STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARYL ZOOK,

Petitioner,

vs. Case No. 15-5538

BENADA ALUMINUM FLORIDA, INC.

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge Robert L. Kilbride for final hearing on December 7, 2015, in Ft. Lauderdale, Florida.

APPEARANCES

For Petitioner: Caryl Zook, pro se
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For Respondent: Grissel T. Seijo, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent committed the unlawful employment practice alleged in the Charge of Discrimination filed with the Florida Commission on Human Relations ("FCHR") on or about September 9, 2014, and, if so, what relief should Petitioner be granted.

PRELIMINARY STATEMENT

On September 8, 2014, Caryl Zook ("Petitioner") filed a Charge of Discrimination ("Complaint") with FCHR alleging that Benada Aluminum Florida, Inc. ("Respondent"), terminated her employment as a chef because of her age, disability, or in retaliation for protected conduct. Following its investigation of the Complaint, FCHR notified the parties in a letter dated August 26, 2015, that "no reasonable cause exists to believe that an unlawful practice occurred."

Petitioner elected to pursue administrative remedies and timely filed a Petition for Relief with FCHR on or about September 30, 2015. FCHR referred the matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct a final hearing under chapter 120, Florida Statutes (2015). In a Pre-hearing Stipulation dated December 3, 2015, the parties agreed to certain facts. The parties' stipulations of fact have been incorporated into this Recommended Order, to the extent they are relevant or required.

The final hearing was held on December 7, 2014. Respondent and Petitioner were present. Petitioner represented herself. At the hearing, Petitioner testified and offered, without objection, Exhibits 1 through 8 and, over objection of counsel, played excerpts of a recording of an unemployment compensation hearing before the Florida Department of Economic Opportunity related to

her termination. Respondent's counsel presented the testimony of Monte Friedkin, Sheree Friedkin, Rosario Diaz, and also called Petitioner. Respondent's Exhibit 1 was received into evidence without objection.

The parties stipulated to the following facts: (1) Petitioner was hired by Mr. Friedkin to be his executive chef; (2) Petitioner was over the age of 40 years old at the time of hire by Mr. Friedkin; and (3) Mr. Friedkin was over the age of 40 when he hired Petitioner.

The final hearing Transcript was filed with DOAH on December 29, 2015. The parties timely filed proposed recommended orders, which were given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented at hearing, the undersigned makes the following findings of material and probative facts:

TESTIMONY OF PETITIONER, CARYL ZOOK

1. Petitioner, a 61-year-old female born in 1954, worked as a private chef for Mr. Friedkin, owner of Respondent. She began in 2007 and was an "at will" employee, there being no written employment contract.

2. Her duties included providing dinners and other meals at Mr. Friedkin's residence, catering or assisting him with some

events, and overseeing some of the other staff members at his residence.

3. Petitioner was in an auto accident in 2011 and suffered neck injuries. Petitioner required physical therapy, acupuncture, steroid injections, and several x-rays.

4. After Petitioner was terminated from Respondent in September 2013, she underwent surgery to remove several bad vertebrae from her neck area.

5. Due to her neck injury and pain, Petitioner testified that she needed to park close to Mr. Friedkin's house to carry groceries as a reasonable accommodation. Other than the inference drawn from this scant evidence, there was little, if any, direct or circumstantial evidence presented to prove that Respondent had knowledge of a qualifying disability by Petitioner.[1/]

6. Petitioner characterized Mr. Friedkin's behavior over the years as insulting and abusive, and she endured it for many years.

7. There was an arrangement between Petitioner and Friedkin for him to purchase a home for her to live in. She would repair or remodel the home, and at some point, he would transfer the mortgage and home to her.[2/]

8. For the Yom Kippur holiday, Mr. Friedkin contacted Petitioner and instructed her to prepare a dinner for his family and to have it ready at 3:00 p.m. that day.

9. Typically, meals were prepared by Petitioner at Mr. Friedkin's home. However, this one was prepared at Petitioner's home because, as she testified, it "needed to be brined" in her refrigerator in advance.

10. Petitioner was admittedly running late and did not have the meal prepared by 3:00 p.m. Mr. Friedkin called her while she was driving to his house but she did not answer the phone. When she arrived at his house, Mr. Friedkin was in his vehicle blocking the driveway.

11. After she parked on the street, Mr. Friedkin got out of his vehicle and began ranting and raving at her, accusing her of being late.

12. He was very upset. He continued yelling and told her that, "Next week you better start looking for a new job."

13. Petitioner went into the house and left the food in the refrigerator.

14. It was undisputed that the food (a turkey breast) was not given to Mr. Friedkin outside the home because it was not carved or ready for consumption.

TESTIMONY OF SHEREE FREIDKIN

15. Mr. Friedkin's wife testified that Mr. Friedkin had made it clear to Petitioner that he wanted her to prepare a turkey meal and that they would pick it up at 3:00 p.m. at the residence.

16. When she and her husband arrived at their home at 3:00 p.m., Petitioner was not there. They went inside, looked in the refrigerator, and saw that the food was not there. They called Petitioner on her cell phone but she did not answer. They waited for some period of time for her, all the while getting very frustrated and agitated.[3/]

17. After waiting more than 30 minutes for Petitioner to arrive, they decided to go to Whole Foods to buy a turkey meal at around 3:40 p.m.

18. On their way, Petitioner phoned them. She said she would be at the house soon, and so, they decided to drive back and meet her. After they arrived back at their residence they had to continue to wait for her to arrive.

19. She finally arrived, sometime after 3:40 p.m., and got out of her vehicle eventually. (Apparently, Petitioner waited in her car for some period of time.)

20. When she got out, Petitioner was in shorts, a sloppy shirt, and her hair was in curlers. Mr. and Mrs. Friedkin found

this inappropriate, particularly since Petitioner usually wore an apron and dressed more appropriately in their presence.

21. Mr. Friedkin was very upset and demanded that she give him the food because they were running late to their family function. Petitioner refused, claiming the turkey needed to be sliced. Mr. Friedkin was very angry and used several unnecessary expletives during the course of his conversation with Petitioner. Mr. Friedkin told her something like, "you're fired" and "don't show up Monday for work."

22. Mrs. Friedkin overheard no age, disability, or retaliation-related comments during this heated exchange.

TESTIMONY OF MONTE FRIEDKIN

23. He confirmed that Petitioner was his chef and also did some assorted chores and supervision around his house.

24. He directed Petitioner to make a meal and have it ready for them to pick up at his residence by 3:00 p.m. on the day in question. He testified that Petitioner always cooked any food for his family at his residence.

25. When they arrived around 3:00 p.m. at the house, Petitioner was not there, and there was no food.

26. He tried to call her and had to leave a message. They decided to go to Whole Foods to buy the meal. They departed for Whole Foods around 3:40 p.m.

27. His description of the event was consistent with his wife's testimony.

28. In addition to the delay caused by Petitioner, Mr. Friedkin testified that it was important to him that she was presentable at all times around him and his family.

29. During the confrontation in the driveway, he terminated her employment. He testified that he had experienced some other performance issues with her over the months preceding this event and that she had begun to respond to questions and directives from him in increasingly insubordinate ways.

30. As far as her termination was concerned, he unequivocally denied that her age, a disability, or retaliation was ever considered or motivated his decision.

31. He admitted that Petitioner told him that she had a car accident in one of their vehicles sometime in 2011. However, she continued to work for him for approximately two years after the accident without incident. She did complain to him, at some point, of some neck pain. He denied that Petitioner ever gave him any medical documents verifying or stating that she was disabled.

32. On cross-examination by Petitioner, Mr. Friedkin elaborated that, during the months preceding the food incident, she had become more and more insubordinate, and there was a growing problem with her not following instructions he gave her.

In his words, the incident at his residence involving the turkey dinner was the proverbial "straw that broke the camel's back."

33. On redirect, Mr. Friedkin denied ever considering any disability and said he did not even know she was "disabled."[4/]

TESTIMONY OF ROSARIO DIAZ

34. Another witness, Mrs. Diaz, testified that Mr. and Mrs. Friedkin arrived at the residence at around 3:00 p.m. and came into her office. They wanted to know whether or not Petitioner was there with the food, and whether or not she had called. Diaz told him that she was not there and did not call. Mr. and Mrs. Friedkin then departed.

35. Approximately 30 minutes later, Petitioner came into her office upset and said that she could not believe what had just happened and that Mr. Friedkin had just fired her. Ms. Diaz commented to her that maybe they were upset because she was late.

36. Mrs. Diaz had worked for Mr. Friedkin for nearly 30 years. She interacted with Petitioner at the residence frequently. She testified that Petitioner never complained to her about age, disability, or other discriminatory remarks or comments by Mr. Friedkin. She also testified that she never overheard any comments by Mr. Friedkin about Petitioner's age or disability, or how either may have affected Petitioner's work performance.

37. At Petitioner's request, recorded portions of an unemployment compensation hearing, conducted by an appeals referee from the Florida Department of Economic Opportunity (DEO), were played. Petitioner represented that the purpose was to show that Mr. Friedkin had made several statements during that hearing that were inconsistent with his present testimony.

38. The DEO hearing was to determine whether or not Petitioner was entitled to unemployment compensation benefits. DEO ruled in Petitioner's favor and found that she was not disqualified from receiving benefits and that no "misconduct" occurred on the job as a result of the Yom Kippur meal incident.[5/]

39. The undersigned finds that Mr. Friedkin did not make any materially inconsistent statements during the DEO hearing bearing upon his credibility as a witnesses in this case.

40. There was insufficient proof offered by Petitioner to show that Respondent's proffered explanation for her termination (poor work performance) was not true, or was only a pretext for discrimination.

CONCLUSIONS OF LAW

41. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

42. The Florida Civil Rights Act of 1992 ("FCRA"), chapter 760, Florida Statutes (2015), 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.

43. The FCRA, as amended, is patterned after the Age Discrimination in Employment Act ("ADEA") and Title VII of the Civil Rights of 1964. Thus, federal decisional authority interpreting the ADEA is applicable to age discrimination cases arising under the FCRA. Petrik v. City of Pembroke Pines, 120 So. 3d 102 (Fla. 4th DCA 2013); Sunbeam TV Corp. v. Mitzel, 83 So. 3d 865, 877 n.3 (Fla. 3d DCA 2012); Woolsey v. Town of Hillsboro Beach, 2013 U.S. App. LEXIS 18569, *1 n.1 (11th Cir. 2013).

44. Likewise, FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing the other anti-discrimination provisions of section 760.10. See, e.g., Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009).

A. AGE DISCRIMINATION

45. To prevail on an age discrimination claim, Petitioner was required to prove by a preponderance of the evidence, which may be direct or circumstantial, that age was the "but-for" reason for the termination or other adverse employment action by the employer. In other words, "but for" her age, Petitioner would not have been terminated. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177-78 (2009); Greene v. Sch. Bd. of Broward Cnty., 2014 U.S. Dist. LEXIS 111664 *13-14 (S.D. Fla. 2014).

B. DISABILITY DISCRIMINATION

46. To state a prima facie case of discrimination based on a disability, Petitioner was required to prove that: (a) she had a disability; (b) she was a qualified individual with a disability; and (c) she was subjected to unlawful discrimination because of her disability. Morisky v. Broward Cnty., 80 F.3d 445, 447 (11th Cir. 1996).

47. To establish the first prong of this test, Petitioner was required to prove by a preponderance of the evidence that: (1) she had a physical disability that substantially limited one or more of the major life activities; (2) she had a record of such impairment; or (3) that she was regarded by Respondent as having an impairment. See 42 U.S.C. § 12102(1)(A)-(C).

48. An impairment's minor interference in major life activities does not qualify as a disability. Toyota Motor Mfg.,

Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002). The impairment's impact must be permanent, and the employer must know of the impairment.

49. While medical records can serve as a basis for demonstrating a disability, Petitioner must prove from her records that she actually suffered a physical impairment in the past and that it substantially limited her major life activities. Cribbs v. City of Altamonte Springs, 2000 U.S. Dist. LEXIS 20084 (M.D. Fla. Oct. 18, 2000). There was scant, if any, evidence from Petitioner to describe what her disability was or how it affected her ability to work or otherwise how it impaired her work or major activities of her life.

C. RETALIATION

50. To establish a prima facie case of retaliation, Petitioner must show that: (1) she was engaged in an activity protected by chapter 760; (2) she suffered an adverse employment action by her employer; and (3) there was a causal connection between the protected activity and the adverse employment action. See Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001).

STANDARDS OF PROOF IN A DISCRIMINATION CASE

51. Generally, two types of evidence are used in employment discrimination cases--direct and circumstantial evidence, or a combination of both.

52. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption and must in some way relate to the adverse action against the complainant. Greene v. Sch. Bd. of Broward Cnty., supra. Only the most blatant or direct remarks, whose intent could mean nothing other than to discriminate on the basis of age, constitute direct evidence of age discrimination. Id. at 26.

53. In this case, there was no direct evidence of discrimination offered by Petitioner. More specifically, there was no evidence in the form of blatant or direct verbal statements, emails, memos or documents offered to show that Respondent intended to discriminate against Petitioner because of her age, disability, or to retaliate for some protected activity or class.

54. When direct evidence of discrimination does not exist, the employee may attempt to establish a prima facie case by way of circumstantial evidence through the burden-shifting legal framework articulated by the United States Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-805 (1973).

55. However, failure to establish a prima facie case of discrimination by either direct or circumstantial evidence ends the inquiry. See Kidd v. Mando Am. Corp., 731 F.3d 1196, 1202

(11th Cir. 2013). If, however, the employee succeeds in making a prima facie case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. Id. This intermediate burden of persuasion by the employer is "exceedingly light." Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 769-70 (11th Cir. 2005).

56. If the employer meets this burden, the employee is obligated to prove that the proffered reason was not the true reason for the employment decision, but rather was a pretext or excuse for discrimination. Kidd, 731 F.3d at 1202. The employee may satisfy this burden directly by showing that a discriminatory reason more likely than not motivated the termination 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 1183, 1186 (Fla. 1st DCA 1991).

57. Notwithstanding these shifts in the burden of production, the ultimate burden of persuasion remains at all times with the employee. Byrd v. BT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007).

58. In evaluating claims of discrimination in the workplace, it is important to remember that "courts do not sit as a super-personnel department that re-examine an entity's business decisions." Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1244 (11th Cir. 2001). Whether an employment decision was

prudent, just, or fair is irrelevant because an employer "may fire [Petitioner] 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).

59. Further, an employee may not recast the employer's proffered nondiscriminatory reasons or substitute her business judgment for that of the employer. Chapman v. AI Transport, et al., 229 F.3d 1012, 1030 (11th Cir. 2000). Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet those reasons head on and rebut them, and the employee cannot succeed by simply quarrelling with the wisdom of those reasons. Id.

60. The ultimate burden of persuading the trier of fact that an employer intentionally discriminated against the employee because of age or other reasons remains at all times with the employee. See, gen. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009).

ULTMATE FINDINGS AND CONCLUSIONS OF LAW

61. Turning to this case, based on the evidence presented at the final hearing, there was no credible or persuasive evidence presented to show that Respondent discriminated against Petitioner and fired her *because of* her age, disability, or in retaliation for some protected activity.

62. The persuasive and credible evidence presented at hearing showed that Petitioner was terminated because of poor job performance on September 13, 2013, and other increasing concerns about her job performance and insubordination.

63. Likewise, there was no credible evidence presented by Petitioner to show that the reasons given by Respondent for her termination were not true.

64. Petitioner failed to demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519, 1538 (11th Cir. 1997).

65. While Mr. Friedkin's decision to terminate Petitioner may seem unfair, abrupt, or even unjustified, this does not convert an otherwise legitimate termination into an unlawful or illegal termination.

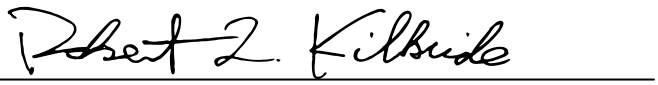
66. Likewise, the fact that DEO concluded that Respondent's reason for Petitioner's termination did not rise to the level of "misconduct," sufficient to justify disqualifying Petitioner from receiving unemployment compensation benefits, is not persuasive or relevant primarily because the standards of proof are different. See Donnell v. Univ. Cmty. Hosp., 705 So. 2d 1031 (Fla. 2d DCA 1998) ("Although an employee's actions may justify

discharge, the same conduct does not necessarily preclude entitlement to unemployment benefits."), citing Betancourt v. Sun Bank Miami, N.A., 672 So. 2d 37, 38 (Fla. 3d DCA 1996).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief and find in Respondent's favor.

DONE AND ENTERED this 27th day of January, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of January, 2016.

ENDNOTES

[1/] Petitioner testified that she "didn't specifically complain regarding discrimination" but that she "asked for minor accommodations because of my neck injuries." However, she did not elaborate on what specific accommodations were requested, who she spoke with, what disability she described, or whether or not her requests were fulfilled or denied.

[2/] While there was considerable evidence on this subject, its relevance and probative value was limited, and it has little or no bearing on the outcome of this case.

[3/] The meal was being prepared for a special family event with their children and grandchildren which undoubtedly added to their frustration and concern. There was also some urgency because their Yom Kippur meal needed to be consumed before sundown to comply with Jewish custom and practice.

[4/] Other than Petitioner providing the undersigned with voluminous medical records and reports, there was no evidence to explain her injuries, or how they may have affected or limited her work or major life activities. Further, there was no evidence to show what medical records were discussed with or provided to Respondent, Benada Aluminum Florida, Inc.

[5/] The undersigned notes that the relevance of an adverse finding in an unemployment compensation proceeding under chapter 443, is of limited relevance. The standard for proving "misconduct" in a DEO hearing to disqualify an employee from benefits is significantly different than the burdens of proof in a discrimination case or what may constitute sufficient grounds to terminate employment. In fact, in "at will" employment, no grounds are required.

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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.