STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HOWARD B. WILLIAMS,

Petitioner,

vs. Case No. 18-5953

CRST TRUCKING CO.-CRST EXPEDITED,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH"), via webcast and telephone conference call between Morganton, North Carolina, and Tallahassee, Florida, on January 17, 2019.

APPEARANCES

For Petitioner: Howard Williams, pro se
2471 Watering Place
Morganton, North Carolina 28655

For Respondent: Elizabeth B. Burgess, Esquire
Carr Allison PA
305 South Gadsden Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice by discriminating against Petitioner based on his age.

PRELIMINARY STATEMENT

Petitioner, Howard B. Williams, filed a complaint on October 6, 2017, with the Florida Commission on Human Relations ("the Commission"), alleging that CRST Trucking Co.-CRST Expedited ("CRST Trucking"), committed an unlawful employment practice by discriminating against him based on his age.

Mr. Williams described the alleged discriminatory act as follows:

> In May 2017 I took CRST's Medical Examination. The medical examiner, Jayne Kwiakowsky, who is not an MD but a chiropractor, failed me on my medical examination. Jayne based the determination on my blood pressure. She did not take into consideration that I had not taken my blood pressure medicine, or that I was required by the staff at Jacksonville, Fl, to walk on asphalt before the medical examination. Cameron Holzer, President of CRST Expedited, did nothing to reverse this determination based on age. I am [90]. Others in class were younger than I & they passed.

The Commission conducted an investigation and issued a determination on July 5, 2018, that there was no reasonable cause to conclude that an unlawful employment practice had occurred:

> [Mr. Williams] applied to be re-hired as a truck driver with Respondent's trucking company. He alleged that Respondent failed to hire him based on his age. [Mr. Williams] fails to prove a prima facie case. As a prerequisite to being hired, all applicants must pass a medical exam administered by one of the Department of Transportation's medical examiners. [Mr. Williams] provided a copy of Complainant's medical exam which states that

> Complainant was unsafe to drive because he had hypertension, walked with a forward posture, had labored breathing, and had tremors in his hands. Therefore, the evidence did not reveal that [Mr. Williams] was qualified for the position he sought.

Mr. Williams responded by filing a Petition for Relief with the Commission on July 16, 2018. In addition to reasserting that he had not taken his blood pressure medication on the day of the medical examination, Mr. Williams denied that he walked with a forward posture and had labored breathing. Mr. Williams also asserted that hand tremors do not cause unsafe driving.

The Commission transmitted the Petition for Relief to DOAH on November 14, 2018, in order for DOAH to conduct a formal administrative hearing.

The undersigned scheduled the final hearing to occur in Tallahassee, Florida, on January 17, 2019. During the final hearing, neither Mr. Williams nor CRST Trucking offered any exhibits into evidence. Mr. Williams testified on his own behalf but called no other witnesses. CRST Trucking presented no witness testimony.

Mr. Williams filed his Proposed Recommended Order on January 24, 2019. The Transcript from the final hearing was filed on January 31, 2019. CRST Trucking filed its Proposed Recommended Order on February 8, 2019. Each post-hearing

submittal was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The following Findings of Fact are based on the testimony adduced at the final hearing, matters subject to official recognition, and the entire record in this proceeding.

1. Title 49 C.F.R. § 391.1(a) provides that "[t]he rules in this part establish minimum qualifications for persons who drive commercial motor vehicles as, for, or on behalf of motor carriers." During the time relevant to the instant case, 49 C.F.R. § 391.41(a)(1)(i) mandated that "[a] person subject to this part must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so. . . ." Title 49 C.F.R. § 391.41(b)(6) specifies that a person is qualified to operate a commercial motor vehicle if he "[h]as no current clinical diagnosis of high blood pressure likely to interfere with his ability to operate a commercial motor vehicle safely. . . ."

2. A driver of commercial motor vehicles must obtain the aforementioned certification every two years. See 49 C.F.R. § 391.45(b)(1)(mandating that any driver who has not been medically examined and certified during the preceding 24 months must be medically examined and certified in accordance with

§ 391.43 of this subpart as physically qualified to operate a commercial motor vehicle).[1/]

3. CRST Trucking initially hired Mr. Williams approximately 15 years ago as a commercial truck driver. At that time, Mr. Williams was 75 or 76 years old.

4. Mr. Williams regularly performed drives for CRST Trucking that exceeded 1,000 miles. On one occasion, he drove an 18-wheeler from Florida to California and back.

5. According to Mr. Williams, CRST Trucking wrongfully terminated him in 2010 because he supposedly was unable to safely get in and out of his truck.

6. After he passed the required medical examination, CRST Trucking rehired Mr. Williams in 2015 when he was 88 years old.[2/]

7. At some point thereafter, Mr. Williams' employment with CRST Trucking ended again.

8. Mr. Williams reapplied with CRST Trucking in 2017 when he was 90 years old. After he failed the 2017 examination because his blood pressure exceeded the allowable limit, CRST Trucking did not rehire him.

9. Mr. Williams does not dispute that his blood pressure was high during the examination, but he attributes that to his failure to take his blood pressure medication beforehand.

10. While Mr. Williams testified that CRST Trucking hired younger drivers, he presented no evidence that CRST Trucking

hired younger drivers who failed to obtain the required certification.

11. Mr. Williams was a very compelling and articulate witness and should be commended for his strong desire to continue being a productive member of society. Even though Mr. Williams failed to present a prima facie case of age discrimination, the undersigned is convinced that he is capable of performing meaningful work as an employee or a volunteer.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (2016),[3/] and Florida Administrative Code Rule 60Y-4.016(1).

13. The legislative scheme contained in sections 760.01 through 760.11, Florida Statutes, is known as the Florida Civil Rights Act of 1992 ("the FCRA").

14. Section 760.10(1)(a) prohibits discrimination "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."

15. The FCRA incorporates and adopts the legal principles and precedents established in the federal anti-discrimination

laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et. seq.

16. 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).

17. In the instant case, Mr. Williams has the burden of proving by a preponderance of the evidence that CRST Trucking committed an unlawful employment practice. See EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002)(noting that a claimant bears the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee); § 120.57(1)(j), Fla. Stat.

18. A party may prove unlawful discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631 (M.D. Fla. May 27, 2009), 2009 U.S. Dist. LEXIS 44885 (M.D. Fla. 2009). Direct evidence is evidence that, "if believed, proves [the] existence of [a] fact in issue without inference or presumption." Burrell v. Bd. of Trs. of Ga. Mil. Coll., 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of an

impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

19. There is no direct evidence that CRST Trucking's decision not to rehire Mr. Williams resulted from unlawful discrimination based on his age. That is not uncommon because "direct evidence of intent is often unavailable." Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996). Accordingly, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

20. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence.
If successful, this creates a presumption of discrimination.
Then the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action.
If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 25 (Fla. 3d DCA 2009). Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

21. In order to establish a prima facie case of age discrimination, a petitioner must prove that: (a) he is a member of a protected group; (b) he was qualified for the position; (c) he was subjected to an adverse employment action; and (d) he was treated differently than similarly situated individuals of a different age, as opposed to a younger age. Clark v. Univ. of Fla. Jacksonville Phys., Inc., Case No. 17-3272 (Fla. DOAH Nov. 30, 2017), rejected in part, Case No. 17-01005 (Fla. FCHR Sept. 14, 2018).

22. As for the final element of a prima facie case, the Commission has explained that:

> With regard to the need to establish that Petitioner lost the position to a "younger" person, we note that it has been stated, "Commission panels have long concluded that the Florida Civil Rights Act of 1992 and its predecessor law the Human Rights Act of 1977, as amended, prohibited age discrimination in employment on the basis of any age "birth to death." See Green v. ATC/VANCOM Management, Inc., 20 F.A.L.R. 314 (1997), and Simms v. Niagra Lockport Industries, Inc., 8 F.A.L.R. 3588 (FCHR 1986). A Commission panel has indicated that one of the elements in determining a prima facie case of age discrimination is that Petitioner is treated differently than similarly situated individuals of a "different" age, as opposed to a "younger" age. See Musgrove v. Gator Human Services, c/o Tiger Success Center, et al., 22 F.A.L.R. 355, at 356 (FCHR 1999). The Commission has concluded that, unlike the federal Age Discrimination in Employment Act (ADEA), the age of 40 has no significance in the interpretation of the Florida Civil Rights Act of 1992. See Green, at 315.

Williams v. Sailorman, Inc., d/b/a Popeye's Chicken and Biscuits, FCHR Order No. 04-037 (June 2, 2004). Accord, Coffy v. Porky's Barbecue Restaurant, FCHR Order No. 05-053 (May 18, 2005), Johnson v. Tree of Life, Inc., FCHR Order No. 05-087 (July 12, 2005), and Bean v. Department of Transportation, FCHR Order No. 05-107 (September 23, 2005).

Marchinko v. The Wittemann Co., LLC, Case No. 05-2062 (Fla. DOAH Nov. 1, 2005), rejected in part, Case No. 2005-00251 (Fla. FCHR Jan. 10, 2006).

23. While Mr. Williams testified that CRST Trucking hired younger drivers, he presented no evidence that CRST Trucking hired other drivers who also failed to obtain the certification required by 49 C.F.R. § 391.45(b)(1). As a result, Mr. Williams did not present a prima facie case of age discrimination.

24. In addition, Mr. Williams did not prove by a preponderance of the evidence that he was qualified to be a commercial truck driver. As noted above, Mr. Williams testified that he takes medication for high blood pressure, and 49 C.F.R § 391.41(b)(6) specifies that a person is qualified to operate a commercial motor vehicle if he "[h]as no current clinical diagnosis of high blood pressure likely to interfere with his ability to operate a commercial motor vehicle safely. . . ."

25. Even if it were to be concluded that Mr. Williams established a prima facie case of age discrimination, his failure to obtain the required certification was a legitimate, non-

discriminatory reason for CRST Trucking not hiring him. See 49 C.F.R. § 391.41(a)(1)(i)(mandating that "[a] person subject to this part must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so. . . .").

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 Howard B. Williams's Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 26th day of February, 2019, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of February, 2019.

ENDNOTES

[1/] Title 49 C.F.R. § 391.47 provides a means by which a driver can dispute a determination that he or she is not physically qualified to operate a commercial motor vehicle.

[2/] Mr. Williams was 91 years old at the time of the final hearing.

[3/] All statutory references will be to the 2016 version of the Florida Statutes.

COPIES FURNISHED:

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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.