STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD ROBERTSON,

Petitioner,

vs. Case No. 19-3665

UNITED STATES SPECIALTY SPORTS ASSOCIATION, INC.,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019),[1/] on September 18, 2019, by video teleconference at sites in Tallahassee and Altamonte Springs, Florida.

APPEARANCES

For Petitioner: Richard Robertson, pro se
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Kissimmee, Florida 34744

For Respondent: Jennifer K. Birmingham, Esquire
The Birmingham Law Firm, P.A.
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STATEMENT OF THE ISSUE

Whether Petitioner, Richard Robertson, was subject to an unlawful employment practice by Respondent, United States

Specialty Sports Association, Inc., in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

On May 29, 2019, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (the "Commission") alleging that Respondent, United States Specialty Sports Association, Inc. ("USSSA"), violated the Florida Civil Rights Act ("FCRA") by discriminating against him based on his age.

On June 6, 2019, the Commission notified Petitioner that no reasonable cause existed to believe that USSSA had committed an unlawful employment practice.

On or about July 8, 2019, Petitioner filed a Petition for Relief with the Commission alleging a discriminatory employment practice. The Commission transmitted the Petition to the Division of Administrative Hearings ("DOAH") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on September 18, 2019. At the final hearing, Petitioner testified on his own behalf. Petitioner also presented the testimony of Randy Fisher and Buddy Mesher. Petitioner's Exhibits 1 through 6, 8, 9, 11 through 24, 27 through 35, 51, 53 through 59, and 69 through 73 were admitted into evidence. USSSA called

Donald DeDonatis and Charles Beckwell as its witnesses. USSSA's Exhibits 1, 6, 7, 9, 10, and 11 were admitted into evidence.

A two-volume Transcript of the final hearing was filed with DOAH on November 13, 2019. At the close of the hearing, the parties were advised of a ten-day time frame following DOAH's receipt of the hearing transcript to file post-hearing submittals. Petitioner filed a Proposed Recommended Order, which was duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. USSSA is a Florida non-profit corporation that acts as a governing body for a number of amateur sporting events and tournaments across the United States. USSSA currently oversees softball (slow pitch and fast pitch), baseball, flag football, lacrosse, taekwondo, and volleyball among others.

2. USSSA hired Petitioner in January 2007 to serve as its National Umpire in Chief. In this role, Petitioner was tasked to oversee USSSA's umpire program and registrations. His responsibilities included developing and training umpires to work at USSSA organized events. He also interpreted, reviewed, and updated USSSA's softball (slow pitch) rule book. In addition, Petitioner supervised a number of USSSA sporting events and tournaments, including the Men's Major World Series (softball), as well as acted as a liaison arranging for the use of softball fields with Osceola County and Walt Disney World.

3. By all accounts, over his ten years as Umpire in Chief, Petitioner was a consistent and reliable worker with no marked deficiencies fulfilling his job expectations. However, in the fall of 2016 (as more fully addressed below) USSSA reassessed whether it needed Petitioner as a full-time employee continuing as its Umpire in Chief. In December 2016, USSSA relieved Petitioner from his position. Thereafter, Petitioner remained on USSSA's payroll, performing tasks as needed, until June 15, 2017, when he received his last paycheck.

4. Petitioner initiated this action because he believes that USSSA fired him based on his age. Petitioner was 65 years old when USSSA terminated him in June 2017.

5. Donald DeDonatis testified on behalf of USSSA. Mr. DeDonatis stated that he served as USSSA's "CEO, COO, and Chairman of the Board" during Petitioner's last year as Umpire in Chief. Mr. DeDonatis was also the person who terminated Petitioner and hired Charles "Doc" Beckwell to assume his job responsibilities.

6. Initially, Mr. DeDonatis described USSSA's current business operations. Mr. DeDonatis explained that, through 2016, USSSA operated out of Kissimmee, Florida. In 2017, USSSA relocated its corporate headquarters and primary sporting venue to a facility situated in Brevard County. The move was spurred

by the conclusion of USSSA's 15-year contract for the use of athletic fields in Osceola County and Walt Disney World.

7. Mr. DeDonatis relayed that USSSA anticipated that the migration to Brevard County would allow it to expand into other sporting events. Mr. DeDonatis represented that his plan has proven the case. USSSA now organizes, oversees, and provides officials for a number of sporting activities beyond softball and baseball.

8. Mr. DeDonatis stated that USSSA signed its contract to move to Brevard County in December 2016. USSSA completed the transition in April 2017. In order to move, USSSA obtained an 18 million dollar loan. With that loan, USSSA redesigned and refurbished the Space Coast Stadium in Viera, Florida, to serve as its home base. USSSA now has ready access to 15 ball fields which accommodate sporting events and tournaments year round.

9. Mr. DeDonatis also testified regarding the reason he terminated Petitioner. Mr. DeDonatis relayed that the relocation of USSSA's corporate offices offered him the opportunity to reevaluate USSSA's top personnel. Mr. DeDonatis asserted that one of his decisions was to eliminate the position of National Umpire in Chief.

10. Mr. DeDonatis expressed that he notified Petitioner about his future with USSSA (or lack thereof) beginning in August 2016. Mr. DeDonatis insisted that he directly apprised

Petitioner that his job was “done” at the end of December (2016). USSSA, however, did not provide Petitioner a termination letter or any other written notification of its decision.

11. Mr. DeDonatis explained that he specifically decided to terminate Petitioner’s job based on several unsatisfactory developments that had arisen in Petitioner’s performance. Initially, Mr. DeDonatis explained that a number of umpires had raised significant issues regarding Petitioner’s management style and lack of professionalism. For example, Mr. DeDonatis attested that he heard from several sources that Petitioner ran onto a softball field during a game to confront an umpire about his performance. In addition, Mr. DeDonatis was alarmed to hear that on one occasion, Petitioner directed negative and sarcastic comments to several USSSA umpires in public. Mr. DeDonatis felt that not only were these remarks unnecessarily degrading, but they gave the impression to those within earshot that USSSA umpires were not “up to snuff.”

12. Further, Mr. DeDonatis lamented the fact that Petitioner did not take advantage of modern technology when crafting umpire assignments and schedules. Petitioner’s “pen and paper” method was not very efficient. Mr. DeDonatis found that Petitioner’s spreadsheets were too antiquated to effectively communicate schedules to the other USSSA umpires. Finally, Mr. DeDonatis was disappointed that Petitioner had not expanded

the pool of umpires USSSA used for its conference tournaments. He saw no development within the ranks, and Petitioner was not supplementing his umpire roster with “fresh blood.”

13. At the final hearing, other than the technology issue, Mr. DeDonatis conceded that he had no firsthand knowledge or observations of Petitioner’s alleged shortcomings. Neither did USSSA produce any contemporaneous written complaints or evidence documenting Petitioner’s unacceptable conduct.

14. Despite eliminating his position in December 2016, however, Mr. DeDonatis informed Petitioner that USSSA would be willing to keep him on, carrying out his current responsibilities, until USSSA completed its move to Brevard County. Mr. DeDonatis insisted that he had no personal problem with Petitioner. Thereafter, USSSA continued to pay Petitioner, at the same rate, over the next six months, including a $5,000 annual bonus. Petitioner received his last pay check from USSSA on June 15, 2017.

15. To assume Petitioner’s Umpire in Chief duties, Mr. DeDonatis selected Charles “Doc” Beckwell. Mr. DeDonatis believed that Dr. Beckwell had earned a reputation as one of the best field umpires for softball (slow pitch) over the past ten years. Mr. DeDonatis asserted that Dr. Beckwell had developed a great relationship with, and garnered much respect from, the other USSSA umpires with whom he worked.

16. Mr. DeDonatis appointed Dr. Beckwell to oversee USSSA's umpire program to include softball (slow pitch and fast pitch) and baseball. Further, in anticipation of USSSA's expansion into other sports, Dr. Beckwell was to manage all umpire, referee, and judge programs for all USSSA sponsored sporting events and tournaments. Dr. Beckwell would also handle all rule interpretations and applications for all sports USSSA supported.

17. Mr. DeDonatis further explained that USSSA did not hire Dr. Beckwell to replace Petitioner as its National Umpire in Chief. Dr. Beckwell did not become a USSSA employee. Instead, he is an independent contractor. USSSA pays Dr. Beckwell $30,000 a year for his services, which is less than half of the annual salary that USSSA paid Petitioner. Mr. DeDonatis explained that this arrangement fits within USSSA's budget expectations and has worked out "excellently."

18. At the final hearing, Petitioner testified that he began umpiring for USSSA in 1981. Petitioner recounted that, over the next 35 years, he earned a reputation as the best in his field. Petitioner insisted that his character was never questioned during his time with USSSA. He was not aware of one negative word regarding his performance. Petitioner considers USSSA's excuses for firing him a personal attack on his good name and reputation.

19. Petitioner began his association with USSSA as a softball umpire. He continued to actively officiate softball games over the ensuing years, gaining greater local, state, and national recognition and responsibilities. In 2005, USSSA hired Petitioner as a part-time consultant and tournament director. Thereafter, Petitioner moved to Florida to work directly for USSSA's corporate office. In 2007, USSSA promoted Petitioner to its full-time National Umpire in Chief. Petitioner served as USSSA's Umpire in Chief until he was let go in June 2017.[2/] USSSA paid Petitioner $68,000 a year.

20. As Umpire in Chief, Petitioner was in charge of all USSSA umpires assigned to officiate softball (slow pitch and fast pitch) and baseball. He also served as the Director of the 15 USSSA Conference tournaments (softball) and represented USSSA at approximately six other softball tournaments, which took place every year all over the United States. Around 40 USSSA umpires (the "cream of the crop") worked directly under him. In addition, over 12,000 men, women, and young adults were registered as USSSA umpires across America.

21. Petitioner also prepared all umpire schedules for the USSSA Conference tournaments. Petitioner explained that every April, he met with USSSA umpires to discuss upcoming events. He then drafted the tournament travel schedules for the year.

Petitioner asserted that the scheduling system he developed worked very well.

22. Petitioner adamantly maintained that his working relationship with other USSSA umpires never approached a “toxic level” as USSSA claimed. Petitioner vigorously denied that he ever screamed at or belittled umpires. Petitioner testified that no umpire ever complained to him regarding his professionalism or lost confidence in his ability to manage them. Neither was Petitioner aware of a single umpire who quit under his watch.

23. Petitioner stated that if disputes ever arose, he would meet with the umpires off the field to resolve any issues. Petitioner insisted that he never embarrassed an umpire during a game.

24. Otherwise, Petitioner expressed that he met with his team of umpires socially for meals and personal gatherings. Many umpires have stayed at his home. At the final hearing, Petitioner produced a number of e-mails, letters, and text messages which supported his testimony that he was highly thought of by the USSSA umpires.

25. Petitioner further disputed that he ever exposed USSSA umpires to unsafe work environments. Petitioner surmised that any complaints Mr. DeDonatis may have heard concerned adequate hydration during tournaments. Petitioner declared that he regularly offered water, Gatorade, coffee, and food to umpires.

Further, he never refused any umpire's request for a break. Petitioner explained that he typically scheduled umpire crews in three-man rotations. This arrangement would name two umpires to officiate the game, and allow the third umpire to take a break. The umpires would then rotate responsibilities/breaks for the next game.

26. Regarding his umpire training and testing regimen, Petitioner commented that he wanted his umpires to be the best in the business, and he prepared them to be the best in the business. He held them to a very high standard. Petitioner conveyed that he conducted many training clinics every year. He held more training sessions that anyone else in USSSA. He also produced videos, as well as designed an online test.

27. Petitioner denied that he ever became complacent at his job. In 2016, he scheduled and directed the same number of USSSA Conference tournaments (15) as when he started as National Umpire in Chief in 2007. Petitioner represented that his tournaments were always extremely well run. Further, he ensured that all umpires were timely paid for their services and travel.

28. Petitioner confirmed that he had several discussions with Mr. DeDonatis in the fall of 2016 regarding his future as USSSA's National Umpire in Chief. Petitioner, however, denied that Mr. DeDonatis ever told him that his job was "done," or that USSSA intended to outsource his duties. Instead, while

Petitioner was aware that Mr. DeDonatis was reexamining his role, Petitioner was under the impression that he was to continue executing his Umpire in Chief responsibilities through June 2017. Towards this end, USSSA continued to pay Petitioner at the same rate through June 2016, as well as awarded Petitioner an annual $5,000 bonus. Further, Petitioner, at USSSA's instructions, directed a Conference tournament in March 2017.

29. Regarding the basis of his discrimination claim, Petitioner testified that Mr. DeDonatis made several specific comments about his age between January and December 2016. Mr. DeDonatis suggested to Petitioner that after USSSA's move to Brevard County, he needed to "think about retiring . . . you should be thinking about the next step." (Petitioner was turning 65 in June 2017.) Moreover, at the final hearing, Mr. DeDonatis expressed that USSSA "had a plan in place that this Association wouldn't get old at the top. That we would get fresh, and we would keep fresh blood into it all the time."

30. Petitioner offered two witnesses to discuss the quality of his job performance as USSSA's National Umpire in Chief. First, Petitioner called Randy Fisher. Mr. Fisher is a former employee for the City of Kissimmee, Florida, where he worked in the Parks & Recreation Department. In Parks & Recreation, Mr. Fisher served as the athletic supervisor over facilities.

31. Mr. Fisher testified that during the period he worked with Parks & Recreation (2006-2013), USSSA frequently used one of Kissimmee's athletic complexes for its tournaments. Over this time, he often met with Petitioner to coordinate and schedule sporting events.

32. Mr. Fisher relayed that Petitioner directed multiple USSSA softball tournaments per year at the Kissimmee athletic fields. Mr. Fisher expressed that he enjoyed working with Petitioner, and they developed a good working relationship. Mr. Fisher encountered no issues with the manner in which Petitioner managed tournaments. Mr. Fisher found Petitioner well-prepared, responsive, and timely. Mr. Fisher never heard or observed Petitioner yelling at umpires, embarrassing umpires, or denying umpires breaks. Mr. Fisher further conveyed that he never knew Petitioner not to abide by the parks' lightning detection system.

33. Finally, Mr. Fisher represented that the City of Kissimmee hired Petitioner twice a year to conduct training clinics for its local umpires, which Mr. Fisher found very well done.

34. Buddy Mesher also testified on Petitioner's behalf. Mr. Mesher worked as an umpire for USSSA for approximately 12 years prior to the final hearing. He worked for ten years directly under Petitioner.

35. Mr. Mesher considers Petitioner a mentor. He has officiated hundreds of tournament games Petitioner organized. In addition, Mr. Mesher has attended many umpire clinics Petitioner conducted. Mr. Mesher commented that Petitioner's training clinics were very polished and well done.

36. Regarding Petitioner's management style, Mr. Mesher voiced that Petitioner was a very good representative of USSSA. Mr. Mesher expressed that Petitioner took his job very seriously, and he never found Petitioner complacent. Petitioner frequently provided advice to umpires and prepared them well for their performances on the field. Mr. Mesher found Petitioner honest and straightforward.

37. Further, Mr. Mesher never saw Petitioner abuse, embarrass, or yell at an umpire. If Petitioner had "teaching moments," he would pull the umpire aside and talk to him or her privately.

38. Regarding Petitioner's oversight of USSSA tournaments, Mr. Mesher conveyed that he never experienced any issues during tournaments. Mr. Mesher never saw Petitioner put any umpire in danger. Nor did he ever deny an umpire's request for water.

39. To support its defense, USSSA called Charles "Doc" Beckwell, the person who Mr. DeDonatis selected to assume Petitioner's National Umpire in Chief duties.

40. USSSA retained Dr. Beckwell as its National Director of Officials in January 2017. Dr. Beckwell was 56 years old at the time (approximately eight years younger than Petitioner). Dr. Beckwell described his job as a contract position. For his services, Dr. Beckwell confirmed that he is paid $30,000 a year by USSSA.

41. In his role, Dr. Beckwell oversees all umpire development and training for the 16 to 17 different sporting operations USSSA conducts. He also serves as the Umpire in Chief for USSSA's softball (slow pitch and fast pitch) and baseball operations.

42. Prior to becoming USSSA's Umpire in Chief, Dr. Beckwell umpired for USSSA for approximately 37 years. He started on the softball circuit in Michigan. Thereafter, USSSA regularly promoted him to officiate more significant events, including the softball World Series (2002 to present), as well as serve as an instructor at numerous umpire clinics.

43. Dr. Beckwell has known Petitioner since 1999. He first met him when Petitioner served as USSSA's Umpire in Chief, and they have worked numerous sporting events together. Dr. Beckwell believes that he and Petitioner have a good relationship, and he considers Petitioner a friend.

44. Regarding Petitioner's job performance, Dr. Beckwell credibly disclosed that, towards the end of Petitioner's tenure

as Umpire in Chief, he became aware of several complaints from fellow umpires regarding Petitioner's management style. These umpires resented the manner in which Petitioner occasionally spoke to them. Other criticisms concerned difficulties in obtaining water when on the field. (Dr. Beckwell urged that he makes a determined effort to ensure his umpire teams stay hydrated.) Dr. Beckwell was also aware of a general complaint regarding insufficient or inadequate training opportunities for umpires.

45. In addition, Dr. Beckwell persuasively attested that he observed "numerous" occasions when Petitioner displayed a caustic attitude when dealing with umpires. Dr. Beckwell also witnessed Petitioner speak in a sarcastic manner to umpires, which included screaming and yelling.

46. Finally, Dr. Beckwell acknowledged that Petitioner's relationship with a number of USSSA Conference umpires had deteriorated. Dr. Beckwell agreed that Petitioner's demeanor had created a "toxic" environment. Dr. Beckwell revealed that some umpires expressed that they did not want to work with Petitioner.

47. Dr. Beckwell professed no specific knowledge of the reason Mr. DeDonatis terminated Petitioner. However, Dr. Beckwell's description of Petitioner's management style in his final years as Umpire in Chief was convincing and is credited.

48. Based on the competent substantial evidence in the record, the preponderance of the evidence does not establish that USSSA discriminated against Petitioner based on his age. Accordingly, Petitioner failed to meet his burden of proving that USSSA committed an unlawful employment practice against him in violation of the FCRA.

CONCLUSIONS OF LAW

49. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes. See also Fla. Admin. Code R. 60Y-4.016.

50. Petitioner brings this action charging that USSSA discriminated against him in violation of the FCRA. Petitioner's claim centers on his allegation that USSSA terminated him based on his age. The FCRA protects employees from age discrimination in the workplace. See §§ 760.10-.11, Fla. Stat. Section 760.10 states, in pertinent part:

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

51. Section 760.11(7) permits a party for whom the Commission determines that there is not reasonable cause to believe that a violation of the FCRA has occurred to request an administrative hearing before DOAH. Following an administrative hearing, if the Administrative Law Judge ("ALJ") finds that a discriminatory act has occurred, the ALJ "shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." § 760.11(7), Fla. Stat.

52. The burden of proof in this administrative proceeding, absent a statutory directive to the contrary, is on Petitioner as the party asserting the affirmative of the issue. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). The preponderance of the evidence standard is applicable to this matter. See § 120.57(1)(j), Fla. Stat.

53. Regarding age discrimination, the FCRA was derived from two federal statutes, Title VII of the Civil Rights Act of 1964 and 1991, 42 U.S.C. § 2000e, et seq.; and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623. See Brown Distrib. Co. of W. Palm Beach v. Marcell, 890 So. 2d 1227, 1230 n.1 (Fla.

4th DCA 2005). Florida courts apply federal case law interpreting Title VII and the ADEA to claims arising out of the FCRA. Id.; see also City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008); and Sunbeam TV Corp. v. Mitzel, 83 So. 3d 865, 867 (Fla. 3d DCA 2012).

54. Discrimination may be proven by direct, statistical, or circumstantial evidence. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009). Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind the employment decision without any inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); see also Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'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., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

55. Petitioner presented no direct evidence of age discrimination on the part of USSSA. Similarly, the record in this proceeding contains no statistical evidence of discrimination related to USSSA's decision to terminate Petitioner's employment.

56. In the absence of direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial

evidence of discrimination to prove his case. For discrimination claims involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny, Valenzuela, 18 So. 3d at 21-22; see also St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458 (Fla. 3d DCA 2011).

57. Under the McDonnell Douglas framework, a petitioner bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. See McDonnell Douglas, 411 U.S. at 802-04; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006). Demonstrating a prima facie case is not difficult, but rather only requires the plaintiff "to establish facts adequate to permit an inference of discrimination." Holifield v. Reno, 115 F.3d at 1562.

58. To establish a prima facie case of age discrimination in a promotion decision, Petitioner must demonstrate that: 1) he is a member of a protected class, i.e., at least forty years of age; 2) he is otherwise qualified for the position; 3) he was subjected to an adverse employment action; and 4) his position was filled by a worker who was substantially younger than Petitioner.[3/] O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996); Kragor v. Takeda Pharm. Am., Inc., 702 F.3d 1304, 1308 (11th Cir. 2012); and Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008).

59. Florida and federal case law further instruct that, to prevail on an ADEA (and FCRA) claim, the employee must prove, by a preponderance of the evidence, that the employer's adverse employment action would not have occurred "but-for" the employee's age. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180, 129 S. Ct. 2343, 2352, 174 L. Ed. 2d 119 (2009); Rodriguez v. Cargo Airport Servs. USA, LLC, 648 F. App'x 986, 989 (11th Cir. 2016). The petitioner's age must have "actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome." Hogan, 986 So. 2d at 641; Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993); see also Cap. Health Plan v. Moore, 44 Fla. L. Weekly D2590 (Fla. 1st DCA October 23, 2019)(the "'but-for cause' does not mean 'sole cause . . . an employer may be liable under the ADEA if other factors contributed to its taking the adverse action, as long as age was the factor that made a difference' . . . age must be determinative.") (citing Leal v. McHugh, 731 F.3d 405, 415 (5th Cir. 2013).

60. If the petitioner establishes a prima facie case, he creates a presumption of discrimination. At that point, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for taking the adverse action. Valenzuela, 18 So. 3d at 22. A legitimate reason is "one that might motivate a reasonable employer." Rodriguez, 648 F. App'x at 990. The

reason for the employer's decision should be clear, reasonably specific, and worthy of credence. Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991).

61. The employer has the burden of production, not the burden of persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Flowers v. Troup Cnty., 803 F.3d 1327, 1336 (11th Cir. 2015). This burden of production is "exceedingly light." Holifield, 115 F.3d at 1564. The employer only needs to produce evidence of a reason for its decision. It is not required to persuade the trier of fact that its decision was actually motivated by the reason given. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (U.S. 1993).

62. If the employer meets its burden, the presumption of discrimination disappears. The burden then shifts back to the petitioner to prove that the employer's proffered reason was not the true reason but merely a "pretext" for discrimination. Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997); Valenzuela, 18 So. 3d at 25.

63. To establish "pretext," the 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 . . . decision is not worthy of belief." Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 252-256 (1981)); Kogan v. Israel, 211 So.

3d 101, 109 (Fla. 4th DCA 2017). The proffered explanation is unworthy of belief if the petitioner demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Combs, 106 F.3d at 1538; see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000). The petitioner must prove that the reasons articulated were false and that the discrimination was the real reason for the action. City of Miami v. Hervis, 65 So. 3d 1110, 1117 (Fla. 3d DCA 2011) (citing St. Mary's Honor Ctr., 509 U.S. at 515)("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.").

64. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the [petitioner] remains at all times with the [petitioner]." Burdine, 450 U.S. at 253; Valenzuela, 18 So. 3d at 22.

65. Turning to the facts found in this matter, Petitioner failed to establish a prima facie case that USSSA discriminated against him based on his age. Regarding the first three elements, Petitioner sufficiently demonstrated that: 1) he is a member of a protected class (Petitioner was 65 at the time he was

let go); 2) he was qualified to hold his position at USSSA (Petitioner persuasively established that he competently performed as USSSA's National Umpire in Chief for over ten years); and 3) he was subjected to an adverse employment action (Petitioner was fired).

66. Although the burden of proving a prima facie case is not difficult, satisfying the fourth element is problematic for Petitioner. On the one hand, the language of several federal cases supports Petitioner's position. See O'Connor, 517 U.S. at 313, which ruled that the prima facie case does not require the "substantially younger" person to be outside of the protected class, i.e., under forty years of age; Carter v. Decisionone Corp., 122 F.3d 997, 1003 (11th Cir. 1997) a three-year age difference was sufficient to establish age discrimination; and Mazzeo v. Color Resolutions Int'l, LLC, 746 F.3d 1264, 1271 (11th Cir. 2014)("A plaintiff may demonstrate that he was replaced by showing that, after his termination, some of his former responsibilities were delegated to another employee."). When viewed in the light most favorable to Petitioner, the evidence shows that USSSA fired Petitioner and assigned his job responsibilities to a "substantially younger" person.

67. On the other hand, however, two facts stymie Petitioner's argument. First, the evidence substantiates that USSSA eliminated Petitioner's position. Mr. DeDonatis resolved

not to staff a full-time National Umpire in Chief after USSSA moved to Brevard County. Consequently, USSSA did not "replace" Petitioner with another (younger) employee. Secondly, USSSA did not shift any of Petitioner's Umpire in Chief duties to another USSSA worker. Instead, USSSA outsourced all umpire oversight and management to an "independent contractor" (Dr. Beckwell). Therefore, the evidence establishes that USSSA did not fill the position from which Petitioner was fired with a younger employee.

68. Moreover, even assuming *arguendo* that Petitioner established a prima facie case of age discrimination, USSSA articulated several legitimate, non-discriminatory reasons for the adverse employment action about which Petitioner complains. USSSA's burden to refute Petitioner's prima facie case is light. USSSA met this burden. First, Mr. DeDonatis persuasively attested that his decision to fire Petitioner was broadly motivated by his effort to reduce expenditures. This position is supported by the fact that USSSA paid Dr. Beckwell less than half Petitioner's salary to assume the Umpire in Chief responsibilities. As an additional reason, USSSA provided credible testimony that USSSA began questioning Petitioner's management style. Dr. Beckwell confirmed Mr. DeDonatis' statements that Petitioner's personal interactions with several umpires had created a "toxic" atmosphere within the USSSA Conference officiating corps.

69. Completing the McDonnell Douglas burden-shifting analysis, Petitioner did not prove, by a preponderance of the evidence, that USSSA's stated reasons for firing him were merely a "pretext" for unlawful discrimination. The record in this proceeding does not support a finding or legal conclusion that USSSA's proffered explanations were false or not worthy of credence.

70. As detailed above, USSSA persuasively argued that USSSA's decision to discharge Petitioner in June 2017 was based on non-discriminatory grounds. First, the evidence bears out that USSSA terminated Petitioner for economic reasons. Both Mr. DeDonatis and Dr. Beckwell credibly testified that Dr. Beckwell can capably serve as Umpire in Chief as a part-time independent contractor while reducing USSSA's expenditures.

71. Secondly, the facts found in this matter support Mr. DeDonatis' representation that Petitioner wielded a brusque management style that rankled some of the umpires he supervised. Mr. DeDonatis had no firsthand knowledge of any such confrontations. Nor did he produce any documentation backing his statement. However, Dr. Beckwell, who personally observed "numerous" confrontations between Petitioner and USSSA umpires, confirmed Mr. DeDonatis' testimony.

72. Based on this evidence, Petitioner did not prove "pretext." In other words, Petitioner did not show that the

reasons Mr. DeDonatis raised for terminating Petitioner were false. Neither does the evidence establish that USSSA fired Petitioner based on his age.[4/]

73. Accordingly, even if Petitioner presented enough evidence to establish a prima facie case of age discrimination, he did not produce sufficient evidence to prove that USSSA would not have fired him "but-for" his age. Consequently, Petitioner did not meet his ultimate burden of proving, by a preponderance of the evidence, that USSSA's decision affecting his employment was based on discriminatory intent.

74. The undersigned is also mindful that in a proceeding under the FCRA, the court is "not in the business of adjudging whether employment decisions are prudent or fair. Instead, [the court's] sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d at 1361. Not everything that makes an employee unhappy is an actionable adverse action. Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001). For example, an employer may fire an employee "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). "An at will employee may be discharged at any time, as long as she is not terminated for a

reason prohibited by law, such as retaliation or unlawful discrimination." Laguerre v. Palm Beach Newspapers, Inc., 20 So. 3d 392, 395 (Fla. 4th DCA 2009).

75. Moreover, it has been consistently held that in reviewing employers' decisions, the court's role is to prevent unlawful employment practices and "not to act as a super personnel department that second-guesses employers' business judgments." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1092 (11th Cir. 2004). An employee cannot succeed by simply quarreling with the wisdom of the employer's reasons. Chapman v. AI Transp., 229 F.3d 1012 (l1th Cir. 2000); see also Alexander v. Fulton Cnty., Ga., 207 F.3d 1303, 1341 (11th Cir. 2000)("[I]t is not the court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated.").

76. The above directions are nevermore applicable than in the present dispute. Petitioner emphatically challenged USSSA's representation that he performed his duties as National Umpire in Chief with less than exemplary conscientiousness and expertise. And, indeed, much of the evidence substantiates Petitioner's asseverations. However, the undersigned's function is not to address "the wisdom of an employer's decisions." The undersigned is charged to determine the employer's motivation. In this matter, the preponderance of the testimony in the record does not link Petitioner's termination with actual discriminatory animus.

On the contrary, USSSA presented plausible justifications for its decision to fire Petitioner, and Petitioner did not demonstrate that those reasons were a "pretext" for age discrimination.

77. In sum, while Petitioner intensely believes (and credibly proved) that USSSA did not need to replace him with another worker, Petitioner did not establish that USSSA's decision to eliminate his job was based on the fact that he was older than the person who assumed his responsibilities. Consequently, Petitioner failed to meet his ultimate burden of proving that USSSA discriminated against him based on his age.

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 Petitioner, Richard Robertson, did not prove that Respondent, USSSA, committed an unlawful employment practice against him; and dismissing his Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 9th day of December, 2019, in Tallahassee, Leon County, Florida.

J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of December, 2019.

ENDNOTES

[1/] All statutory references are to Florida Statutes (2019), unless otherwise noted.

[2/] During the final hearing, USSSA attempted to argue that it terminated Petitioner in December 2016, when Mr. DeDonatis began shifting Petitioner's responsibilities to Dr. Beckwell. However, the facts show that Petitioner was employed by USSSA through June 2017. While USSSA may have removed Petitioner from his position as National Umpire in Chief in December 2016, it continued to pay him at the same rate, as well as assign him the same duties, through June 15, 2017 (when Petitioner received his last paycheck). USSSA did not prove that it was simply paying Petitioner a severance package from December 2016 through June 2017.

[3/] While the federal ADEA (on which the FCRA is modeled) specifically protects employees aged 40 and older, the FCRA does not set a minimum age for a classification of persons protected thereunder. The Commission has determined that the age "40" has no significance in interpreting the FCRA. Accordingly, to establish a prima facie case of age discrimination under the FCRA, Petitioner must show that similarly situated individuals of

a “different” age, as opposed to a “younger” age, were treated more favorably. See Downs v. Shear Express, Inc., Case No. 05-2061 (Fla. DOAH March 14, 2006), modified, Order No. 06-036 (Fla. FCHR May 24, 2006); Boles v. Santa Rosa Cnty. Sheriff’s Off., Case No. 07-3263 (Fla. DOAH December 5, 2007), modified, Order No. 08-013 (Fla. FCHR Feb. 8, 2008); Ellis v. Am. Aluminum, Case No. 14-5355, modified, Order No. 15-059 (Fla. FCHR Sep. 17, 2015).

[4/] Notwithstanding this conclusion, Mr. DeDonatis plainly made several graceless comments regarding Petitioner’s age while transitioning Petitioner out of his role as Umpire in Chief, including his sentiment at the final hearing that USSSA would not “get old at the top.” Despite these remarks, the preponderance of the evidence establishes that Respondent’s age was not the determinative or “but-for” reason for Mr. DeDonatis’ decision to fire him.

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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.