STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ADALBERTO LOPEZ,

Petitioner,

vs. Case No. 17-2417

INSYNC STAFFING, INC.,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on July 28, 2017, at sites in Tallahassee and West Palm Beach, Florida, with Respondent's qualified representative appearing by telephone from Orange County, California.

APPEARANCES

For Petitioner: Adalberto Lopez, pro se
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For Respondent: Charles A. Swartz, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether, on the basis of Petitioner's age, Respondent (a staffing agency) unlawfully discriminated against Petitioner by having him terminated from

his position with Respondent's client, in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

In an Employment Charge of Discrimination filed with the Florida Commission on Human Relations ("FCHR") on August 11, 2016, Petitioner Adalberto Lopez alleged that Respondent inSync Staffing, Inc., an employment agency, had engaged in unlawful discrimination because of age by terminating his assignment with NBTY, Inc., a client of Respondent's.

The FCHR investigated Mr. Lopez's claim, and, on March 16, 2017, issued a Determination stating that no reasonable cause existed to believe that an unlawful practice had occurred. Thereafter, Mr. Lopez filed a Petition for Relief, which the FCHR transmitted to the Division of Administrative Hearings ("DOAH") on April 20, 2017.

The final hearing took place on July 28, 2017. Mr. Lopez, who was self-represented, testified on his own behalf and submitted Petitioner's Exhibit 7, which was received into evidence. In its case, Respondent called an employee named Christina Raimondo as a witness. Respondent's Exhibits 1 through 29 were admitted into evidence as well.

On September 28, 2017, Mr. Lopez filed with DOAH a copy of what purports to be a letter from Wendy M. Fiel, an in-house attorney for NBTY, Inc., dated September 7, 2017. In this

letter, Ms. Fiel makes two assertions of material fact that are in direct conflict with evidence presented at the final hearing of this matter, namely: (1) "At all relevant times, you [Lopez] were an employee of InSync, not NBTY." (2) "NBTY had no role in InSync's decision to terminate your employment." On October 4, 2017, Respondent filed an Objection to Late Submitted Material. Even if the untimely submitted (and unauthenticated) exhibit were received in evidence, it could not support any findings of fact because (i) Ms. Fiel's out-of-court statements clearly constitute hearsay which neither supplements nor explains (and actually contradicts) other substantial competent evidence, and (ii) the letter is not admissible under a recognized exception to the hearsay rule. See § 120.57(1)(c), Fla. Stat. Accordingly, the undersigned sustains Respondent's objection and excludes the Fiel letter from consideration by the fact-finder.

The final hearing transcript was filed on October 3, 2017. Each party timely filed a proposed recommended order on or before the deadline, which was October 13, 2017.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2017.

FINDINGS OF FACT

1. Respondent inSync Staffing, Inc. ("inSync"), is a company that recruits for, and supplies employees to, its

clients, including, as relevant here, NBTY, Inc. ("NBTY"). inSync is an "employment agency" as that term is used in the Florida Civil Rights Act of 1992 ("FCRA"). See ¶ 13, infra. inSync does not meet face-to-face with most of the candidates it places with clients.

2. On or around August 19, 2015, a recruiter at inSync forwarded the résumé of Petitioner Adalberto Lopez ("Lopez"), then 75 years old, to NBTY in hopes that NBTY might hire Lopez to fill the position of "QA Floor Inspector – Shift 1," a job that paid $13.50 per hour. About a week later, NBTY interviewed Lopez, and, on September 2, 2015, inSync informed Lopez that NBTY was offering him the job. Lopez accepted the offer.

3. NBTY, not inSync, made the decision to hire Lopez. At all times, inSync acted essentially as a go-between, introducing Lopez to NBTY and helping him apply for the job, informing Lopez of NBTY's training and drug test requirements for new employees, and providing him with documents that NBTY wanted completed and returned in the ordinary course of new-hire onboarding.

4. One of the documents that Lopez was required to sign and submit was the Employment Eligibility Verification (Form I-9), which is used by the U.S. Department of Homeland Security, administrator of the federal E-Verify program, to determine whether an employee is authorized to work in the United States. The E-Verify program provided NBTY with a result

of Tentative Nonconfirmation ("TNC"), meaning that there was, at a minimum, some discrepancy between the information provided in Lopez's Form I-9 and that available in other public records. A TNC does not necessarily disqualify an employee from continuing to work, but it does need to be resolved to avoid the possibility of termination. In this instance, there is no persuasive evidence that the TNC led NBTY to take any adverse action against Lopez. There is, moreover, no evidence that inSync took any adverse action against Lopez as a result of the TNC.

5. Lopez's first day of work at NBTY was September 14, 2015. The next day, NBTY terminated Lopez's employment. Nevertheless, Lopez showed up for work on September 16 and was told, again, that he no longer had a job. There is no persuasive evidence that inSync played any role in NBTY's decision to fire Lopez. inSync did, however, communicate this decision to Lopez, telling him that he had "been terminated due to not catching on fast enough." This was the reason for the termination given to inSync by NBTY. There is no persuasive evidence that this was not, in fact, NBTY's reason for firing Lopez.

6. There is no persuasive evidence that NBTY eliminated Lopez's job, but there is, likewise, no evidence that NBTY filled the vacant position after Lopez's termination, nor (it

obviously follows) any proof regarding the age of Lopez's successor (assuming NBTY hired someone to replace Lopez). There is no evidence concerning the candidates, if any, that inSync referred to NBTY after Lopez had been fired.

Ultimate Factual Determinations

7. There is no persuasive evidence that any of inSync's decisions concerning, or actions affecting, Lopez, directly or indirectly, were motivated in any way by age-based discriminatory animus. Indeed, there is no competent, persuasive evidence in the record, direct or circumstantial, upon which a finding of unlawful age discrimination could be made.

8. Ultimately, therefore, it is determined that inSync did not discriminate unlawfully against Lopez on the basis of his age.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

10. As stated in City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008):

> The Florida Civil Rights Act of 1992 (FCRA) prohibits age discrimination in the workplace. See § 760.10(1)(a), Fla. Stat. (2007). It follows federal law, which prohibits age discrimination through the Age

> Discrimination in Employment Act (ADEA). 29 U.S.C. § 623. Federal case law interpreting Title VII and the ADEA applies to cases arising under the FCRA. Brown Distrib. Co. of W. Palm Beach v. Marcell, 890 So. 2d 1227, 1230 n.1 (Fla. 4th DCA 2005).

11. Section 760.10(1)(a), Florida Statutes, provides that it is an unlawful employment practice for an *employer*:

> 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, pregnancy, national origin, age, handicap, or marital status.

12. Section 760.10(2) provides that it is an unlawful employment practice for an *employment agency*:

> [T]o fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status or to classify or refer for employment any individual on the basis of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

13. The term "'[e]mployment agency' means any person regularly undertaking, with or without compensation, to procure employees for an employer or to procure for employees opportunities to work for an employer, and includes an agent of such a person." As found above, inSync is an employment agency as that term is defined in the FCRA.

14. Lopez's theory of the case is that his *discharge* was the result of unlawful age discrimination, not any failure or refusal to refer him for employment. It is undisputed, moreover, that inSync referred Lopez to NBTY for employment. The facts, therefore, rule out consideration of this case as a matter of "refusal to refer" discrimination.

15. As found above, the decision to discharge Lopez was taken by NBTY, which was his employer. Because, as also found, there is no persuasive evidence that inSync had any involvement in that decision other than merely to communicate it to Lopez, it is doubtful (to say the least) that inSync can be held legally liable as an employment agency for "otherwise" discriminating against Lopez. Rather than recommend a disposition on that basis, however, the undersigned will examine the facts as if inSync were a joint employer (which was neither proved nor alleged) or, alternatively, were potentially guilty, as an employment agency, of discriminating against Lopez by some action other than refusing to refer him for employment.

16. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court articulated a scheme for analyzing employment discrimination claims where, as here, the complainant relies upon circumstantial evidence of discriminatory intent. Pursuant to this analysis, the complainant has the initial burden of establishing by a

preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. Id.; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993).

17. A prima facie case of age discrimination is made "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." Hogan, 986 So. at 641; Miami-Dade Cnty. v. Eghbal, 54 So. 3d 525, 526 (Fla. 3d DCA 2011); see also, O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 313 (1996)("In the age-discrimination context, . . . an inference [that the employment decision was based on an illegal discriminatory criterion] cannot be drawn from the replacement of one worker with another worker insignificantly younger.").[1/]

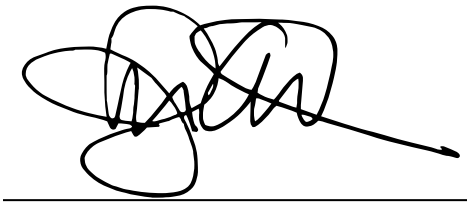
18. Lopez offered proof sufficient to establish the first, second, and third elements of the prima facie case. With regard to the fourth element, however, the evidence fails to show that the position was filled by *any* person, of any age, or that inSync referred only younger or "differently aged" candidates to replace Lopez after NBTY terminated his employment.[2/]

19. Lopez's failure to make out a prima facie case of age discrimination ended the inquiry. Because the burden never shifted to inSync to articulate a legitimate, non-discriminatory reason for its conduct, it was not necessary to make any findings of fact in this regard. Nevertheless, inSync gave such a reason for its involvement in Lopez's discharge, namely that NBTY (inSync's client) reported that it had terminated the assignment "due to [Lopez's] not catching on fast enough," a fact which inSync duly communicated to Lopez. The undersigned found this explanation to be not pretextual.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order finding inSync not liable for age discrimination.

DONE AND ENTERED this 26th day of October, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 2017.

ENDNOTES

[1/] Historically, the FCHR has taken the position that the protected class, for purposes of age discrimination claims under the FCRA, includes all living human beings, and that the comparator's age need not be "substantially younger" to establish a prima facie case, but merely "different." See, e.g., Manzaro v. Dep't of Child. & Fams., FCHR Case No. 2004-22128, FCHR Order No. 05-123 (FCHR Nov. 3, 2005). The undersigned frankly fails to see how a reasonable inference of *age* discrimination could arise from, for example, evidence establishing that an otherwise qualified 34-year-old plaintiff was rejected in favor of a 35-year-old applicant. As it happens, however, no need arises here to decide whether the FCHR's version of the prima facie case is correct, because (i) Lopez is more than 40 years old; (ii) he presented no evidence proving that the position was filled after his departure, much less about the age of his successor (if there were one); and (iii) there is no allegation or proof that inSync referred only younger or "differently aged" candidates to replace Lopez after NBTY fired him.

[2/] Nor is there any allegation or evidence suggesting that this is a "reduction in force" case involving the *elimination* of Lopez's position, where the employer would have discharged Lopez without intending to find a replacement for him. If this were the case, which was not established, Lopez might have made a prima facie showing of age discrimination by proving that after his termination, others who were not members of the protected class remained in similar positions. E.g., Meinecke v. H & R Block of Hous., 66 F.3d 77, 83 (5th Cir. 1995).

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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.