STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JEFF B. PARSONS,

Petitioner,

vs. Case No. 19-5134

MONRO D/B/A MCGEE TIRE AND AUTO,

Respondent.
_____/

SUPPLEMENTAL RECOMMENDED ORDER

Pursuant to notice, a supplemental final hearing was conducted in this case on July 1, 2021, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Ryan M. Barnett, Esquire
Whibbs and Stone, P.A.
801 West Romana Street, Unit C
Pensacola, Florida 32502

For Respondent: Jeffery Alan Meyer, Esquire
Nixon Peabody LLP
50 Jericho Quadrangle
Jericho, New York 11753

STATEMENT OF THE ISSUES

The issues in this portion of the instant proceeding are the amount of back pay/lost wages and interest to which Petitioner is entitled and the amount of attorney's fees and costs that have been reasonably incurred by Petitioner in this proceeding.

PRELIMINARY STATEMENT

On March 2, 2020, the undersigned entered a Recommended Order in this case recommending that the Florida Commission on Human Relations (the "FCHR") enter an interlocutory order finding that Respondent, Monro d/b/a McGee Tire and Auto ("Monro"), committed an unlawful act of age discrimination against Petitioner, Jeff B. Parsons ("Mr. Parsons" or "Petitioner"), while Mr. Parsons was employed by Monro. The Recommended Order also recommended that the FCHR remand this case to DOAH for an evidentiary proceeding to establish the amount of back pay/lost wages owed to Petitioner, and to determine the amount of costs, including attorney's fees, owed to Mr. Parsons.

On May 5, 2021, the FCHR entered an order styled "Interlocutory Order Finding that an Unlawful Employment Practice Occurred and Remanding Case to Administrative Law Judge to Establish the Amount of Back Pay/Lost Wages Owed to Petitioner, and to Determine the Amount of Costs, Including Attorney's Fees, Owed to Petitioner" (the "Interlocutory Order"). As its self-explanatory title states, the Interlocutory Order adopted the Findings of Fact and Conclusions of Law in the Recommended Order and remanded the case to DOAH for further proceedings to determine the amounts of back pay/lost wages, and attorney's fees and costs owed to Petitioner, and for the issuance of a Supplemental Recommended Order as to those amounts.

The final hearing was scheduled for July 1, 2021, on which date it was convened and completed.

At the hearing, Mr. Parsons testified on his own behalf. Petitioner's Exhibits 1 through 4 were admitted into evidence without objection. Monro presented the testimony of Maureen Mulholland, Monro's Executive Vice President and General Counsel; and of Raemary Nacy, Monro's Workers'

Compensation Risk Manager. Respondent's Exhibits 1 through 4 were admitted into evidence without objection.

The one-volume Transcript of the final hearing was filed with DOAH on July 16, 2021. Two unopposed Motions for Extension of Time to File Proposed Recommended Orders were granted by Orders dated July 27 and August 5, 2021. On August 12, 2021, both parties timely filed Proposed Recommended Orders in accordance with the second Order Granting Extension of Time. The Proposed Recommended Orders have been duly considered in the writing of this Supplemental Recommended Order.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Monro is an employer as that term is defined in section 760.02(7), Florida Statutes. Monro is generally in the business of automotive repair and maintenance. Monro operates through subsidiary companies, including McGee Tire & Auto ("McGee Tire"). McGee Tire is in the business of selling, servicing, and installing commercial tires.

2. Mr. Parsons is a white male who was employed by McGee Tire in commercial sales and operations. At the time of the initial final hearing in this case, Mr. Parsons was 55 years old. At all times relevant to the determination of this case, Mr. Parsons was older than 40 years old.

3. As more fully detailed in the March 2, 2020, Recommended Order, Mr. Parsons entered the commercial tire business in 1985 and worked in that industry for about 34 years. He worked his way up to district manager with Bridgestone/Firestone. In about 2001, he opened his own business, Florida Commercial Tire, which was renamed Florida Tire Service in 2010.

4. Florida Tire Service was a successful business, but Mr. Parsons believed the days were limited when an independent dealership such as his

could stay competitive. In 2016, he began negotiations with, and ultimately sold his company to, Monro under a Bill of Sale and Asset Purchase Agreement.

5. The Asset Purchase Agreement, entered into on September 16, 2016, included a non-compete clause, under which Mr. Parsons could not compete against Monro "in the business of operating a tire and/or automotive repair and service facility" within 200 miles of the current location in Pensacola.

6. In addition to selling the business, Mr. Parsons negotiated a contract to work for McGee Tire for $120,000 per year. The Monro negotiators told Mr. Parsons that their salary structure would not allow Monro to pay him a straight salary of $10,000 per month. Mr. Parsons agreed to accept a base salary of $6,500 per month and a guaranteed bonus of $3,500 per month. The company would also give him a truck allowance of $600 per month.

7. At the hearing on remand, Mr. Parsons introduced his W-2 from Monro for the year 2017, his last full year of working for McGee Tire. The W-2 shows wages of $116,965.33. Mr. Parsons credibly testified that this amount did not include his final bonus for the year, which was paid out in early 2018. The W-2 and Mr. Parsons's testimony establish that Monro was paying him $120,000 per year.

8. On March 9, 2018, Mr. Parsons injured his back while loading tires into his truck. He attempted to continue working but was in too much pain. He was sent home on or about March 18, 2018, and was referred to White-Wilson Clinic for treatment.

9. As more fully explained in the March 2, 2020, Recommended Order, Mr. Parsons underwent several rounds of consultation and therapy and was released to work with lifting restrictions. However, McGee Tire disregarded his inquiries and never called him back in to work.

10. Mr. Parsons reasonably believed that he was fully capable of carrying out the primary duty of his job: selling commercial tires. Mr. Parsons testified that he could have fully performed every aspect of the job, including lifting

heavy truck tires, if he had been given the relatively simple and inexpensive accommodation of a lift-gate on his truck.

11. Mr. Parsons testified that he very much wanted to return to work, having gone from making $10,000 per month to receiving workers' compensation payments of $925 per week.

12. McGee Tire replaced Mr. Parsons with a 29-year-old employee who was paid less than $50,000 per year. This employee injured his back on the job and was given accommodations until his back healed. The evidence demonstrated the correctness of Mr. Parsons's statement that "stronger, younger, and less money is what they were after." The undersigned concluded, and the FCHR agreed, that Monro had constructively dismissed Mr. Parsons well before he signed the workers' compensation settlement on or about June 17, 2019, and that Monro had discriminated against Mr. Parsons on the basis of his age.

13. Mr. Parsons ultimately agreed to a workers' compensation settlement of $40,000 with Monro. He testified that by the time of the settlement offer, he was in desperate financial straits and had little choice but to accept. As part of the agreement, Mr. Parsons signed a letter of resignation from McGee Tire.

14. At the hearing on remand, Mr. Parsons testified as to his efforts to secure employment since late 2018, when he realized that McGee Tire was never going to bring him back to work. About six months after his separation from Monro, Mr. Parsons was offered a sales manager job with GCR Truck Tire Centers, now called Southern Tire Mart. Mr. Parsons stated that he declined to negotiate the offer because the job would have entailed working in Pensacola, Fort Walton Beach, and Mobile, Alabama, locations that fell within the prohibition of the non-compete clause.

15. Mr. Parsons testified that he also had a job offer from McGriff Tire Company in Mobile to be one of their outside sales representatives. Mr. Parsons testified that he was required by the non-compete clause to

immediately decline the offer. The job would have interfered with McGee Tire's Pensacola market and would also have resulted in many of McGee Tire's Mobile clients defecting to Mr. Parsons's new employer.

16. The non-compete clause aside, Mr. Parsons testified that he did not wish to take a position that would harm the McGee Tire store in Pensacola. He had built the business from scratch and bore no grudge toward the personnel at the local store. Mr. Parsons testified that he continued to send business to McGee Tire even after his employment ended. He credibly testified that he could have done great damage to the business if he went to work for a competitor and drew away the many customers whose loyalty was more to him than to McGee Tire.

17. Mr. Parsons testified that he examined online job listings in search of a job in the tire business that he would be allowed to take. Specifically, he sought a position as a territorial representative or marketer for a manufacturer such as Goodyear, Bridgestone, or Hankook. Such a job would have enabled Mr. Parsons to sell tires to Monro instead of competing with his former employer.

18. The sticking point with the manufacturer positions was that there were none available in the Pensacola area. Mr. Parsons did not wish to relocate. He and his wife had lived in Pensacola for 34 years. Their adult children still lived in Pensacola. Mr. Parsons testified that, at first, he did not seriously pursue out of town jobs because of his great desire to remain in Pensacola.

19. Mr. Parsons conceded that he could have accepted a low wage job at Target but stated that he wanted to continue in the business he was trained to do.

20. Mr. Parsons testified that he and his wife have made ends meet through her ownership of 98 Treasures, a consignment store in Gulf Breeze. His wife runs the store alone, six days a week. Mr. Parsons works there without pay a few days a week to give her a break. Mr. Parsons estimated

that his wife's annual profit from the store is about $30,000. Ms. Parsons's business was another complicating factor in any decision to move away from the Pensacola area.

21. Since leaving McGee Tires, Mr. Parsons's only income has come from liquidating assets. He testified that he has sold his Ranger bass boat, a mobile home that he used as a hunting cabin, and liquidated his stock in Monro.

22. At the time of the hearing, Mr. Parsons had accepted a job as general manager of a Southern Tire Mart store outside of Montgomery, Alabama, starting in late July or early August of 2021. He testified that with salary and bonuses, he will be making about $150,000 per year. Mr. Parsons testified that he had reached the end of his financial rope, including having a car repossessed, and saw no choice but to relocate.

23. Though Montgomery is a little less than 200 miles from Pensacola, Mr. Parsons believes that his new job presents no business conflict with Monro because it is far enough away from Pensacola to constitute a different market. He testified that he would "bow out gracefully" in the unlikely event of a conflict with Monro's business.

24. Maureen Mulholland, Monro's Executive Vice President and General Counsel, testified for the presumed purpose of showing that Mr. Parsons could have done more to offset his loss of income than he did. To that end, Ms. Mulholland stated that Mr. Parsons read the language of the non-compete clause in a much more restrictive manner than intended by Monro.

25. Ms. Mulholland stated that the phrase, "in the business of operating a tire and/or automotive repair and service facility," was intended to mean only that Mr. Parsons could not *own* a competing business. She testified that Monro would not have objected if Mr. Parsons had accepted a job with a competitor in the Pensacola market, provided he had no ownership interest in the competitor's business.

26. Ms. Mulholland's testimony is not credited. The plain language of the non-compete clause states that Mr. Parsons may not engage in the business of *operating* a tire facility. The language is not restricted to ownership of the business. Monro drafted the non-compete clause. It would have been easy enough for Monro to state "owning" rather than "operating" if such was its intent. It was perfectly reasonable for Mr. Parsons to read the term "operating" to include the kinds of store management jobs that were on offer in the Pensacola area. It is difficult to accept the proposition that Monro would have stood by and done nothing while Mr. Parsons wrecked their Pensacola business by going to work as the manager of a competitor. The undersigned finds that Ms. Mulholland's reading of the non-compete clause is self-serving and at odds with the plain language of the contract.

27. Raemary Nacy, Monro's Workers' Compensation Risk Manager, credibly testified that Mr. Parsons received a total of $47,150.28 in indemnity payments from workers' compensation. Her testimony was based on detailed records from Monro's workers' compensation carrier. It is found that any award of back pay/lost wages to Mr. Parsons should be offset by the amount he received in workers' compensation indemnity payments.

28. In the underlying proceeding, it was established that the last day Mr. Parsons worked for Monro was on or about March 18, 2018. Thus, as of the date of the hearing on remand, Mr. Parsons had lost 39.42 months of income. His income from Monro was $10,000 per month plus a truck allowance of $600 per month. Mr. Parsons's lost income would amount to $394,200, to which should be added the lost truck allowance of $23,652, for a total of $417,852 in back pay/lost wages. After the offset of $47,150.28, the total of back pay/lost wages to which Mr. Parsons is entitled is $370,701.72, plus interest.

29. The credible evidence presented at the hearing, including the detailed invoices of the law firm of Whibbs Stone Barnett, P.A., demonstrated that Mr. Parsons incurred attorneys' fees of $9,956.00 and costs of $1,340.04, for a

total of $11,296.04 in attorneys' fees and costs. Based on the expertise of Mr. Parsons's counsel and the efficient use of time demonstrated by the invoices, it is found that these fees and costs were eminently reasonable.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

31. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "FCRA"), chapter 760, prohibits discrimination in the workplace.

32. Section 760.10 states the following, in relevant 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, national origin, age, handicap, or marital status.

33. Monro is an "employer" as defined in section 760.02(7), which provides the following:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

34. The Florida Civil Rights Act gives the FCHR the authority to issue an order prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay, if it finds, following an administrative hearing, that an unlawful employment practice has occurred. *See* § 760.11, Fla. Stat. It was established in the March 2, 2020, Recommended Order that Monro's constructive dismissal of Petitioner was an act of discrimination on

the basis of age in, violation of section 760.10(1)(a). The Recommended Order's Findings of Fact and Conclusions of Law were adopted in full as the FCHR's final agency action as to those issues.

35. The undersigned must take into account the efforts that Mr. Parsons made to mitigate his damages. As was noted by ALJ Joyous D. Parrish in *Lamarre v. The Richman Group*, Case No. 10-9511 (Fla. DOAH Apr. 6, 2011):

> 42. The purpose of relief in a discrimination case, such as this, is to recreate the conditions and relationships that would have been had there been no unlawful discrimination; that is to say, make the party whole. *See United States v. City of Miami*, 195 F.3d 1292 (11th Cir. 1999). Nevertheless, such party must mitigate damages through reasonably diligent efforts to seek employment that is substantially equivalent. See *Lathem v. Dep't of Child. & Youth Servs.*, 172 F.3d 786 (11th Cir. 1999)….

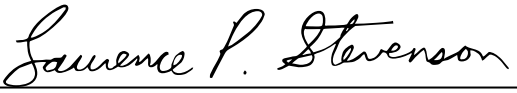
36. The above Findings of Fact demonstrate that Mr. Parsons engaged in a diligent effort to obtain employment that was consistent with his extensive knowledge of, and long experience in, the commercial tire business. He sought a position in Pensacola that was substantially equivalent to his prior jobs and could easily have done so but for the non-compete clause in the Asset Purchase Agreement. He conceded that he might have taken a low wage job, but such employment would have done little to repair the economic damage done to Mr. Parsons and his family by Monro's act of discrimination, and would in any event not have been substantially equivalent to his prior employment.

37. Based on the above Findings of Fact, the undersigned concludes that Mr. Parsons is entitled to back pay/lost wages in the amount of $370,701.72, plus interest, and attorneys' fees and costs in the amount of $11,296.04.

RECOMMENDATION

Based upon 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 Monro, Inc., d/b/a McGee Tire and Auto, committed an act of unlawful discrimination against Petitioner, Jeff B. Parsons, and awarding Petitioner back pay/lost wages in the amount of $370,701.72, with interest, and attorneys' fees and costs in the amount of $11,296.04.

DONE AND ENTERED this 31st day of August, 2021, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2021.

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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.