STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONNA EARLEY,

Petitioner,

vs. Case No. 16-4119

TELEFLEX, INC.,

Respondent.
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RECOMMENDED ORDER

On November 1, 2016, an evidentiary hearing was conducted by video teleconference, with sites in Tampa and Tallahassee, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Steven Edward Hovsepian, Esquire
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For Respondent: James W. Seegers, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent committed an unlawful employment practice by discriminating against

Petitioner because of her sex and/or age, and/or by retaliating against her for engaging in a protected activity.

PRELIMINARY STATEMENT

In January 2016, Donna Earley (Petitioner) filed with the Florida Commission on Human Relations (FCHR) a charge of discrimination against her former employer, Teleflex, Inc. (Respondent or Teleflex), in which she alleged that beginning in August 2014, she was subjected to unlawful discrimination because of her sex and age, and unlawful retaliation for engaging in a protected activity. FCHR conducted an investigation, after which it determined there was no reasonable cause to believe that Respondent committed any unlawful employment practice as charged. Petitioner timely requested an administrative hearing, and FCHR referred the case to DOAH to conduct the requested hearing.

The hearing was first scheduled for September 26 and 27, 2016, to be conducted by video teleconference with sites in Tampa and Tallahassee. Petitioner’s unopposed motion for continuance was granted, and the video teleconference hearing was rescheduled for November 1, 2016. A second day was reserved but not needed.

Prior to the hearing, the parties filed a Joint Pre-Hearing Stipulation, in which they stipulated to several facts. They added another stipulated fact on the record at the outset of the hearing. The stipulations are incorporated in the findings below, to the extent relevant.

At the hearing, Petitioner testified on her own behalf and called no other witnesses. Petitioner's Exhibits 12 through 19, 33, 51, 54, 58, 59, 61, 65, 66, and 69 were admitted in evidence. Respondent presented the testimony of John Bowman and Jennifer Robichaud. Respondent's Exhibits 1 through 11, 13 through 28, and 30 were admitted in evidence.

At the conclusion of the hearing, post-hearing deadlines were discussed. A transcript was ordered, and the parties jointly requested that they be afforded 20 days after the filing of the transcript at DOAH in which to file their proposed recommended orders (PROs). Their request was granted.

The two-volume Transcript of the final hearing was not filed at DOAH until December 14, 2016, apparently having been misfiled with FCHR, then retrieved and refiled at DOAH after inquiry was made as to why the transcript was not yet filed. Thereafter, two joint motions were filed for brief extensions of the PRO filing deadline, which were granted. Both parties timely filed their PROs by the extended deadline, and the PROs have been fully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, a female, is a former employee of Respondent. At the time her employment with Respondent was terminated on December 31, 2015, she was 60 years old.

2. Petitioner was a salesperson for Respondent, a company that sells specialty medical devices to medical providers and facilities. Petitioner's background gave her technical knowledge regarding the cardiac-related product line, as she had obtained a certification as a perfusionist in 1978. A perfusionist operates the heart-lung bypass machine during open-heart surgery. By 1985, Petitioner moved into sales and has focused on cardiac products because of her background.

3. Petitioner began her employment with Arrow, Teleflex's predecessor, as a salesperson for the cardiac unit in August 2003. At some point, Arrow was acquired by Teleflex; the record is unclear as to exactly when this occurred, but it may have been sometime in late 2007. Petitioner testified that the product line has changed over the years, as there used to be artificial heart-related products, which were her "great loves" (R. Exh. 28 at 44), and why she started working there, but the company got rid of those programs. Under Teleflex, the main big-ticket piece of capital equipment sold by salespersons in the cardiac unit is the intra-aortic balloon pump. In addition, salespersons sell disposable products, such as catheters and cannulas used with the pump, in cardiac surgeries, and catheterization lab procedures.

4. The organization and composition of the cardiac unit's sales territories and the salespersons assigned to them were subject to change and did change throughout Petitioner's time

with Arrow and then Teleflex. Likewise, the organization and composition of sales divisions/regions and the managers assigned to be in charge of them were subject to change and did change throughout Petitioner's employment. Sales divisions and sales territories within divisions were created, combined, split up, and reconfigured, and both salespersons and managers were added, eliminated, and reassigned.

5. Petitioner attempted to recount the history of changes in sales territories that affected her during her years at Arrow and then Teleflex.[1/] When Petitioner started in 2003, her sales territory was most of the state of Florida up to Tallahassee, and all of the cardiac unit's sales representatives were under the supervision of a single manager.

6. At some point, separate sales divisions were created, and a new manager was assigned to supervise Petitioner and others in her division. At another point, when a sales associate was let go, Petitioner's sales territory was expanded to add the Florida panhandle and part of Alabama (to Mobile).

7. At another point, separate sales territories were combined, and the sales associate who covered sales in Georgia and Alabama was let go. At the request of her new manager, Petitioner helped train a new sales associate to cover Georgia and Alabama.

8. Petitioner was successful in sales for Arrow, and received several honors and awards for her achievements. At the end of her first year of employment in 2004, she was honored as "rookie of the year." She received the chairman's club award twice, in 2005 and 2007, for ranking in the top 10 percent of sales company-wide. Finally, she received the circle of excellence award in 2007, for having achieved her sales quota numbers three years in a row.

9. Petitioner was promoted to executive sales representative, although she cannot remember exactly when that was. Her sales role was not changed, but she got a pay increase and some increased duties in the area of training new sales associates.

10. When Teleflex acquired Arrow, the sales associate trained by Petitioner for the Georgia-Alabama sales territory was let go. Both Georgia and Alabama were added to Petitioner's territory. From her home base in Florida (she lived in Spring Hill), she covered the three-state sales territory of Florida, Georgia, and Alabama.

11. Another change affecting Petitioner occurred when the state of Georgia was reassigned to a salesman in North Carolina and Petitioner's territory was reduced to Alabama and Florida. Later, that salesman was promoted to manager for the eastern division, and Georgia was added back to Petitioner's sales

territory. It is unknown when these changes occurred, but from that point until early 2014, Petitioner's sales territory remained the three-state area of Florida, Georgia, and Alabama.

12. Somewhere along the line, Petitioner experienced another changeover in management, with Christine Mazurk assuming the position of eastern regional manager. Ms. Mazurk supervised Petitioner from approximately 2010 to 2013.

13. Petitioner was evaluated annually using a standardized format called the performance management process (PMP). The most heavily weighted area in the PMP is the annual formulation of business objectives and target goals, expressed in terms of sales revenue dollars by product line. In addition to business objectives, other categories evaluated include competencies and development. The objectives and target goals are established annually in the first quarter of the calendar year. The process begins with the employee who creates and submits the objectives and goals to his or her manager, who must accept them. At the end of the year, the employee performs a self-evaluation, rating each category as 1 (does not meet), 2 (partially meets), 3 (fully meets), or 4 (exceeds), while the manager similarly rates the employee in each category. The manager's ratings are used to calculate an overall "final rating." The final rating scale is as follows: between 1 and 1.4 means "does not meet";

between 1.5 and 2.4 means "partially meets"; between 2.5 and 3.4 means "fully meets"; and between 3.5 and 4 means "exceeds."

14. In 2011, Petitioner rated herself at 2 for business objectives, which she believed were partially met. She rated her overall performance at 3.0. In contrast, from her manager's perspective, Petitioner did not meet her business (sales revenue) objectives, achieving only 73 percent of her revenue target for 2011. The manager gave Petitioner the lowest rating of 1 in business objectives, and an overall final rating of 2.4, partially meeting performance expectations. Petitioner added the comment in her PMP that the economy really hurt sales in 2011.

15. Petitioner's performance was worse in 2012, according to the PMP that she and her manager, Ms. Mazurk, completed. Once again, Petitioner's self-evaluation was higher than her manager's. Petitioner's overall rating for herself was 2.9, but her manager's overall rating and the final rating on her PMP was 2.0, a little lower than in the prior year in the range of only partially meeting her performance expectations. In this PMP, Petitioner offered the following comment: "Really feel the baseline numbers were off."

16. At some point in 2012, a business profile of Petitioner was prepared. Although the source of this profile was not entirely clear, Petitioner said that she thought it had been prepared by her manager (who, at the time, was Ms. Mazurk) in

connection with a promotion that Petitioner was seeking. The profile reported that Petitioner had been employed at the company for nine years, and gave her sales performance in relation to her target goals for 2008 through 2011. The profile also identified Petitioner's "developmental needs" in the following three areas:

- Communication skills (email and verbal with support team)
- Emotions run high
- Sales Training

Petitioner did not receive the promotion, and continued as an executive sales representative in the sales territory of Florida, Alabama, and Georgia, under Ms. Mazurk's management.

17. In 2013, Petitioner's PMP was not completed, apparently because Petitioner was out for two weeks with an injury, and then later in the year was out for two months for a surgical procedure and recovery. In the nine and one-half months that she worked (almost 80 percent of the year), she reportedly achieved sales revenues of 54 percent of her target revenue goal for that year.

18. A reorganization at the end of 2013 resulted in a new manager for Petitioner, James Phillips. Mr. Phillips was the manager for the western North America sales region, but served temporarily as Petitioner's manager, from January to May 2014, while the company was looking to bring in someone new to manage the eastern region.

19. Mr. Phillips met with Petitioner in the beginning of 2014 to inform her of another realignment of sales territories, which would go into effect in March 2014. Insofar as the changes affected Petitioner, a new sales territory was being created, called the "south Florida" territory, and the company's plan was to hire a new salesperson for the new territory. More accurately, the newly created sales territory covered more than just south Florida; it included all of the east coast from Jacksonville south, the west coast up to Tampa-Saint Petersburg, and part of central Florida, including Orlando. At the same time, the state of South Carolina would be added to Petitioner's reconfigured sales territory.

20. The impetus for creating the new south Florida territory was evidence showing that this highly populated market had been underpenetrated. In other words, Petitioner, who had been the area's sole sales representative for more than 10 years, was not accomplishing the level of sales expected for this market. Accordingly, the business judgment was that splitting up the state and assigning the underpenetrated south Florida market to a new salesperson would promote increased market penetration by making that market the sole focus of the new salesperson.[2/]

21. Petitioner disagreed with splitting the state into two territories, but said that she could understand why the company wanted to create a new south Florida sales territory; as she

stated, that market is very different from north Florida. However, solely from the perspective of the lost sales opportunities for herself, she voiced her disagreement with the line-drawing for the new territory. In a letter she sent to her new manager, as well as to three members of upper management, she requested that management reconsider how to split the territory within the state of Florida, and asked that she be allowed to retain the Orlando market. Petitioner's letter also reported that she was "very excited" about the addition of South Carolina to her sales territory.

22. Petitioner's letter did not result in a reconsideration of the March 2014 territory realignment. Therefore, beginning in March 2014, Petitioner's sales territory included the Florida west coast, central Florida north of Tampa/St. Petersburg from Ocala north to the state line, and the Florida panhandle, plus all of the states of Alabama, Georgia, and South Carolina.

23. When the decision was made to create a new south Florida territory, a specific salesperson had not been identified for that new territory. Petitioner claims that she asked to be assigned to the new territory, but was refused. No evidence was presented to substantiate her claim; instead, the letter she wrote to her superiors about the realignment only asked that the territories be redrawn so that she could retain the Orlando

market, while expressing her enthusiasm about acquiring the state of South Carolina.

24. In May 2014, John Bowman was brought on board for the position of eastern regional manager, covering eastern United States and Canada. He was hired by the president of the company because the eastern region was underperforming. Mr. Bowman was charged with improving the business performance of the sales team so that sales would reach and sustain expected goals, which Mr. Bowman said is his forte.

25. Mr. Bowman is very direct with the sales representatives under his charge. He is results-oriented and does not mince words when it comes to identifying deficient performance and making corrective "suggestions" that may sound more like demands. Thereafter, if he observes a continuation of the performance deficiency he has tried to correct, he is quick to point that out. That is his management style, and why he believes he has been effective in achieving results: "In sales you're constantly measured by your results. You're paid on your results. You're measured on your results. You're ranked on your results. I am as well and so is my president. And I make that very clear with sale individuals and always have." (Tr. 138).

26. As part of the management transition, Mr. Phillips provided Mr. Bowman with his assessment of Petitioner as a salesperson. Mr. Phillips had not served as Petitioner's manager

long enough to conduct a formal year-end PMP evaluation, and so the assessment was characterized as a "personal assessment" and was not placed in Petitioner's personnel file.[3/] While both positive and negative qualities were described in the assessment, there was more bad than good; however, Mr. Bowman set the assessment aside so that he could form his own opinions. He considered the points raised by Mr. Phillips as simply identifying some issues that he should look out for.

27. Mr. Bowman was not based in the same city or even the same state as Petitioner. He did not meet with her until after he had been employed as her manager for just over one month. As Petitioner acknowledged, he had much ground to cover, as his region included all of North America east of the Mississippi from Florida up into Canada, and as she put it, "he tried to be fair with everyone." (Tr. 100).

28. Before Mr. Bowman ever met Petitioner, he fielded complaints from two different customers who called the Teleflex toll-free number to track down Petitioner's manager. Both complaints were perceived by Mr. Bowman to be communication problems, i.e., the issues would not have arisen if Petitioner had communicated better with the customers. One of the customers complained to Mr. Bowman that Petitioner was "useless in giving us the information we needed." (R. Exh. 10). Petitioner's attempted explanation of the two incidents tended to lend

credence to Mr. Bowman's assessment and the customer's comment. Ultimately, she sought to minimize their significance by characterizing them as only two isolated incidents during her long tenure. However, from Mr. Bowman's perspective, these were two customer complaints that he had to field in his first month as Petitioner's manager, unlike what he faced with any other sales representative there.

29. When Mr. Bowman met with Petitioner on July 1, 2014, he talked with her generally about her background and abilities, which he complimented, and he addressed the concerns he had from the two customer complaints. He also identified two other areas where he thought her performance required improvement. In an email sent the following week, he summarized their discussion (including the compliments) and the three areas where he wanted to see her improve. These were: her interaction and communication with customers, evidenced by the two recent incidents requiring him to intercede; her communications with internal Teleflex personnel, where her failure to provide clear, complete, and precise information resulted in "elongated email strings" and confusion; and her too-frequent requests to him for low pricing approval.

30. Petitioner was taken aback by these criticisms, which she took as demeaning and condescending, because she viewed herself as a proven performer who was highly respected. She did

not react well to the email summary of these points, which she viewed as a paper trail intended to bring her down.[4/] Nonetheless, Mr. Bowman's points were shown to be valid, and, indeed, consistent with similar comments made by prior managers, including the manager who noted in Petitioner's profile in 2012 that Petitioner needed to work on her verbal and e-mail communication skills.

31. Mr. Bowman was clear in his meeting with Petitioner, in the e-mail summary of that meeting, in subsequent discussions, and in his testimony at hearing that he fully expected Petitioner to learn from his constructive criticisms and improve her performance. Moreover, he did not view her performance deficiencies as extreme enough to warrant formal action, such as placing her on a performance improvement plan. Instead, he quickly and consistently pointed out to Petitioner each time he saw a continuation of the behavior he had criticized, and he repeated the criticism while noting that he was repeating prior criticism, as was his way.

32. Mr. Bowman testified credibly that he treated all of the sales representatives under his charge the same way, and was consistent in the way he communicated both positive capabilities and performance issues requiring improvement. Petitioner offered no evidence to prove that Mr. Bowman treated her any differently from the way he treated other sales representatives.

33. One of Mr. Bowman's first tasks as the new eastern region manager was to participate in interviews for a new salesperson to be assigned to the new south Florida territory. After interviews by Mr. Bowman, the president of the company, the director of finance, the director of marketing, and another manager, and after a third-party psychological exam, Eric Patton was hired in August 2014 as a sales representative for the new south Florida territory. At the time he was hired, he was approximately 34 years old.

34. Although the territory changes went into effect in March 2014, Petitioner continued to cover sales in the new south Florida territory, for which she was compensated, until September 2014 when Mr. Patton assumed coverage of the territory.

35. Petitioner was asked to provide Mr. Patton with information on her contacts in the new territory, and she did so. Petitioner also spent several hours with Mr. Patton at her home to demonstrate how she made her sales pitches, and she also gave him a script. Thereafter, she took a couple of day trips with him to introduce him to some customer contact persons in his new territory. These were meet-and-greet sessions only, not extended visits involving actual sales presentations.

36. Petitioner's view is that it was not fair that she lost the pipeline of sales opportunities in the south Florida territory to Mr. Patton. When it came to losing this, or any,

sales territory, Petitioner complained that she was losing out on the "pipeline" of sales opportunities that she had cultivated but not yet closed. However, when Petitioner gained sales territory, she complained about the disadvantage of starting out from scratch in a new area. Neither viewpoint appears to comport with the reality that every time sales territories are changed, the new salesperson has some head start by virtue of the work of the predecessor salesperson. But there was no basis shown for Petitioner's sense of "entitlement" to the benefits of a sales territory after the territory is assigned to someone else. That is particularly true here, where Petitioner did not refute the legitimate business purpose of an underpenetrated market that led to the territory reconfiguration. The company compensation system for sales representatives was based on revenue recognized from sales, not on unrealized "pipelines" for future business.

37. Petitioner claimed that in one instance, she believes that Mr. Patton was treated more favorably than her while they were both working in sales in their respective territories. Petitioner and several other salespersons (both male and female) had closed some pump sales with contingency clauses written in the contracts whereby the customer would be allowed to return the pump and upgrade to a new model at no additional cost if a new model became available within 18 months after the sale. The company determined that under federal law, the revenue from those

sales could not be recognized, but rather, had to be held in escrow until the contingency period had passed. Since sales commissions were paid on the basis of sales revenue recognized by the company, sales commissions were deferred as well.

38. Mr. Bowman explained credibly that these deferred compensation sales had been allowed under a policy in place before he was employed, but that Petitioner's deferred sale was the last of several allowed before the policy was discontinued.

39. Petitioner testified that Mr. Patton told her that one year after her deferred compensation sale, he made a sale in which he was allowed to offer verbal, but not written, assurance that an upgrade to a new model would be allowed, and his commission was paid on the sale. However, Petitioner offered no non-hearsay evidence to substantiate her description of what she was told, and her description was refuted by Mr. Bowman's credible testimony. In any event, Petitioner's unsupported description did not establish two sales that would be considered the same so as to require the same treatment regarding payment of commissions. No finding can be made that Mr. Patton was treated more favorably than Petitioner in this regard, as claimed.

40. Petitioner and Mr. Bowman completed Petitioner's PMP evaluation for calendar year 2014. The evaluation was similar to those for Petitioner in 2011 and 2012. Petitioner rated her performance either the same or more favorably than her manager

did, with the result that her overall final rating was 2.2, compared with her self-evaluation of 2.4.

41. In mid-2015, the company lost a large contract with HPG, which is a large group purchasing organization (GPO)--probably the largest in the country, according to Petitioner. Instead of contracting again with Teleflex, HPG entered into a sole source contract with Teleflex's competitor. As Petitioner acknowledged, the recent advent of GPOs had dramatically changed the sales business, because the GPOs control access to potential purchasers. Purchasers using the GPOs are no longer free game for salespersons to explore new sales opportunities. For Teleflex, this meant that as of mid-2015, its salespersons could not solicit new sales from potential purchasers using HPG, because HPG would direct those purchasers to Teleflex's competitor pursuant to the new sole source contract. As Petitioner acknowledged, the loss of the HPG contract was a substantial loss for Respondent, with the significant impact coming in the loss of growth opportunity to develop new business.

42. In June 2015, the president of the company raised the possibility of a reorganization to consolidate the north Florida and south Florida territories, in light of the loss of the HPG contract. Mr. Bowman began discussions with senior management about possible changes to the sales territories.

43. In late September 2015, Mr. Bowman provided senior management with a Power Point presentation that set forth a proposed reorganization of the southeast. His proposal was to reconfigure the two existing territories, to create a single Florida territory and a separate "Tidewater" territory covering Alabama, Georgia, and South Carolina. As he proposed the reorganization, the two sales representatives--Petitioner and Eric Patton--would cover the two reorganized territories.

44. Meanwhile, Mr. Bowman continued to critique Petitioner's performance in some fairly strident emails and conversations. In an incident on September 30, 2015, Petitioner submitted a quote request for a new pump for one Baycare hospital, while another Baycare hospital was also considering a new pump. According to Petitioner, the issue was not the price to quote for the new pumps, as she stated that the price had been set and was "already on a contract." (R. Exh. 28 at 154). Instead, Petitioner said that the issue was whether the hospitals would get a credit for the cost of unusual repairs being made to their existing pumps. In contrast, according to Mr. Bowman, the company had already agreed that the repair costs would be applied to the purchase price, but the issue was what price should be quoted for the new pump, which he said had not been set by any contract. Mr. Bowman found the price requested by Petitioner to be too low, and instead of approving her price request, he sent

her an email at 5:35 p.m. on September 30, 2015, questioning her price approval request, while noting the same price would have to be given to both Baycare hospitals. He ended the email as follows: "Call me tomorrow to discuss." (R. Exh. 14 at 1).

45. Instead of acknowledging Mr. Bowman's email and waiting to talk to him first, Petitioner sent an email to the customer, with a copy to Mr. Bowman, the next morning. The email apologized for "not getting you the outright purchase quote yesterday," explaining that the delay was because "[t]he outright quote required management approval[.]" (R. Exh. 14 at 2).

46. After reading his copy of the email, Mr. Bowman called Petitioner and reacted harshly, telling Petitioner that she threw him under the bus by sending the email to the customer without discussing it with him first, and that she had committed a fire-able offense. While harsh, Mr. Bowman's reaction was not off-base. Petitioner's email tends to undermine her testimony that the issue was not the purchase price which she claimed was fixed by contract. And while Petitioner testified that she tried to call Mr. Bowman that afternoon or evening before she sent the email the next morning, Petitioner did not mention the email from Mr. Bowman. Surely, when waiting to hear from her manager, she would have read his incoming email before sending the email to the customer. Petitioner failed to explain why she did not follow her manager's instruction to discuss the matter with him.[5/]

47. Following their telephone conversation, Petitioner called the human resources department and spoke with the manager, Jennifer Robichaud, to complain about Mr. Bowman. The essence of her complaint was that at 60 years old and close to retirement, she felt that Mr. Bowman was gunning for her and trying to push her out.[6/] She complained about the March 2014 territory realignment, which she though was unfair because a large part of her territory was given to the new sales representative, "a young guy." She told Ms. Robichaud that she has always been a top performer, and although she recently had not been closing sales on pumps, that was because she was starting from scratch in a new territory. She said that until Mr. Bowman came on board, she never had any issues with her past managers. Although she acknowledged that she and Mr. Bowman have very different styles, she felt that Mr. Bowman did not accept her for who she is.

48. Ms. Robichaud assured Petitioner she would investigate. They spoke on a Thursday; Ms. Robichaud was able to discuss the matter with Mr. Bowman the following Tuesday, October 6, 2015. She relayed Petitioner's complaints that she felt that Mr. Bowman was trying to push her out, and her feeling that it was unfair to give her pipeline to Mr. Patton.

49. Mr. Bowman denied that he was trying to push Petitioner out of the company, and said, instead, he wants her to succeed. With regard to her perception about pipeline fairness, Mr. Bowman

responded that all sales representatives are expected to have a pipeline of business opportunities, but that it is closing the business that matters. In the days thereafter, he sent Ms. Robichaud information pertinent to the investigation, including email communications with Petitioner, the assessment from Petitioner's prior manager, and information about the customer complaints. Ms. Robichaud also investigated Petitioner's annual PMP ratings and her performance through September 2015. She also sought and later received the data supporting the decision to realign the Florida territory in 2014.

50. As before, Mr. Bowman continued his practice of addressing Petitioner's performance on issues that had previously surfaced, which he had previously addressed with Petitioner. Thus, on October 9, 2015, Mr. Bowman criticized Petitioner for her email communications with customer service in which she asked for free replacements of medical supplies to be sent to her home for a customer, without giving sufficient information. The response from the customer service representative stated he was "a bit confused" by the request, and asked for more information: "Donna, your input is appreciated here." The representative had to ask questions to get the information necessary to handle the request appropriately, such as whether the supplies were being provided for free to respond to a complaint. Mr. Bowman's criticism was that Petitioner's email request to customer service

was "an example of a lack of professionalism and clarity in your communications. I have addressed this issue with you multiple times over the past year and unfortunately, you have not demonstrated improvement." (R. Exh. 15).

51. On Monday, October 12, 2015, Petitioner forwarded Mr. Bowman's email criticism to Ms. Robichaud and asked her to call. They spoke Tuesday morning. Ms. Robichaud told Petitioner that she had been looking into Petitioner's concerns and had spoken with Mr. Bowman. Ms. Robichaud told Petitioner that Mr. Bowman was not trying to push Petitioner out of the company, but was looking for performance results, and Ms. Robichaud did not find any reason to believe Petitioner was being treated unfairly. Ms. Robichaud said that Petitioner and Mr. Bowman needed to talk, because in Ms. Robichaud's opinion, the problem appeared to be a clash of styles, which is not uncommon with a change in managers, and that they needed to learn to adapt.

52. Ms. Robichaud talked to Mr. Bowman afterwards. She encouraged him to reach out to Petitioner, hear her concerns, and try to understand her perspective. She reminded him that he has acknowledged that he is very direct, and "perhaps a few small changes in how he communicates with her can have a positive impact." (R. Exh. 18 at 2).

53. Mr. Bowman contacted Petitioner, and they agreed to meet in person. The meeting took place on October 16, 2015, in

Tampa. Before the meeting, Petitioner requested a copy of her personnel file from Ms. Robichaud.

54. Petitioner testified that at the meeting, Mr. Bowman was very civil and respectful to her. He said that he thrives on diversity and enjoys the challenge of working with different kinds of people. He assured her that any decisions that are made are always going to be about performance.

55. Petitioner reacted curiously to this: she testified that she realized that nothing was going to change, while admitting that Mr. Bowman was acting completely differently than he had before. Petitioner said that he was "extremely scripted," and probably had been coached on what to say by the human resources manager. Yet she also complained, inconsistently, that the human resources department did nothing to help her or to facilitate a meeting with Mr. Bowman.

56. According to Mr. Bowman, Petitioner said that she did not think she would be able to meet the objectives set for her. According to Petitioner, she said that he should just stop (being civil to her), that she knew what he was doing, and knew that he wanted her to go away. Regardless of which lead-in is accurate, Petitioner went on to offer that she would resign her employment at the end of the year if the company paid her the deferred commissions, and her salary and benefits for six months. Mr. Bowman was genuinely surprised by Petitioner's offer.

57. Shortly after Mr. Bowman's meeting with Petitioner, Mr. Bowman was informed by his superiors that his proposal to retain but reconfigure two sales territories with two sales representatives in the southeast had been reviewed, but was rejected because it would not be a viable solution to address the loss of the HPG contract. Instead, the decision was made to consolidate the southeastern states--Florida, Georgia, Alabama, and South Carolina--into a single sales territory, covered by one salesperson. Mr. Bowman was told to extract metrics for the time period that Petitioner and Mr. Patton were both working sales in their respective territories, including their recognized sales revenues compared to their quotas, pump sales, and 2014 PMP rating. He was also told to add non-metric qualitative considerations regarding any business practice and customer interaction issues.

58. Mr. Bowman pulled the data, and on October 23, 2015, he provided his superiors with his performance comparison of Mr. Patton and Petitioner. For the period of September through December 2014, Mr. Patton's first quarter with the company, the quantitative metrics were mixed. Mr. Patton's overall PMP performance rating of 2.7 was better, falling within the "fully meets expectations" range, whereas Petitioner's overall rating of 2.2 only partially met her performance expectations. Mr. Patton sold one balloon pump during his first few months with the

company. Petitioner was credited with zero sales of balloon pumps during this time, although she noted that she had at least one deferred sale that was not counted during this time. Petitioner achieved 104 percent of her overall sales quota from September to December 2014, although the revenue recognized was from disposables and not pump sales. Mr. Patton achieved 73 percent of his sales quota in his first few months with the company, but that included recognized revenue from a pump sale.

59. For the first three quarters of 2015 (Mr. Bowman was able to extract data through the end of September 2015), the quantitative metrics were decidedly in Mr. Patton's favor. During this period, Petitioner had zero pump sales, while Mr. Patton had seven pump sales, and Petitioner achieved 83 percent of her sales quota through sales of disposables, whereas Mr. Patton achieved 112 percent of his sales quota, largely from pump sales.

60. On the qualitative considerations, Mr. Bowman summarized the issues he had been addressing with Petitioner in an attempt to bring about improvements, including communication issues with customers and internal personnel, as well as his concerns about her frequent requests for low pricing approval. He also noted a recent situation where Petitioner lost a pump sale to a hospital in Alabama. When he had asked Petitioner why she thought she did not get the sale, she explained to Mr. Bowman

that the chief of perfusion "may have felt I was too aggressive," that Petitioner "felt there was tension between he and I," and "obviously something happened here." (R. Exh. 22, last page). Petitioner acknowledged in her deposition that what Mr. Bowman said was true, but that the tension was due to extenuating circumstances.

61. In contrast, for Mr. Patton, Mr. Bowman reported no issues of concern in just over one year of managing him. As Mr. Bowman testified at hearing, Mr. Patton was an excellent sales representative and Mr. Bowman found no performance deficiency issues to address with him. Petitioner offered no evidence to the contrary, stating that she had no knowledge of Mr. Patton's performance or the quality of his salesmanship.

62. Based on the performance comparison, Mr. Bowman recommended that Mr. Patton should be retained as the salesperson to cover the consolidated southeastern sales territory. Mr. Bowman's recommendation was reasonable.

63. Mr. Bowman's recommendation was accepted and the decision made by senior management was to retain Mr. Patton as the salesperson for the consolidated sales territory and to terminate Petitioner's employment due to elimination of her sales position.

64. Petitioner presented no evidence to refute the reasonableness of Respondent's business judgment to consolidate

sales territories and reduce one sales position after the loss of the HPG contract. Instead, Petitioner only pointed to the suspicious timing of the decision in relation to her complaint to the human resources department about Mr. Bowman.[7/]

65. Petitioner does not contend that anyone other than Mr. Bowman himself discriminated against her or retaliated against her. The evidence does not support Petitioner's claim that Mr. Bowman discriminated against Petitioner on the basis of her age or her sex, nor does the evidence support Petitioner's claim that Mr. Bowman retaliated against Petitioner because she complained about him to the human resources department.

66. Instead, the evidence established that when Respondent's diminished business growth prospects caused it to make the reasonable business decision to reduce its sales positions in the southeast states, Petitioner lost out in a fair comparison on the merits of her performance compared to the other salesperson's performance.

67. Petitioner's flagging job performance evident from 2011 forward, while not bad enough to warrant immediate action to terminate her, was not good enough to withstand comparative assessment with Mr. Patton. Petitioner's view that the choice to retain Mr. Patton must have been a pretext for discrimination or retaliation is in keeping with Petitioner's inflated view of her own performance. At the same time, Petitioner's view is also an

unfair discredit to Mr. Patton, when the unrebutted evidence was that he was an excellent sales representative. Petitioner admitted that she knows nothing about the quality of his sales work or the quantitative achievements he garnered in just over one year with the company.

68. Although findings on the subject of damages are unnecessary in light of the above findings, even if Respondent had been found guilty of unlawful employment practices, the undersigned would have to find that Petitioner failed to prove her actual economic damages that would have been caused by those employment practices. Petitioner did not present proof of her earnings, and offered only limited evidence of her attempts to mitigate damages with other income and efforts to look for a comparable job. Indeed, in Petitioner's PRO, this shortcoming appears to be admitted because Petitioner requested an opportunity to submit support for damages. Petitioner's opportunity to present evidence to support her case was at the final hearing before the evidentiary record closed. There was no request for a bifurcated hearing to address liability, followed by a separate evidentiary hearing on damages if needed. Thus, Petitioner had her opportunity, and failed to prove damages.

CONCLUSIONS OF LAW

69. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding, pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes (2016).[8/]

70. Section 760.10(1) provides that it is an unlawful employment practice for an employer to discriminate against an employee “because of” the employee’s age or sex, or because the employee has opposed a practice which is an unlawful employment practice under the Florida Civil Rights Act (FCRA).

71. Respondent is an "employer" within the meaning of the FCRA. § 760.02(7), Fla. Stat.

72. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing the FCRA. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

Claim of Age and Sex Discrimination

73. Petitioner offered no direct evidence to prove that she was terminated because of her age or sex. Accordingly, in the absence of any direct evidence of discrimination, a finding of discrimination, if any, must be based on circumstantial evidence.

74. The shifting burden analysis established by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), applies to this circumstantial evidence-based discrimination claim. Under this well-established model of

proof, the complainant bears the initial burden of establishing a prima facie case of discrimination.

75. If Petitioner establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991) (discussing shifting burdens of proof in discrimination cases under McDonnell and Burdine). The employer has the burden of production, not persuasion, and need only articulate a non-discriminatory reason for the action. Id.; Alexander v. Fulton Cnty., Ga., 207 F.3d 1303, 1339 (11th Cir. 2000).

76. Petitioner must then come forward with specific evidence proving that the reasons given by the employer are a pretext for discrimination. Dep't of Corr. v. Chandler, supra, at 1187. Conclusory allegations, without more, are insufficient to show pretext. Instead, Petitioner must meet the proffered reason head on and rebut it. A reason is not pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason. Corbett v. Beseler, 2016 U.S. Dist. LEXIS 129639, *29-*30 (M.D. Fla. 2016) (internal citations and quotes omitted).

77. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the

employee remains at all times with the [petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. BT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

78. To establish a prima facie case of sex or age discrimination under the FCRA, Petitioner must show that: (1) she was a member of a protected sex or age group; (2) she was subject to an adverse employment action; (3) she was qualified to do the job[9/]; and (4) that she was replaced by, or treated less favorably than, a person of a different age or sex. McQueen v. Wells Fargo, 573 Fed. Appx. 836, 839 (11th Cir. 2014); see Ellis v. Am. Aluminum, Inc., Case No. 14-5355 (Fla. DOAH July 14, 2015, FCHR Sept. 17, 2015), FO at 2-3 (noting different interpretation of FCRA regarding whether the claimant must be over 40 years old and whether comparator must be younger or just of a different age).

79. Petitioner met her burden of establishing a prima facie case. She proved that she is a member of a protected sex (female) and age group (any age). She proved that she was subject to an adverse employment action by being terminated on December 31, 2015. Petitioner proved that she was qualified to do the job, as interpreted by prior FCHR Orders (see endnote 9).

Finally, Petitioner provided that a similarly situated male of a different age was treated differently only insofar as he was retained by Respondent when Petitioner was terminated. Petitioner did not prove that, prior to her termination, she was treated less favorably than a similarly situated person of a different age or sex.

80. The parties agree that, upon Petitioner meeting her prima facie case, the burden shifts to Respondent to state a legitimate non-discriminatory reason for the adverse action. Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009). Respondent met its burden of production in this regard. The loss of a significant contract in mid-2015 led to an assessment of the sales territories and a reasonable business decision to combine the south Florida territory with the north Florida, Alabama, Georgia, and South Carolina territory. Once that decision was made, a reasonable comparative assessment was made of the two salespersons covering those territories, and a performance-based decision was made to retain Mr. Patton instead of Petitioner.

81. Petitioner failed to meet her burden of proving that Respondent's articulated reason for its decision was a pretext for unlawful discrimination. The more credible, persuasive evidence proved that Respondent's decision was based on an objective comparison of performance data, augmented with some

consideration of subjective performance attributes, none of which had anything to do with Petitioner's age or sex. Petitioner ineffectively quibbled with some of the data, but did not undermine the ultimate conclusions drawn from the comparison. Indeed, she has no knowledge of how effective Mr. Patton was as a salesman, nor could she quarrel with his performance data.

82. While Petitioner repeatedly stated that she was a proven performer, and went so far as to state in her charge of discrimination filed with FCHR that she had always met or exceeded expectations throughout her employment, the evidence demonstrated that this was not the case, at least since 2011. In each annual evaluation, Petitioner was consistently rated as only partly meeting expectations, while just as consistently, Petitioner demonstrated an inflated view of her own performance.

83. Petitioner also ineffectively quibbled with the subjective determinations on which a comparative assessment was made between Petitioner and Mr. Patton. Petitioner essentially acknowledged that in Mr. Bowman's first month as her manager, he fielded two complaints by customers about Petitioner's performance as their sales representative. Petitioner defensively noted these were two isolated incidents--yet they were two customer complaints made to her manager in his first month in that position. In contrast, after more than a year of managing Mr. Patton, Mr. Bowman had no performance issues and no

complaint issues. Petitioner presented no evidence to the contrary.

84. Petitioner failed to meet her ultimate burden of proof that Respondent intentionally discriminated against her because of her age or her sex.

Claim of Retaliation

85. Just as with the claim of age and sex discrimination, Petitioner's claim that Respondent terminated her employment in retaliation for her complaint to the human resources department is not supported by any direct evidence, and thus, is analyzed under a similar burden-shifting approach.

86. To establish a prima facie case for retaliation, Petitioner must prove that: she engaged in statutorily protected activity; she suffered an adverse employment action; and there is a causal relation between the two events. Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1336 (11th Cir. 1999). For purposes of establishing a prima facie case, a close temporal proximity between the protected expression and an adverse action can provide sufficient circumstantial evidence of a causal relation between the two events.

87. Petitioner established a prima facie case, by showing that she complained to the human resources department about her manager on October 1, 2015, and the recommendation that

Mr. Patton be retained and Petitioner's position be eliminated was made 22 days later, albeit that Petitioner's termination was not effective until three months after the protected action.

88. Respondent must then articulate a legitimate, non-retaliatory reason for the adverse employment action. Respondent did so, with the explanation for consolidating territories because of the lost HPG contract, followed by the performance-based comparison of which of the two sales representatives should be retained for the single sales position.

89. The burden thus shifted back to Petitioner to prove that the proffered reason is merely a pretext for prohibited retaliatory conduct. Petitioner was required to prove that the reasons given by Respondent were not the real reasons for the adverse employment decision. Conclusory allegations, without more, are insufficient to show pretext. Instead, "the employee must meet [the proffered] reason head on and rebut it, and the employee cannot succeed simply by quarreling with the wisdom of that reason." Chapman v. A1 Transp., 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc). Summary judgment against the claimant on a retaliation claim has been deemed proper "where the defendant offers legitimate reasons and the employee only offers temporal proximity." Gerard v. Bd. of Regents, 324 Fed. Appx. 818, *826, 2009 U.S. App. LEXIS 9726, *21 (11th Cir. 2009).

90. Petitioner failed to meet her burden of proving pretext. Petitioner acknowledged the legitimate reasons offered by Respondent, but offered proof of only temporal proximity in response. Petitioner argued that this should suffice because in Petitioner’s view, Respondent failed to substantiate its reasons. But it was not Respondent’s burden to present proof to substantiate its reasons; it was Petitioner’s burden to “meet the proffered reason head on and rebut it.” Chapman, supra. Petitioner failed in this regard.

91. Petitioner did not meet her ultimate burden to prove that Respondent retaliated against her because of her complaint to the human resources department against Mr. Bowman.

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 dismissing the Petition for Relief by Petitioner, Donna Earley, against Respondent, Teleflex, Inc.

DONE AND ENTERED this 2nd day of March, 2017, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of March, 2017.

ENDNOTES

[1/] Petitioner's testimony was confusing at times, often lacking in detail and context, such as the timing of when certain events occurred in relation to other events. For example, her testimony regarding the various changes to her sales territories and managers was hard to follow, and her testimony at hearing on this subject seemed inconsistent with her deposition testimony on the same subject. The findings reflect the undersigned's reconciliation of the somewhat disjointed testimony in the record, and at times are necessarily vague (e.g., "at some point") when that is the best the record testimony would support.

[2/] Petitioner did not claim in her charge of discrimination that Respondent's decision in early 2014 to split the state of Florida into two separate territories was an act of discrimination against her. Petitioner's complaint filed with FCHR alleged that the earliest time that she was allegedly subjected to unlawful discrimination was in August 2014. The business purpose standing behind the company's decision to split Florida into two territories in March 2014 was shown to be reasonable; Petitioner did not attempt to prove otherwise.

[3/] Mr. Phillips' assessment of Petitioner was set forth in a document sent by email from Mr. Phillips to Mr. Bowman, and then

they met to discuss it. Although Petitioner questioned the authenticity of the document, which was not signed or dated, Mr. Bowman credibly explained when and from whom the document was received, and his testimony in this regard is credited. In addition, the contents of the document substantiate that the source was Mr. Phillips. For example, one criticism was that Petitioner struggles with technical things, such as learning "simple Excel functions," and had not taken the time to learn, even though she had been told about the Excel courses available at no charge on the company's website. Petitioner confirmed her belief that Mr. Phillips wrote that critique, as he had spoken with her about her problems using Excel and the need to improve. Also of note is this passage: "[B]ecause Donna is an emotionally charged and dramatic person she has a very difficult time with change. When I informed her about the territory split, she was quiet at [first], and then became livid! You would have thought I fired her; she was so upset and emotional (to the point of tears)." (Resp. Exh. 8 at 5). Petitioner confirmed that it was James Phillips who informed her of the territory split into north Florida and south Florida territories, which occurred in the first quarter of 2014 before Mr. Bowman was hired. Although Petitioner questioned whether a few other parts of the assessment may have been written by Mr. Bowman or by Mr. Phillips and Mr. Bowman together, her reasoning was unclear or unsubstantiated and her suspicions are not credited. For the most part, when asked to explain why she did not believe Mr. Phillips authored particular statements, she lapsed into arguing whether the statements themselves of various negative qualities had merit. Regardless, as noted at hearing, the assessment document is hearsay if offered to prove the truth of the statements made in that document, and for that purpose, can only be considered to the extent it supports or explains other admissible evidence. § 120.57(1)(c), Fla. Stat. The assessment document can also be considered for reasons other than the truth of the matters asserted. In this vein, whether the statements are true or not, the fact that the document was provided by Petitioner's manager of a few months as his personal assessment of a salesperson who would become the charge of the incoming new manager was considered, just as Mr. Bowman's testimony has been considered that he did not accept Mr. Phillips' personal assessment of Petitioner because he wanted to judge Petitioner for himself.

[4/] Embellishing on her perception that he was trying to bring her down, Petitioner testified that in their first meeting on July 1, 2014, Mr. Bowman made a gesture with his hands around his own neck holding his head up; he said that he was holding her up and that he could either lift her up or bring her down. Petitioner

described this as a threatening, choking gesture. Petitioner's description was overly dramatic and not found to be credible. It is not credible that Petitioner would have experienced an incident as she described it and not report it to anyone, even the human resources department when she ultimately complained about Mr. Bowman, nor include it in the "exact diary of events leading to" her termination in her complaint filed with FCHR.

5/ Petitioner admitted in her deposition testimony that she knew Mr. Bowman wanted to quote a higher price for the new pump. As she stated: "[W]e did not see eye to eye on that, but he never explained what his thought process was and why that had to be changed to a higher quote[.]" (R. Exh. 28 at 154). Given this explanation, Mr. Bowman's reaction to Petitioner's email was understandable, as the email informed the customer that Mr. Bowman was the cause of the delay, perhaps as a way to put pressure on Mr. Bowman to accede to Petitioner's viewpoint.

6/ Petitioner described a conversation with Mr. Bowman while they were in Alabama visiting customers in late October 2014, in which the general subject of retirement came up. Mr. Bowman's hearing testimony describing the context of this innocuous conversation was credible and is credited. Mr. Bowman went with Petitioner on a two-day field trip to Alabama. The conversation came up during the second day of the two-day trip, during a one-hour drive to Tuscaloosa to see a customer. The drive was in the country on a beautiful fall day, and Mr. Bowman and Petitioner talked about their personal situations and got to know each other a little bit. Petitioner shared how she met her husband in high school and how he initially worked for the telephone company in Chicago, which caused Mr. Bowman to share that his father had worked for the telephone company in Pennsylvania until he retired. The overall conversation was one of families and life progression. The general subject of retirement was part of that, but only as a passing reference; like Petitioner, Mr. Bowman was in his late 50s at the time. Mr. Bowman emphatically (and credibly) denied that he was trying to get Petitioner to retire as a result of that conversation. Petitioner acknowledged that Mr. Bowman never said anything directly about Petitioner's retirement plans, much less suggest that Petitioner should consider retiring early, but Petitioner said she interpreted it that way. Here too, Petitioner's description was overly dramatic, as she started describing a conversation in which retirement came up during a drive of almost two hours, but then her story became that Mr. Bowman talked about nothing but retirement for two solid days. Petitioner also testified that she was so troubled by the retirement talk that she made an anonymous call to the Teleflex

ethics hotline. In contrast, she told Ms. Robichaud when she complained about Mr. Bowman on October 1, 2015, that she called the ethics hotline in August 2014 (months before the Alabama trip), to complain about the loss of some of her Florida sales territory which was later assigned to the newly-hired Mr. Patton.

7/ Petitioner also argued that there was sufficient evidence to allow the fact-finder to find that the reasons given by Respondent for terminating her employment were a pretext for retaliation, based on various alleged inconsistencies and challenges to the credibility of Respondent's witnesses. However, Petitioner's positions regarding alleged inconsistencies and credibility have not been accepted and are not reflected in the findings of fact. Moreover, Petitioner's claims of inconsistency and lack of credibility were not directed to refuting Respondent's proffered reasons for the adverse employment decision.

8/ References to Florida Statutes are to the 2016 codification.

9/ Petitioner's prima facie burden is not an onerous one. While evidence related to Petitioner's job performance is relevant to Respondent's explanation for its action and whether that explanation was a pretext for unlawful discrimination or retaliation, such evidence does not preclude a determination that Petitioner was qualified to do the job, insofar as that inquiry is part of the prima facie burden. See Crapp v. City of Miami Bch. Police Dep't, 242 F. 3d 1017, 1020 (11th Cir. 2001). Accordingly, FCHR has consistently determined that a person is "qualified to do the job" for purposes of satisfying this criterion as part of a prima facie case if the person is shown to be at least "minimally" qualified, with more than "a total lack of qualification," by virtue of having been hired for the position. See, e.g., Ellis v. Am. Aluminum, Inc., Case No. 14-5355 (Fla. DOAH July 14, 2015, FCHR Sept. 17, 2015), FO at 3-4.

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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.