STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DWAYNE E. CLARK, SR.,

Petitioner,

vs. Case No. 17-3272

UNIVERSITY OF FLORIDA
JACKSONVILLE PHYSICIANS, INC.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 31, 2017, in Jacksonville, Florida, before W. David Watkins, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dwayne E. Clark, Sr., pro se
11334 Bridges Road
Jacksonville, Florida 32218

For Respondent: Jesse D. Bannon, Esquire
Margaret P. Zabijaka, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice pursuant to chapter 760, Florida Statutes, against Petitioner due to his age.

PRELIMINARY STATEMENT

Petitioner filed a Complaint of Discrimination with the Florida Commission on Human Relations (Commission) on November 4, 2016. The Commission entered a Notice of Determination: Reasonable Cause on or about May 3, 2017. Petitioner then filed a Petition for Relief. The Petition was forwarded to the Division of Administrative Hearings (DOAH) on May 11, 2017, for assignment of an Administrative Law Judge to conduct a formal hearing. A Notice of Hearing was issued on June 20, 2017, scheduling the final hearing for August 31, 2017. The hearing commenced as scheduled.

At the final hearing, Petitioner and Respondent presented the testimony of William Davis, Director of Human Resources for Respondent; and Richard Rivera, Human Resources Manager for Respondent. Petitioner testified on his own behalf and was cross-examined by Respondent. Respondent's Exhibits 1 through 7 were received into evidence without objection.

At the conclusion of the hearing, the parties agreed to file their proposed recommended orders, if any, within 10 days of the filing of the final hearing transcript. The one-volume hearing Transcript was filed with DOAH on September 19, 2017, making the deadline to file proposed recommended orders September 29, 2017. At Petitioner's request, that deadline was extended to October 9, 2017. Both parties timely filed their

Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

All citations are to Florida Statutes (2017) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner was employed by Respondent as an Employee Relations Specialist from July 30, 2007, to March 7, 2008. Petitioner's position as an Employee Relations Specialist was a full-time salaried exempt position.

2. Throughout Petitioner's employment, Mary Campbell was the Director of Human Resources for Respondent, and William Davis was the Human Resources Manager for Respondent. Campbell was Petitioner and Davis's direct supervisor.

3. On March 6, 2008, Petitioner submitted a letter of resignation to Campbell, effective Friday, March 7, 2008.

4. Pursuant to Respondent's termination policy, salaried exempt employees are expected to provide a minimum of four weeks' notice of their resignation, and failure to do so could block their eligibility for rehire and payment of accrued paid time off (PTO).

5. Petitioner failed to provide the required four weeks' notice when he resigned his employment with Respondent.

6. Petitioner understood that resigning with less than four weeks' notice would block his eligibility for rehire, but,

despite that understanding, he chose to resign on such short notice because he was starting a new job the next Monday. Petitioner expressed that understanding in his resignation letter, stating: "I understand the ramification of my early resignation but my future employer will not hold a position for thirty days." (Resignation letter, Respondent's Ex. 1).

7. On March 7, 2008, Campbell signed a Personnel Action Notice relating to Petitioner's resignation of employment, stating that "Dwayne Clark resigned his position for another opportunity without proper notice, accepting the consequences of losing PTO and rehire eligibility." Campbell, without the involvement of Davis, classified Petitioner as ineligible for rehire on March 7, 2008. At hearing, Petitioner acknowledged this action was not discriminatory.

8. The Monday after his resignation, Petitioner began working for Citizens Property Insurance as a Human Resources Generalist, and was involuntarily terminated after six weeks of employment with Citizens.

9. In July 2009, Davis was promoted to Director of Human Resources after Campbell resigned from her employment with Respondent.

10. On April 15, 2011, Richard Rivera was hired by Respondent as the Human Resources Manager. Prior to that, Rivera was employed by University of Florida Shands Medical

Center's (UF Shands) Human Resources Department, which shares the same building with Respondent's Human Resources Department. Rivera knew Petitioner as a human resources employee of Respondent in 2007/2008. However, they had never spoken prior to mediation of this matter in 2017.

11. Since becoming Director of Human Resources, Davis has received several requests for an exception to the termination policy from former employees classified as ineligible for rehire. Though he has the authority to do so, Davis has never made an exception to the termination policy or rehired anyone who had been classified as ineligible for rehire.

12. In July 2010 and early 2012, Petitioner asked Davis to make an exception to the termination policy and reclassify him as eligible for rehire. However, Davis did not reclassify Petitioner as eligible for rehire because "[w]hen you make an exception, you have problems enforcing the policy going forward, so that's why I do not make exceptions."

13. Petitioner claims that while he was employed with Respondent, Campbell made two exceptions to the termination policy and allowed the rehire of two former employees who had been classified as ineligible for rehire. However, other than their gender and race, Petitioner could not name or otherwise identify the two former employees in a way that would allow Respondent to attempt to verify his claim.

14. Petitioner asserted that a physician assistant (PA) had been rehired by Respondent after providing less than four weeks' notice of her resignation. Respondent was able to identify that individual as Allison McFauls. Ms. McFauls has worked as a Senior PA since 1998 and has never been an employee of Respondent or subject to Respondent's termination policy. Ms. McFauls has always been employed by UF Shands, which is a separate entity from UF Jacksonville Physicians, Inc., with a separate human resources department and separate personnel policies.

15. Neither Davis nor Rivera is aware of any employee of Respondent receiving an exception to the termination policy.

16. Davis classified Hubert Collins, an Employee Relations Manager, who is nearly 20 years younger than Petitioner, and Christy Wright, who is even younger than Collins, as ineligible for rehire due to their failures to comply with the required resignation notice period in the termination policy.

17. During their conversation in July 2010, Petitioner asked Davis if Respondent would be interested in contracting with Petitioner's consulting company to assist with the Office of Federal Contract Compliance Programs (OFCCP) compliance review. Respondent did not contract with Petitioner because Respondent performed compliance review work and completed its Affirmative Action Plan in-house.

18. Davis did not ask Petitioner questions regarding his age and does not recall having a conversation with Petitioner about retirement since Petitioner's employment with Respondent. Even if such topics of conversation occurred, Petitioner agreed he may have been the one to raise them.

19. On September 12, 2016, Petitioner applied online for a vacant Employee Relations Specialist position with Respondent. However, due to Petitioner's failure to comply with Respondent's four-week notice requirement, Petitioner was ineligible for rehire with Respondent in September 2016.

20. On September 14, 2016, Rivera reviewed the applications and selected which applicants would be interviewed and considered for the open Employee Relations Specialist position.

21. Because Petitioner was ineligible for rehire, Rivera removed Petitioner from further consideration. Rivera did not base his decision on Petitioner's age, and there was no persuasive evidence of record that Rivera was biased against Petitioner because of his age.

22. On September 14, 2016, Rivera rejected Petitioner's application in the online application system and entered "ineligible for rehire" as the reason for rejecting Petitioner's application. The same day, Petitioner was sent a form email

notifying him that his application had been removed from consideration for the Employee Relations Specialist position.

23. No one but Rivera was involved in the decision to remove Petitioner from consideration for the position.

24. Rivera did not inform Davis or anyone else that Petitioner had applied for the Employee Relations Specialist position. Likewise, Davis never directed Rivera or anyone else to reject applications from Petitioner.

25. Petitioner did not communicate with Davis, Rivera, or any other employee about his September 12, 2016, application. Nor did Petitioner request an exception to the termination policy from Davis or anyone else in 2016.

26. Davis did not know that Petitioner had applied for the Employee Relations Specialist position until November 2016, when Respondent was notified by the Commission that Petitioner had filed a charge of discrimination.

27. After receiving Petitioner's charge of discrimination in November 2016, Davis reviewed Petitioner's September 2016 application, and noticed that Petitioner stated that he had resigned from his employment with Citizens Property Insurance, which Davis knew to be false. If Petitioner had been hired for the Employee Relations Specialist position, Davis would have terminated Petitioner's employment for falsifying his application.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569, 120.57(1), and 760.11, Fla. Stat.

29. According to Mr. Clark's Petition for Relief, and the testimony given at final hearing, Petitioner contends that William Davis has discriminated against him because of his age.

30. Pursuant to section 760.10:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

31. Florida courts interpret chapter 760, Florida Statutes, in accordance with federal anti-discrimination laws, codified under Title VII of the Civil Rights Act of 1964 (Civil Rights Act), as amended in 42 U.S.C. § 2000e, et seq.

32. When a petitioner alleges disparate treatment under chapter 760, or the Civil Rights Act, the petitioner must prove that his age "actually motivated the employer's decision. That is, the Plaintiff's age must have actually played a role [in the employer's decision making] process and had a determinative influence on the outcome." Reeves v. Sanderson Plumbing Prods.,

Inc., 530 U.S. 133, 141 (2000) (quotation marks omitted) (alteration in original). "A plaintiff may establish a claim of illegal age discrimination through either direct or circumstantial evidence." Van Voorhis v. Hillsborough Cnty. Bd. of Cnty. Comm'rs, 512 F.3d 1296, 1300 (11th Cir. 2008).

33. A plaintiff bringing a disparate treatment claim of age discrimination "must prove, by a preponderance of the evidence, that age was the 'but for' cause of the challenged adverse employment action." Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009); see also Rodriguez v. Cargo Airport Servs. USA, LLC, 648 F. App'x 986, 989 (11th Cir. 2016)(applying "but for" causation requirement to an age claim brought pursuant to the FCRA). "In other words, a plaintiff must prove that, regardless of other possible contributing factors, the employee's age was the determinative factor, without which the employer would not have taken adverse action." Wineberger v. RaceTrac Petro., Inc., 2015 U.S. Dist. Lexis 35830 (M.D. Fla. 2015).

34. Petitioner has the ultimate burden to prove discrimination by direct or indirect evidence. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). Direct evidence is admissible evidence, which if believed, would prove the existence of discrimination without any need for inference or presumption. Petitioner offered no such evidence.

35. Absent direct evidence of discrimination, Petitioner must prove discrimination by indirect or circumstantial evidence. To prove discrimination by indirect or circumstantial evidence, Petitioner must first establish a prima facie case of the following elements: (a) he is a member of a protected group; (b) he is qualified to do his job; (c) he was subjected to an adverse employment action; and (d) similarly-situated employees, who are not members of a protected group, were treated more favorably than Petitioner. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

36. "Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation . . . ." § 760.11(1), Fla. Stat. Petitioner's charge of discrimination was filed on November 4, 2016. Therefore, the only timely adverse employment action in this case is the September 14, 2016, removal of Petitioner's application from consideration for the Employee Relations Specialist position.

37. If Petitioner proves his prima facie case, the employer then must articulate a legitimate, non-discriminatory reason for the challenged employment decision. Burdine, 450 U.S. at 254. The employer is required only to "produce admissible evidence, which would allow the trier of fact

rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, 450 U.S. at 257.

38. If the employer produces evidence of a non-discriminatory reason for the adverse action, the burden shifts back to Petitioner to prove that the employer's reason was a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 503 (1993).

39. Petitioner has failed to prove a prima facie case of discriminatory failure-to-hire based on age. While Petitioner presented evidence that he is a member of a protected age group, he failed to prove that he was qualified for the position, inasmuch as he has been ineligible for rehire ever since his resignation on March 7, 2008 (the status of which Petitioner admits was non-discriminatory). See Trask v. Sec'y, Dept. of Vets.' Aff., 822 F.3d 1179, 1191 (11th Cir. 2016)("To demonstrate that she was qualified for the position at the prima facie stage, a plaintiff must show that she satisfied an employer's objective qualifications."). In addition, Petitioner failed to present any evidence that Respondent filled the position with a substantially younger person (neither the identity nor the age of the person who filled the Employee Relations Specialist position is of record).

40. Even if, arguendo, Petitioner had proven a prima facie case of discriminatory failure-to-hire based on age, Petitioner

failed to prove that Respondent's articulated legitimate, non-discriminatory reason for taking the employment action is a pretext for age discrimination and that his age was the determinative factor ("but-for" cause) in Rivera's decision to remove his application from consideration. See Gross, 557 U.S. at 180.

41. An employer's articulated non-discriminatory reason cannot constitute pretext for discrimination unless it is shown that the reason was false and that discrimination was the real reason. See St. Mary's Honor Ctr., 509 U.S. at 515. The plaintiff must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find them unworthy of credence." McCann v. Tillman, 526 F.3d 1370, 1375 (11th Cir. 2008).

42. Respondent presented persuasive documentary and testimonial evidence that Petitioner was removed from consideration for the Employee Relations Specialist position by Rivera on September 14, 2016, based solely on his ineligibility for rehire in accordance with Respondent's termination policy. Conversely, Petitioner failed to present any competent evidence (let alone the required preponderance of the evidence) that Respondent's proffered reason for removing him from consideration for the Employee Relations Specialist position is

a pretext for age discrimination. Plainly stated, Petitioner did not present any credible evidence that Respondent's reason for the adverse employment action was a pretext for discrimination.

43. "The ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [employee] remains at all times with the [employee]." Burdine, 450 U.S. at 253. In this case, Petitioner failed to meet his burden.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 30th day of November, 2017, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 30th day of November, 2017.

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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.