determination by the FCHR that there is no probable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause." Following the FCHR determination of no cause, Petitioner filed her Petition for Relief from Unlawful Employment Practices and Request for Administrative Hearing requesting this hearing.

81. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute 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); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

82. 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. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

83. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d at 22.

84. 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). It is well-established that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .' will constitute direct evidence of

discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

85. The statement that Petitioner did not "fit in with the property" is far from the type of blatant discriminatory remark that could constitute direct evidence of discrimination. The record of this proceeding contains not a scintilla of direct evidence of any racial or age bias on the part of Respondent at any level.

86. Petitioner presented no statistical evidence of discrimination by Respondent in its personnel decisions affecting Petitioner.

87. In the absence of any direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of such intent. In McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the United States Supreme Court established the procedure for determining whether employment discrimination has occurred when employees rely upon circumstantial evidence of discriminatory intent.

88. Under McDonnell Douglas, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination.

89. To establish a prima facie case of racial discrimination, Petitioner must demonstrate by a preponderance of the evidence that 1) she is a member of a protected class; 2) she was qualified for the position; 3) she was subjected to an adverse employment action; and 4) her employer treated similarly-situated employees outside of her protected class more favorably than she was treated. Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006).

90. To establish a prima facie case of age discrimination, the undersigned recognizes that Florida judicial case law on age discrimination clearly establishes that:

> The plaintiff must first make a prima facie showing of discriminatory treatment. He or she does that by proving: 1) the plaintiff is a member of a protected class, i.e., at least forty years of age; 2) the plaintiff is otherwise qualified for the positions sought; 3) the plaintiff was rejected for the position; 4) the position was filled by a worker who was substantially younger than the plaintiff. (emphasis added).

City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008). Despite this seemingly clear instruction by a Florida appellate court, the FCHR has determined, citing only its own orders as authority, that:

> With regard to element (1), Commission panels have concluded that one of the elements for establishing a prima facie case of age discrimination under the Florida Civil Rights Act of 1992 is a showing that individuals similarly-situated to Petitioner

of a "different" age were treated more favorably, and Commission panels have noted that the age "40" has no significance in the interpretation of the Florida Civil Rights Act of 1992. See, e.g., Downs v. Shear Express, Inc., FCHR Order No. 06-036 (May 24, 2006), and cases and analysis set out therein; see also, Boles v. Santa Rosa County Sheriff's Office, FCHR Order No. 08-013 (February 8, 2008), and cases and analysis set out therein.

Consequently, we yet again note that the age "40" has no significance in the interpretation of the Florida Civil Rights Act of 1992. Accord, e.g., Grasso v. Agency for Health Care Administration, FCHR Order No. 15-001 (January 14, 2015), Cox v. Gulf Breeze Resorts Realty, Inc., FCHR Order No. 09-037 (April 13, 2009), Toms v. Marion County School Board, FCHR Order No. 07-060 (November 7, 2007), and Stewart v. Pasco County Board of County Commissioners, d/b/a Pasco County Library System, FCHR Order No. 07-050 (September 25, 2007). But, cf, City of Hollywood, Florida v. Hogan, et al, 986 So. 2d 634 (4th DCA 2008).

With regard to element (4), while we agree that such a showing could be an element of a prima facie case, we note that Commission panels have long concluded that the Florida Civil Rights Act of 1992 and its predecessor law, the Human Rights Act of 1977, as amended, prohibited age discrimination in employment on the basis of any age "birth to death." See Green v. ATC/VANCOM Management, Inc., 20 F.A.L.R. 314 (1997), and Simms v. Niagara Lockport Industries, Inc., 8 F.A.L.R. 3588 (FCHR 1986). A Commission panel has indicated that one of the elements in determining a prima facie case of age discrimination is that Petitioner is treated differently than similarly situated individuals of a "different" age, as opposed to a "younger" age. See Musgrove v. Gator Human Services, c/o Tiger Success Center, et

> al., 22 F.A.L.R. 355, at 356 (FCHR 1999); accord Qualander v. Avante at Mt. Dora, FCHR Order No. 13-016 (February 26, 2013), Collins, supra, Lombardi v. Dade County Circuit Court, FCHR Order No. 10-013 (February 16, 2010), Deschambault v. Town of Eatonville, FCHR Order No. 09-039 (May 12, 2009), and Boles, supra. But, cf, Hogan, supra.

Johnny L. Torrence v. Hendrick Honda Daytona, Case No. 14-5506 (DOAH Feb. 26, 2015; FCHR May 21, 2015).

91. Given that this Recommended Order will be subject to the Commission's Final Order authority, the undersigned will apply the standard described in Johnny L. Torrence v. Hendrick Honda Daytona, supra. Thus, Petitioner must demonstrate by a preponderance of the evidence that 1) she is a member of a protected class; 2) she was qualified for the position; 3) she was subjected to an adverse employment action; and 4) her employer treated individuals similarly-situated to Petitioner of a "different" age more favorably than she was treated.

92. When determining whether similarly-situated employees have been treated differently in cases of discriminatory discipline, an evaluation must be made that the employees engaged in similar conduct but were disciplined in different ways. In making that determination, "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." Burke-Fowler v.

Orange Cnty., 447 F.3d at 1323 (citing Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999)); see also Reilly v. Novartis Pharms. Corp., 2008 U.S. Dist. LEXIS 23011 at *12 (M.D. Fla. 2008) ("Furthermore, 'In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.").

93. If Petitioner is able to prove her prima facie case by a preponderance of the evidence, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its employment decision. Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 255; Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). An employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Dep't of Corr. v. Chandler, supra. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d at 1564; Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

94. If the employer produces evidence that the decision was non-discriminatory, 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. at 516-518. In order to satisfy this final step of the

process, Petitioner must "show[] directly 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, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-256). "[A] reason cannot be a pretext for discrimination 'unless it is shown both that the reason was false, and that discrimination was the real reason.'" Fla. State Univ. v. Sondel, 685 So. 2d at 927, citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 515; see also Jiminez v. Mary Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995). The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." Holifield v. Reno, 115 F.3d at 1565.

95. In a proceeding under the Civil Rights Act, "[w]e are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d at 1361. As established by the Eleventh Circuit Court of Appeals, "[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." Nix v. WLCY Radio/Rahall Commc'ns,

738 F.2d 1181, 1187 (11th Cir. 1984). Moreover, "[t]he employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve." Dep't of Corr. v. Chandler, 582 So. 2d at 1187.

Prima Facie Case - Race

96. Petitioner demonstrated that she is a member of a protected class. Title VII prohibits racial discrimination against all groups, including white employees. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-280 (1976); Bates v. Greyhound Lines, Inc., 81 F. Supp. 2d 1292, 1299 (N.D. Fla. 2000); Bush v. Barnett Bank of Pinellas Cnty., 916 F. Supp. 1244, 1252 (M.D. Fla. 1996).

97. Petitioner established that she met the qualifications for the position of property manager. The dispute with Respondent was not over whether Petitioner was qualified for employment as a property manager, but was related to the quality of her performance.

98. Petitioner was terminated from employment, which is an adverse employment action.

99. Where Petitioner has failed in the establishment of her prima facie case is her failure to demonstrate that similarly-situated employees outside of her protected class were subject to personnel decisions that differed from those applied to her.

100. The only evidence of a similarly-situated employee comparator produced by Petitioner was that Ms. Sutton, an African-American female, had some of the same issues with entering invoices into Timberscan that were experienced by Petitioner, and that she was hired despite unsubstantiated, and denied, rumors of misconduct during her previous period of employment with Respondent.

101. The evidence in this case establishes that the primary bases for Petitioner's termination were deficient occupancy numbers, and problems with delinquency. Ms. Sutton, during her first period of employment with Respondent as the property manager of the Good Bread Hills tax credit apartment complex, knew the tax credit program, "did a great job of leasing that property up," and left Respondent's management with a perception that she "had done an outstanding job." Furthermore, the issues of occupancy and delinquency that led to Petitioner's termination were largely resolved during Ms. Sutton's period of employment as the Spinnaker Reach property manager.

102. As to the issue with Timberscan, Ms. Sutton was, as was Petitioner, subject to written counseling for that incident, after which the problem was resolved and did not recur. Thus, Ms. Sutton was not subject to a personnel decision regarding Timberscan that differed from that applied to Petitioner.

103. For the reasons set forth herein, Ms. Sutton, despite her being hired as Petitioner's replacement, did not have problems with her performance similar to those that led to Petitioner's termination, and is not a similarly-situated employee comparator.

104. In addition to the foregoing, Petitioner failed to prove that the decision to replace a single Caucasian employee with a single African-American employee constituted any sort of pattern or practice of disparate treatment that might allow an inference of discriminatory animus on the part of Respondent.

105. In short, Petitioner failed to prove that Respondent's decision to terminate her was the result of any consideration of or discriminatory intent based on race, or that her treatment as an employee differed in any material way from the treatment afforded other employees, regardless of their race. Therefore, Petitioner failed to prove a prima facie case of race discrimination.

Prima Facie Case - Age

106. Petitioner, age 54, is a member of a protected class.

107. As established previously, Petitioner met the qualifications for the position of property manager, with the dispute being the quality of her performance.

108. Petitioner was terminated from employment, which is an adverse employment action.

109. Where Petitioner has failed in the establishment of her prima facie case is her failure to demonstrate that persons of a different age were subject to personnel decisions that differed from those applied to her.

110. As with the analysis of race-based discrimination set forth above, only Ms. Sutton was identified as a differently-aged employee comparator. For the reasons set forth in paragraphs 100 through 103 above, Ms. Sutton is not a similarly-situated employee comparator.

111. In addition to the foregoing, Petitioner failed to prove that the decision to replace a 54 year-old employee with a significantly younger employee constituted any sort of pattern or practice that might allow an inference of discriminatory animus on the part of Respondent.

112. In short, Petitioner failed to prove that Respondent's decision to terminate her was the result of any consideration of or discriminatory intent based on age, or that her treatment as an employee differed in any material way from the treatment afforded other employees, regardless of their age. Therefore, Petitioner failed to prove a prima facie case of age discrimination, and her petition for relief should be dismissed.

Legitimate, Non-discriminatory Reason

113. Assuming--for the sake of argument--that Petitioner made a prima facie showing of either race or age discrimination,

the burden would shift to Respondent to proffer a legitimate non-discriminatory reason for its action.

114. Respondent met its burden by producing credible evidence that Petitioner was terminated solely on the basis of what Respondent legitimately believed to be poor performance of her job duties. Issues of occupancy and delinquency have been discussed at length herein. Added to that was Respondent's legitimate concern with Petitioner's propensity to delegate her duties to subordinates without adequate oversight. Quite simply, Respondent had a legitimate belief that Petitioner was not performing at a level that was expected of its property managers.

115. Although Respondent's burden to refute Petitioner's prima facie case of discrimination on the basis of both race and age was light, the evidence showing the reason for its personnel decision to be legitimate and non-discriminatory was substantial.

Pretext

116. Assuming--again, for the sake of argument--that Petitioner made a prima facie showing, then upon Respondent's production of evidence of a legitimate non-discriminatory reason for its action, the burden shifted back to Petitioner to prove by a preponderance of the evidence that Respondent's stated

reasons were not its true reasons, but were a pretext for discrimination.

117. In determining whether Respondent's actions were pretextual, the undersigned "must evaluate whether the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'" Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519, 1538 (11th Cir. 1997). Petitioner failed to make that requisite demonstration.

118. Petitioner argued at length that the July 2, 2013, written counseling form, which established the August 1, 2013 deadline for achieving 93-percent occupancy, was unrealistic, thus establishing that it was a pretext for the sanction of termination. Her argument is substantially similar to the argument advanced by the complainant in Reilly v. Novartis Pharms. Corp., 2008 U.S. Dist. LEXIS 23011 (M.D. Fla. 2008). In that case, the employer placed the complainant on a "performance improvement plan" (PIP) designed to address the complainant's declining sales figures. The complainant argued that "unlike her younger and male coworkers, she was placed on an unrealistic PIP which ultimately led to her termination." Id. at *12. The court noted that "[a]fter being placed on the PIP, Plaintiff did

improve in several areas, but continued to perform 'below expectations' in a number of other areas." Id. at *4. In its analysis of the standard for establishing pretext, the court held that:

> Plaintiff's argument that the PIP was untenable misses the point; Defendant had legitimate, nondiscriminatory reasons for terminating Plaintiff in October 2004. Rather than immediately terminating Plaintiff, however, Defendant gave Plaintiff an opportunity to improve by placing her on a PIP. While Plaintiff argues that the requirements under the PIP were unfair, the PIP merely required Plaintiff to strictly comply with the nominal requirements placed on her coworkers. Further, the wisdom or fairness of the PIP's requirements do not negate the reasons for placing Plaintiff on the PIP. As the Eleventh Circuit has stated, "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."

Id. at *32, citing Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000).

119. Much like the situation confronted by the court in Reilly, Respondent had a legitimate, nondiscriminatory reason for terminating Petitioner in July 2012, when occupancy at Spinnaker Reach hovered at 84 percent. However, Respondent elected to give Petitioner a final opportunity to achieve an acceptable occupancy rate. Given that occupancy was at 94 percent when Petitioner was hired, but had fallen to and

remained in the low 80s (and as low as 79 percent) since December 2012, it was not an unreasonable employment decision for Respondent to impose a requirement that occupancy be quickly raised to a level comparable to that existing at Petitioner's hiring.

120. The record of this proceeding does not support a finding or a conclusion that Respondent's proffered explanation for its personnel decisions was false or not worthy of credence, nor does it support an inference that the explanation was pretextual.

Conclusion

121. Respondent put forth persuasive evidence that Petitioner was terminated from employment as a result of her inability to manage Spinnaker Reach at a level of effort and competence that was expected of its property managers, and not as a result of discrimination on the basis of race or age.

122. Section 760.10 is designed to eliminate workplace discrimination, but it is "not designed to strip employers of discretion when making legitimate, necessary personnel decisions." See Holland v. Washington Homes, Inc., 487 F.3d 208, 220 (11th Cir. 2007). As stated by the Eleventh Circuit Court of Appeals:

> Federal courts "do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how

> medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the [Civil Rights Act] does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior." Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988) (citations omitted). "For an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory . . . ." Moore v. Sears, Roebuck & Co., 683 F.2d 1321, 1323 n. 4 (11th Cir. 1982) (emphasis in original).

Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991).

123. Because Petitioner failed to put forth sufficient evidence that Respondent had some discriminatory reason for its personnel decision, her petition must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order determining that Respondent, Royal American Management, Inc., did not commit any unlawful employment practice as to Petitioner, Janet J. Lewis, and dismissing the Petition for Relief filed in FCHR No. 2014-00937.

DONE AND ENTERED this 16th day of March, 2016, in Tallahassee, Leon County, Florida.

E. GARY EARLY
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 March, 2016.

ENDNOTES

[1/] Petitioner testified that occupancy was "an issue" before she was hired. However, Respondent's occupancy reports reflect that occupancy at Spinnaker Reach had been above 90 percent since March 2012, and stood at 95 percent at the end of the week in which she started employment. Occupancy then steadily declined from that point, standing at 81 percent by the end of 2012, and bottoming-out at 79 percent during the week ending on March 10, 2013. The suggestion that occupancy was an issue at the time of Petitioner's employment is not supported by the evidence.

[2/] No explanation was given as to why the 90 Day Performance Review was completed after only 62 days of employment.

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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.