

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DANIEL ASKINAS,

Petitioner,

vs.

Case No. 18-3956

UNITED NATURAL FOODS,

Respondent.

_____ /

RECOMMENDED ORDER

On September 17, 2018, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by video teleconference in West Palm Beach and Tallahassee, Florida. Respondent's counsel and witness participated by telephone.

APPEARANCES

For Petitioner: Daniel Askinas, pro se
1208 East Atlantic Avenue, Apartment A
Delray Beach, Florida 33483

For Respondent: Nancy A. Johnson, Esquire
Littler Mendelson, P.C.
111 North Magnolia Avenue, Suite 1250
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue is whether Respondent's failure to hire Petitioner constituted discrimination on the basis of religion, as provided by section 760.10(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

By Employment Complaint of Discrimination filed with the Florida Commission on Human Relations (Commission) on August 17, 2017, Petitioner alleged that Respondent discriminated against him based on religion and race by failing to hire him as a merchandiser. On June 18, 2018, the Commission entered a Determination: No Reasonable Cause.

By Petition for Relief filed with the Commission on July 20, 2018, Petitioner alleged that Respondent discriminated against him based on religion by failing to hire him as a merchandiser. On July 30, 2018, the Commission transmitted the file to DOAH.

At the final hearing, Petitioner confirmed that he was not claiming discrimination based on race. Petitioner and Respondent each called one witness. Petitioner offered into evidence no exhibits. Respondent offered into evidence seven exhibits: Respondent Exhibits 1 through 7, which were admitted into evidence.

On October 30, 2018, the court reporter filed the transcript. On November 13, 2018, Respondent filed a proposed recommended order.

FINDINGS OF FACT

1. Petitioner graduated from the University of Rhode Island with a bachelor's degree in marketing management. He has had an unbroken employment history from 1980 to present.

2. Respondent was employed as a sales representative of casual and sports shoes in south Florida from 1980 to early 1997. After owning and operating a sandwich shop with 60 seats in Boca Raton for six years, Petitioner resumed work as a sales representative of sports shoes for two years. From 2006 through 2009, Petitioner was employed as a marketer and sales representative for various retail lines unrelated to food.

3. For four and one-half years, ending in late 2013, Petitioner was employed as a merchandiser of various Nestle ice-cream products to Publix, Winn-Dixie, Target, and Walmart outlets in West Palm Beach; one of these products was Haagen-Dazs ice cream, which is a natural food. In 2014, Petitioner owned and operated a salad restaurant with 20 seats in Delray Beach. From 2015 to present, for 20 hours weekly, Petitioner has served as a concierge at a private tennis club in Boca Raton. Also, for 2017 and the first half of 2018, for 20 hours weekly, Petitioner also was employed as a merchandiser of Nabisco cookies and crackers to Publix, Walmart, and Target outlets from West Palm Beach to Fort Lauderdale; none of these products is a natural food.

4. Respondent is a distributor of natural foods to retail outlets. At all material times, Respondent employed at least 15 persons for each working day in at least 20 calendar weeks.

5. In 2017, Petitioner submitted a job application to Respondent for a full-time job as a merchandiser with Respondent.

A representative of Respondent contacted Petitioner and set up an appointment for a job interview on July 12, 2017, at a Hampton Inn in Coconut Creek. Keith Olsen, Respondent's manager of retail merchandising, conducted the interview.

6. The interview started unremarkably, as Mr. Olsen described the job, which entailed considerable air travel. Petitioner mentioned that he lived between two major airports. Mr. Olsen then asked Petitioner if he lived in a Jewish community. Petitioner replied that he lived by the beach. Examining Petitioner's resume, Mr. Olsen then asked if Petitioner was Jewish. Petitioner confirmed that he is Jewish. Mr. Olsen said that Respondent, which distributes four or five Kosher food items, sold Kosher food in Boca Raton and Delray Beach, and Mr. Olsen was interested in whether Petitioner might be able to reinvigorate Respondent's lagging Kosher sales.

7. Petitioner then recited his experience in the food industry, and Mr. Olsen said that Petitioner had "plenty" of relevant experience. After Mr. Olsen summarized the benefits, Petitioner noted that he might save them some money on health insurance because he had his own. Mr. Olsen asked if his insurance was the "Obamacare crap," and Petitioner did not reply. Sensing that his inquiry about Petitioner's religion had irritated Petitioner, Mr. Olsen tried to regain his footing by recalling that, as a child, he had delivered newspapers to "Jews,

Catholics, and Christians," but this comment, itself awkward, did not dispel the unease created by Mr. Olsen's earlier question of whether Petitioner was Jewish.

8. To his credit, Mr. Olsen testified candidly, countering two or three specific items of Petitioner's testimony with no more than tepid "I don't recall" answers. His candor supports his remaining testimony concerning the interview process, as set forth immediately below.

9. Respondent received over 200 applications for this position. Mr. Olsen scheduled 11 interviews for July 12, but only eight applicants showed up for their interviews. Having conducted numerous interviews for Respondent, Mr. Olsen always assesses interviewees as to five attributes: customer service, communication skill, ability to read planograms (i.e., diagrams showing the strategic placement of products on shelves), product knowledge, and awareness of national trends. Among the eight interviewees, Richard Magnum demonstrated his superior qualifications as to these five attributes.

10. Mr. Magnum had over 17 years' experience in customer service and merchandising and was "very direct" with his answers. Petitioner's customer service and communication skills placed him third among the eight interviewees as to these attributes. Mr. Magnum also demonstrated easy familiarity with planograms and ranked first among the interviewees as to knowledge of the family

of products purveyed by Respondent; Petitioner and another interviewee were tied for second as to product knowledge. As for national trends, Mr. Magnum "seemed to know what's going on." "National trends" seems to have something to do with marketing and the fact that Respondent has over 90,000 SKUs, which evidently underscores the large number of products handled by Respondent.

11. Following the completion of the interview process, Respondent offered the job to Mr. Magnum, who was still employed by Respondent at the time of the hearing. On these facts, Petitioner has failed to prove that his qualifications were at least equal to those of Mr. Magnum.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction. §§ 120.569, 120.57(1), and 760.11(7), Fla. Stat. Respondent is an employer, as defined in section 760.02(7).

13. Section 760.10(1)(a) declares that it is an unlawful employment practice for an employer to refuse to hire an individual due to the individual's religion. Petitioner must prove discrimination by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

14. This is a disparate-treatment case, as distinct from a disparate-impact or pattern-and-practice disparate-treatment case. Cooper v. Southern Co., 390 So. 3d 695, 723 (11th Cir.

2004). Liability in a disparate-treatment case depends on proof that "'the protected trait actually motivated the employer's decision.'" Young v. UPS, 135 S. Ct. 1338, 1345 (2015) (citing Raytheon Co. v. Hernandez, 540 U.S. 42 (2003)).

15. Absent direct evidence of disparate treatment, a complainant may prove unlawful discrimination by circumstantial evidence, typically using the burden-shifting framework of McDonnell Douglas v. Green, 411 U.S. 792 (1973). Young, 135 S. Ct. at 1345 (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)); Johnson v. Great Expressions Dental Ctrs. of Fla., P.A., 132 So. 3d 1174, 1176 (Fla. 3d DCA 2014). The McDonnell Douglas burden-shifting framework requires that the complainant initially prove a prima facie case of discrimination by proving four elements: he belongs to a minority, he applied and was qualified for an available job, the employer rejected his application, and the employer continued to seek applicants from persons of the complainant's qualifications. Young, 135 S. Ct. at 1345 (citing McDonnell Douglas, 411 U.S. at 802).

16. It is unnecessary to consider the remaining two parts of the McDonnell Douglas burden-shifting framework because Petitioner has failed to prove that his qualifications were at least the equivalent of the qualifications of Mr. Magnum. Respondent elected to hire a more-qualified applicant, so Petitioner is unable to prove a prima facie case of

discrimination in hiring, even assuming that Mr. Magnum is not Jewish. More generally, a largely pointless inquiry about Petitioner's religion coupled with an awkward attempt to show a history of nondiscrimination in the delivery of newspapers provide little support for an inference that Mr. Olsen's rejection of Petitioner's application was motivated by religious discrimination.

RECOMMENDATION

It is

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

DONE AND ENTERED this 28th day of November, 2018, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of November, 2018.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020
(eServed)

Daniel Askinas
1208 East Atlantic Avenue, Apartment A
Delray Beach, Florida 33483

Nancy A. Johnson, Esquire
Littler Mendelson, P.C.
111 North Magnolia Avenue, Suite 1250
Orlando, Florida 32801
(eServed)

Cheyenne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020
(eServed)

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.