STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACQUELYN JAMES,

Petitioner,

vs. Case No. 19-1693

FLORIDA DEPARTMENT OF REVENUE,

Respondent.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case on June 7, 2019, in Tallahassee, Florida, before Administrative Law Judge Suzanne Van Wyk of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jacquelyn James, pro se
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For Respondent: Alexandra Marshall Lozada, Esquire
Carla Jane Oglo, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent is liable to Petitioner for employment discrimination in violation of section 760.10, Florida Statutes (2018).[1/]

## PRELIMINARY STATEMENT

On March 16, 2018, Petitioner, Jacquelyn James, filed a complaint of discrimination with the Florida Commission on Human Relations ("FCHR") alleging that Respondent, Department of Revenue ("Department" or "Respondent"), violated section 760.10, by discriminating against her on the basis of her age and in retaliation for engaging in a protected activity. The complaint of discrimination alleges that Petitioner applied for positions with the Department, "met the screening criteria, passed the test for both and interviewed for both positions," but that she was not hired because she had previously filed a charge of discrimination against the Department.

On February 21, 2019, the FCHR issued a Determination: No Cause, and a Notice of Determination: No Cause, by which the FCHR determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On March 28, 2019, Petitioner filed a Petition for Relief with the FCHR. The Petition was transmitted to the Division of Administrative Hearings ("Division") to conduct a final hearing.

The final hearing was scheduled for June 7, 2019, and commenced as scheduled. At the final hearing, Petitioner testified on her own behalf, and offered Exhibits P1 through P23, which were admitted in evidence. Respondent presented the testimony of Tiffany Clark, Lance Swedmark, Debra McCall, Vance

Wiggins, Janeen Evans, Taronza Robinson, and Jonathan McCabe. Respondent's Exhibits R1 through R10 were admitted in evidence.

The one-volume Transcript of the final hearing was filed on June 27, 2019. The parties timely filed Proposed Recommended Orders on July 8, 2019, which have been considered by the undersigned in preparing this Recommended Order.

## FINDINGS OF FACT

1. Petitioner is a 63-year-old female, who was employed by Respondent in its Child Support Program in the Tallahassee Service Center from June 9, 1997, to April 5, 2010.

2. In 1997, Petitioner became employed as a Revenue Specialist II ("RS II") in the Payment Processing and Funds Distribution ("PPFD") section, where she performed financial reviews and audits of client financial accounts.

3. On January 28, 2005, Petitioner was promoted to RS III in that section, where Petitioner continued to perform financial reviews and audits, and assumed supervisory duties, including interviewing candidates and training new employees. In that position, Petitioner was considered a PPFD team expert.

4. At her request to "learn something new," Petitioner was transferred to the Administrative Support section in April 2009. She was assigned half-time to the Administrative Paternity and Support ("APS") team, and half-time to support the PPFD team.

5. The split-time arrangement was terminated in July 2009, and Petitioner was assigned to APS full-time.

6. On December 7, 2009, Petitioner received her first performance evaluation for her new position. The evaluation covered the time period from April 17, 2009, to January 29, 2010.[2/] Petitioner's supervisor, Katherine Osborne, rated Petitioner's overall performance at 2.11.

7. Petitioner was placed on a Corrective Action Plan ("CAP") concurrent with her December 7, 2009 performance evaluation. The CAP period ended on February 8, 2010.

8. On February 16, 2010, Petitioner was notified, in writing, that the Department intended to demote her to the position of RS II because she did not successfully complete the expectations during the CAP period, or "failed the CAP." Petitioner exercised her right to an informal hearing to oppose the intended demotion.

9. On March 2, 2010, Petitioner was notified, in writing, that she was being demoted to the position of RS II because she failed the CAP.

10. Petitioner resigned from her position with the Department, effective April 5, 2010.

11. On September 15, 2010, Petitioner filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), challenging her demotion as illegal employment discrimination.

12. On February 12, 2011, the EEOC issued its determination, stating that it was "unable to conclude that the information obtained establishes violations of the [requisite] statutes."

Petitioner's 2017 Applications

13. On August 16, 2017, the Department advertised 20 openings for an RS III (position 4372) in customer service administration. Petitioner applied for the position, met the screening criteria, took and passed the skills verification test, and was interviewed for the position.

14. Petitioner was interviewed by a selection committee composed of Tiffany Clarke, Janeen Evans, and Jonathan McCabe. Each of the three committee members rated Petitioner's interview as "fair" on a scale which ranged from "poor," "fair," and "good," to "excellent." Petitioner was not considered for the position following her interview.

15. While the Department made some offers to candidates, ultimately the Department did not hire any candidates for position 4372.

16. On October 2, 2017, the Department advertised 30 openings for an RS III (position 6380) in customer service administration.

17. The main difference between the screening criteria for positions 4372 and 6380 was in education and experience.

Position 4372 required applicants to have child support experience, while position 6380 gave a preference to applicants with child support experience. The Department's goal in revising the requirements was to increase the applicant pool in response to the advertisement for position 6380.

18. Petitioner applied for position 6380, met the screening requirements, passed the skills verification test, and was interviewed for the position.

19. Petitioner was interviewed by a selection committee composed of Tiffany Clarke, Lance Swedmark, and Taronza Robinson. All three committee members rated her interview as "good," and recommended advancing Petitioner's application for reference checks.

20. Mr. Swedmark conducted reference checks on Petitioner's application. During that process, he was informed of Petitioner's prior CAP failure, demotion, and resignation. Based on that information, the selection committee determined Petitioner would not be considered for the position.

Hires for Position 6380

21. The Department hired 30 applicants from the pool for position 6380.

22. Of the 30 hires, 10 were over age 40. Specifically, their ages were 56, 50, 49, 49, 48, 46, 44, 43, 42, and 41.

23. Petitioner was 61 years old when she applied for position 6380. None of the members of the selection committee were aware of Petitioner's age when she applied, or was interviewed, for the position.

24. The ages of the 30 new hires were compiled from human resources records specifically for the Department's response to Petitioner's March 2018 charge of discrimination.

25. None of the members of the selection committee were aware of Petitioner's 2010 EEOC complaint against the Department.

CONCLUSIONS OF LAW

26. Sections 120.569 and 120.57(1), Florida Statutes (2019), grant the Division of Administrative Hearings jurisdiction over the subject matter of, and the parties to, this proceeding.

27. Petitioner alleges discrimination on the basis of both her age and in retaliation for engaging in protected conduct, namely filing the 2010 EEOC complaint, in violation of section 760.10.

28. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended, as well as the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623. When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Fla. Power Corp.,

633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

29. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

30. Employees may prove discrimination by direct, statistical, or circumstantial evidence. See Valenzuela, 18 So. 3d at 22.

31. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. See Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). "Only the most blatant remarks, whose intent could be nothing other than to discriminate will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

32. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, 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).

33. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the United States 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), is applied. Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination.

34. When the charging party is able to make out a prima facie case, the burden to go forward 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 (Fla. 1st DCA 1991)(court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Id.; Alexander v. Fulton Cnty., Ga., 207 F.3d 1303, 1335 (11th Cir. 2000).

35. The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. Schoenfeld v. Babbitt, 168 F.3d 1257, 1267 (11th Cir. 1999). The employee must satisfy

this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. Chandler, 582 So. 2d at 1186; Alexander v. Fulton Cnty., Ga., 207 F.3d at 1336.

36. "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 [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265 (11th Cir. 2002); see also Byrd v. RT 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.").

Age Discrimination

37. Section 760.10 provides, "It is an unlawful employment practice for an employer . . . [t]o discharge or to fail or refuse to hire any individual . . . because of such individual's . . . age[.]"

38. 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).

39. To establish a prima facie case of age discrimination under the federal ADEA, the complainant must show that she is a member of a protected age group (i.e., over 40); she was qualified for the job; she suffered adverse employment action; and she was treated less favorably than substantially younger persons. See McQueen v. Wells Fargo, 2014 U.S. App. LEXIS 14387, at *7 (11th Cir. 2014)(citing McDonnell Douglas, 411 U.S. at 792)(the 11th Circuit has adopted a variation of the McDonnell test in ADEA violation claims).

40. Alternatively, Petitioner may establish a prima facie case "by showing by a preponderance of the evidence that age was the 'but-for' cause of the employer's adverse action." McQueen v. Wells Fargo, 2014 U.S. Dist. LEXIS 14387, at *7 (citing Gross v. FBC Fin. Servs., 557 U.S. 167 (2009)).

41. In cases alleging age discrimination under section 760.10(1)(a), FCHR has concluded that, unlike cases brought under the ADEA, the age of 40 has no significance in the interpretation of the Florida Civil Rights Act of 1992. See Lopez v. Wal-Mart Stores East, L.P., Case No. 18-0297 (Fla. DOAH Oct. 25, 2018), rejected in part, Case No. 2017-410 (Fla. FCHR

Jan. 17, 2019). FCHR has determined that to demonstrate the last element of a prima facie case of age discrimination under Florida law, it is sufficient for Petitioner to show that she was treated less favorably than similarly situated individuals of a "different" age as opposed to a "younger" age. See Torrence v. Hendrick Honda Daytona, Case No. 14-5506 (Fla. DOAH Feb. 26, 2015), rejected in part, Case No. 2014-303 (Fla. FCHR May 21, 2015), and cases cited therein. FCHR cites its own final orders as the only basis for this interpretation.

42. FCHR has repeatedly rejected and modified the conclusions of law in the Division's recommended orders construing section 760.10 to apply "protected class" status to individuals over age 40 for the purposes of demonstrating a prima facie case of age discrimination. See, e.g., Downs v. Shear Express, Inc., FCHR Order No. 06-036 (May 24, 2006); Boles v. Santa Rosa Cnty. Sheriff's Off., FCHR Order No. 08-013 (Feb. 8, 2008); Grasso v. Ag. for Health Care Admin., FCHR Order No. 15-001 (Jan. 14, 2015); Cox v. Gulf Breeze Resorts Realty, Inc., FCHR Order No. 09-037 (Apr. 13, 2009); Toms v. Marion Cnty. Sch. Bd., FCHR Order No. 07-060 (Nov. 7, 2007); and Stewart v. Pasco Cnty. Bd. of Cnty. Comm'rs, FCHR Order No. 07-050 (Sept. 25, 2007).

43. In its orders, FCHR reasoned that the conclusions of law being modified "are conclusions of law over which the [FCHR]

has substantive jurisdiction, namely conclusions of law stating what must be demonstrated to establish a prima facie case of unlawful discrimination under the Florida Civil Rights Act of 1992." Freeman v. LD Mullins Lumber Co., Case No. 2013-01700 (Fla. FCHR Nov. 7, 2014).

44. In 2018, the Florida Constitution was amended to create article V, section 21, which reads as follows:

> **Judicial interpretation of statutes and rules.** — In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

45. The undersigned is not required to defer to FCHR's interpretation of section 760.10, and declines to do so. The undersigned adopts the more persuasive legal analysis of the Eleventh Circuit Court of Appeals and Florida courts.

46. Pursuant to controlling federal and state caselaw, Petitioner has not established a prima facie case of age discrimination by circumstantial evidence. Petitioner established the first two elements: (1) she is a member of a protected class (i.e., over 40); and (2) she was qualified for the positions sought (as evidenced by the fact that she met the screening requirements, passed the skills verification tests, and was interviewed for both positions). Petitioner satisfied

the third element because she was rejected for both RS III positions 4372 and 6380.

47. Petitioner did not establish the fourth element--that the positions were filled by persons substantially younger than herself. As to position 4372, the Department did not hire any of the candidates. As to position 6380, Respondent produced competent, substantial evidence that 10 of the 30 positions were filled by applicants within Petitioner's protected class (i.e., over 40). One of those individuals was age 56, a mere five years younger than Petitioner at age 61.

48. Petitioner did not establish a prima facie case by the alternative method of demonstrating by a preponderance of the evidence that age was the "but-for" cause of the Department's decision not to hire Petitioner.

49. Assuming, arguendo, Petitioner had established a prima facie case, the burden shifted to Respondent to articulate a legitimate, non-discriminatory reason for its failure to hire Petitioner. Burdine, 450 U.S. at 255; Chandler, 582 So. 2d at 1183. An employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Id. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997); Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

50. Respondent met this burden by introducing evidence of Petitioner's CAP failure and demotion to RS II from a prior RS III position. The evidence established a legitimate, non-discriminatory reason for the Department's decision not to hire Petitioner for the RS III position.

51. If the employer produces evidence that the decision was non-discriminatory, then the complainant must establish that the proffered reason was not the true reason, but merely a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 516-518 (Fla. 1993). In order to satisfy this final step of the process, Petitioner must "show[] directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Chandler, 582 So. 2d at 1186 (citing Burdine, 450 U.S. at 252-256). The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." Holifield, 115 F.3d at 1565.

52. Petitioner attempted to demonstrate that the Department's articulated reason was mere pretext by attacking the CAP itself as unfounded. Petitioner argued, among other criticisms of the CAP, that she was neither provided the job description in a timely manner, nor the training she needed to succeed in her new position.

53. Petitioner's arguments were misplaced. The issue in this case is not whether Petitioner's 2010 CAP was fair, but whether the CAP failure and demotion were legitimate reasons for failure to hire Petitioner. This proceeding was not the forum to challenge or grieve Petitioner's 2010 CAP.

54. Petitioner did not meet her burden to prove by a preponderance of the evidence that Respondent's articulated reason for not hiring her was a pretext for discrimination.

55. Section 760.10 is designed to eliminate workplace discrimination, but it is "not designed to strip employers of discretion when making legitimate, necessary personnel decisions." See Holland v. Washington Homes, Inc., 487 F.3d 208, 220 (4th Cir. 2007).

56. Because Petitioner failed to either establish a prima facie case of age discrimination or demonstrate that Respondent's articulated reason was mere pretext for discrimination, her petition must be dismissed.

Retaliation

57. Section 760.10(7) prohibits retaliation in employment as follows:

> (7) It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any

> manner in an investigation, proceeding, or hearing under this section. (emphasis added).

58. The burden of proving retaliation follows the general rules enunciated for proving discrimination. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996). As discussed above, Petitioner can meet her burden of proof with either direct or circumstantial evidence.

59. Petitioner did not introduce any direct evidence of retaliation in this case. Thus, Petitioner must prove her allegation of retaliation by circumstantial evidence. Circumstantial evidence of retaliation is subject to the burden-shifting framework established in McDonnell Douglas.

60. To establish a prima facie case of retaliation, Petitioner must show: (1) that she was engaged in statutorily-protected expression or conduct; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Holifield, 115 F.3d at 1566.

61. Petitioner established the first two elements of a prima facie case: (1) she engaged in a statutorily-protected activity when she filed the 2010 EEOC Complaint, and (2) she was not considered for either of the RS III positions for which she applied.

62. Petitioner's case fails because she did not establish the third element--a causal connection between her engagement in the protected activity and the adverse employment action.

63. The U.S. Supreme Court changed the causation standard for Title VII retaliation claims in University of Texas Southwest Medical Center v. Nassar, 570 U.S. 338 (2013). There, the Court held that "[t]he text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under section 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." Nassar, 570 U.S. at 365. "Title VII retaliation claims must be prove[n] according to traditional principles of but-for causation, not the lessened causation test" for status-based discrimination. Id. at 360.

64. There is no direct evidence of a causal connection in this case. Petitioner introduced no evidence that any member of either selection committee raised Petitioner's 2010 EEOC complaint as a basis for removing her application from consideration.

65. Proximity between the protected conduct and the adverse employment action can be offered as circumstantial evidence of causation, but "[m]ere temporal proximity, without more, must be 'very close'." Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007). Even "[a] three to four

month disparity between the statutorily protected expression and the adverse employment action is not enough." Id. (citing Richmond v. Oneok, 120 F.3d 205, 209 (10th Cir. 1997); and Hughes v. Derwinski, 967 F.2d 1168, 1174-75 (7th Cir. 1992)).

66. In the case at hand, a period of seven years elapsed between Petitioner's EEOC complaint and the Department's decision not to consider Petitioner's application for the RS III positions. Thus no inference of causation can be drawn from temporal proximity. See Jones v. Gadsden Cnty. Sch., 2018 U.S. App. LEXIS 35176, at *4 (11th Cir. 2018)("a nine-year gap is too attenuated to establish [plaintiff] would have been hired but-for his 2008 complaint.").

67. "In the absence of other evidence of causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law." Cooper Lighting, Inc., 506 F.3d at 1364. Here, Petitioner introduced no other evidence of retaliatory conduct.[3/]

68. Again, assuming arguendo, Petitioner had established a prima facie case of retaliation, Respondent presented persuasive evidence that its decision not to hire Petitioner was based on her failed CAP and demotion in 2010. Respondent established a legitimate non-discriminatory reason supporting its decision not to hire Petitioner for the RS III position.

69. Petitioner did not meet her burden to establish a prima facie case of retaliation or prove that Respondent's articulated reason for failing to hire her was mere pretext for retaliation.

## 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 finding that Respondent, Florida Department of Revenue, did not commit any unlawful employment practice as to Petitioner, Jacquelyn James, and dismissing the Petition for Relief filed in FCHR No. 2018-04904.

DONE AND ENTERED this 16th day of July, 2019, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 2019.

ENDNOTES

[1/] Unless otherwise noted, all references to the Florida Statutes herein are to the 2018 version.

[2/] There is no record explanation for why the evaluation was given prior to the expiration of the evaluation period.

[3/] The record clearly establishes that none of the selection committee members even knew that Petitioner had filed the 2010 EEOC complaint.

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.