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.
_______________________________________/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on December 13, 2019, in Pensacola, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Esther J. Neal, Corporate Representative
Monro d/b/a McGee Tire & Auto
The Tire Circle
200 Holleder Parkway
Rochester, New York 14615

STATEMENT OF THE ISSUE

The issue is whether Respondent, Monro d/b/a McGee Tire & Auto, discriminated against Petitioner based upon his age and/or disability, in violation of section 760.10, Florida Statutes.[1]

PRELIMINARY STATEMENT

On February 27, 2019, Petitioner, Jeff B. Parsons ("Mr. Parsons" or "Petitioner"), filed with the Florida Commission on Human Relations ("FCHR") an Employment Complaint of Discrimination against Monro d/b/a McGee Tire & Auto ("McGee Tire"). Mr. Parsons alleged that he had been discriminated against pursuant to chapter 760 and Title VII of the Federal Civil Rights Act, based upon age and disability/handicap. Mr. Parsons essentially stated that he had been injured on the job and, upon being released by his physician to return to light duty, was told the company had nothing for him. Mr. Parsons was never given a definitive notice of dismissal. He was simply never called back to work.

The FCHR conducted an investigation of Mr. Parsons's allegations. On August 23, 2019, the FCHR issued a written determination that there was no reasonable cause to believe that an unlawful practice occurred. The FCHR's amended determination stated as follows, in relevant part:

> Complainant worked for Respondent as a Sales Manager. Complainant is still receiving benefits from Respondent, but has not been working with Respondent since he was injured on the job and went on medical leave. Complainant alleged that Respondent discriminated against him due to his disability and age. However, the investigation did not support his allegations. Respondent stated that

[1] Citations shall be to Florida Statutes (2019) unless otherwise specified. Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla.

> Complainant had the opportunity to return to work after his doctor released him from leave with a weight lifting restriction, but that Complainant did not return to his assignment. Complainant alleged that he could not work for a different company because he had a non-compete agreement, but Respondent denied that there is a non-compete agreement. Complainant did not provide any documentation to support that he has a disability that limits one or more major life functions, so it is not reasonable to believe that Respondent discriminated against him based on a disability. Complainant did not make any specific allegations regarding age discrimination, so it is not reasonable to believe that Respondent discriminated against him due to his age.

On September 23, 2019, Mr. Parsons timely filed a Petition for Relief with the FCHR. On September 25, 2019, the FCHR referred the case to the Division of Administrative Hearings ("DOAH") for the assignment of an ALJ and the conduct of a formal hearing. The final hearing was scheduled for December 13, 2019, on which date it was convened and completed.

At the hearing, Mr. Parsons testified on his own behalf and presented the testimony of Tory Irving, the manager of the McGee Tire location in Cantonment, Florida; and of Tyler Thompson, a sales representative at the McGee Tire location in Cantonment. Mr. Parsons also offered brief rebuttal testimony on his own behalf. Petitioner's Exhibits 1 through 5 were admitted into evidence without objection. Respondent presented the testimony of Anita McGuinness, Director of Commercial Operations for Monro Muffler Brake, Inc. ("Monro"), the parent company of McGee Tire. Respondent offered no exhibits into evidence.

The one-volume Transcript of the final hearing was filed with DOAH on January 13, 2020. Petitioner's unopposed Motion for Extension of Time to

File Response was granted by Order Granting Extension, dated January 16, 2020. On January 31, 2020, both parties timely filed Proposed Recommended Orders in accordance with the Order Granting Extension. The Proposed Recommended Orders have been duly considered in the writing of this 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. McGee Tire is an employer as that term is defined in section 760.02(7). 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 hearing, 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. Mr. Parsons entered the tire business in 1985, when he was 21 years old, taking a position as an outside sales representative for Bridgestone/Firestone. Mr. Parsons worked in commercial fleet sales, developing business with governmental entities such as the Navy, Air Force, cities, school boards, and concrete companies. He went through every training program offered by Bridgestone/Firestone and became certified in off-road, agricultural, industrial, heavy truck, and bus tires, as well as retreading. Mr. Parsons was employed by Bridgestone/Firestone for about 16 years, working his way up to district manager in Pensacola.

4. Mr. Parsons left Bridgestone/Firestone to open his own shop, Florida Commercial Tire, which was renamed Florida Tire Service in 2010.

5. Mr. Parsons testified that, after some growing pains, Florida Tire Service was a successful business. He discussed the difficulties faced by a

small local shop trying to compete with large national companies. Mr. Parsons tried to offset the lower prices offered by the big chains with superior service. If a trucker was stuck on the side of the road at 2 a.m., Mr. Parsons answered their call and sent out his service trucks.

6. Despite his success, Mr. Parsons believed the days were limited when an independent dealership such as his could stay competitive. In 2016, he was approached by George Bradshaw, who for some years had been a friendly competitor of Mr. Parsons in the commercial tire business. Mr. Bradshaw stated that he was now working for a subsidiary of Monro called McGee Tire, and that his company was interested in entering the Pensacola market. They wanted to talk about buying Mr. Parsons's company and/or having him come to work for them.

7. Mr. Parsons testified that he was not eager to sell but neither was he "stupid to the business." He had several meetings with Mr. Bradshaw and Bob Lanpher, another executive in McGee Tire's Florida operation. On September 19, 2016, they completed a deal for Mr. Parsons to sell his company to Monro.

8. The Asset Purchase Agreement included a four-year 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.

9. In addition to selling the business, Mr. Parsons negotiated a contract to come 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 give him a truck allowance of $600 per month and pay for his cell phone. Mr. Parsons would receive bonuses for monthly sales in excess of $150,000.

10. Mr. Parsons testified that "I busted my butt for these guys." From September 2016 through January 2017, Mr. Parsons's main job was finding a new, larger location for the business and then overseeing the transition to, and equipping of, the new store in Cantonment. At the same time, Mr. Parsons continued to act as the main salesperson and dispatcher for McGee Tire.

11. On March 9, 2018, Mr. Parsons and McGee Tire Manager Tory Irving were loading flotation tires into Mr. Parsons's truck for delivery to a customer. Mr. Parsons testified that these tires were used on the front of cement trucks and weighed about 270 pounds each. As he lifted a tire, Mr. Parsons felt a stabbing pain in his back. He rested a bit then delivered the tires to the customer.

12. Mr. Parsons continued coming to work for a few days despite the pain. At the urging of Mr. Irving and Mr. Bradshaw, he took a few days off but the rest did nothing to lessen the back pain. Mr. Parsons returned to work.

13. Mr. Parsons testified that his pain became so intractable that Kevin McGee, the manager in charge of commercial operations for Monro, sent him home and placed him on workers' compensation. On about March 18, 2018, Monro sent Mr. Parsons to White-Wilson Clinic for treatment.

14. The nurse practitioner at White-Wilson Clinic prescribed steroids and anti-inflammatory medications. Mr. Parsons was also given a lifting restriction of 15 pounds.

15. Mr. Parsons testified that subsequent MRIs showed that he had aggravated the sciatic nerve. He was referred to Dr. Barry Lurate, an orthopedist, who concluded that there was no surgical solution for Mr. Parsons's back pain. Medical records indicate that Dr. Lurate reached this conclusion on August 27, 2018. Because Mr. Parsons had back problems that pre-existed the flotation tire incident, Dr. Lurate was uncertain as to what impairment rating to give Mr. Parsons for workers' compensation purposes. However, Dr. Lurate did not doubt that Mr. Parsons was suffering

and should continue on lifting restrictions. Mr. Parsons recalled that Dr. Lurate imposed a 15-20 pound lifting restriction and released him to light duty work.

16. Mr. Parsons testified that he phoned Mr. McGee three or four times to let him know his status, but was unable to reach him. Mr. Parsons testified that Mr. McGee had always been difficult to reach by telephone, so he sent him a text message. Mr. Parsons's message stated that he had been released to come back to work.

17. Mr. McGee responded with questions about Mr. Parsons's lifting restrictions. Mr. Parsons described the lifting restrictions and asserted that he was able nonetheless to sell tires. Mr. McGee told Mr. Parsons that he had no work for him at that time but that he would have "Esther in HR" give him a call.[2] Mr. Parsons testified that this text conversation with Mr. McGee took place in the Fall of 2018 and was the last communication he received from Monro.

18. Mr. Parsons testified that he later phoned Mr. Irving to ask if he had heard anything about the company's intentions. Mr. Irving responded that he had no news but that he wished Monro would bring Mr. Parsons back immediately.

19. 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 loading heavy tires, if he had been given the accommodation of a lift-gate on his truck.

20. A lift-gate is a device that can raise and lower items from ground level to the level of the truck bed. It would have had the effect of allowing Mr. Parsons to roll the commercial tires, the lightest of which weighs over

[2] At the hearing, it was acknowledged that "Esther in HR" was Esther Neal, who acted as Respondent's corporate representative.

120 pounds, onto the lift-gate rather than having to hoist them up and into the truck.

21. Mr. Parsons testified that he discussed the possibility of a lift-gate with Mr. McGee but nothing came of their talk. Mr. Parsons testified that he would have been willing to install the lift-gate at his own expense had McGee Tire shown interest. He stated that a lift-gate costs between $1,600 and $2,000.

22. 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. He testified that he has had several opportunities to work for competitors of McGee Tire, but was stopped by the non-compete clause in the Asset Purchase Agreement with Monro.

23. 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. Mr. Parsons believed that he had been constructively discharged well before he signed the letter of resignation.

24. Mr. Irving testified that he worked for five years at McGee Tire's Dundee, Florida, location before moving to the Cantonment store on July 15, 2017. When Mr. Irving started at Cantonment, Mr. Parsons was the outside salesperson. Mr. Irving described the outside salesperson as the "billboard" of the company, responsible for building relationships and developing customers in the community. According to Mr. Irving, the outside salesperson makes or breaks the store. Without a good outside salesperson, "nobody knows you exist."

25. Mr. Irving testified that Mr. Parsons was highly effective in his job. Mr. Parsons had extensive relationships in the community. He could pick up the phone and turn a $2,000 day into an $8,000 day. Mr. Parsons was a team player, doing whatever needed to be done and asking Mr. Irving where he

needed help. Mr. Irving testified that he never had any problems with Mr. Parsons.

26. Mr. Irving's recollection of Mr. Parsons's injury and consequent events was consistent with Mr. Parsons's testimony. Mr. Irving testified that for a time after his injury, Mr. Parsons continued to work from his home. Mr. Parsons was unable to endure driving to customers in Alabama, but he was able to cover the Pensacola area. Once Mr. Parsons began receiving workers' compensation payments, he was no longer allowed to work for McGee Tire.

27. Mr. Irving testified that Mr. Parsons's workers' compensation case was being handled from Monro's corporate office in New York, and that the local McGee Tire store was in the dark as to when or if Mr. Parsons would be cleared to return to work.

28. Mr. Irving testified that even when Mr. Parsons was on workers' compensation and not being paid a salary, he continued to funnel business to McGee Tire. Mr. Irving remembered that Mr. Parsons handed McGee Tire a $79,000 sale by Esfeller Construction at a time he was not working and stood to receive no compensation for the referral.[3]

29. Mr. Irving testified that Monro made the decision to hire someone else for the outside sales position in about March 2018.[4] Monro hired Scott Rainy. Mr. Irving testified that Mr. Rainy could not compare to Mr. Parsons in terms of knowledge about the merchandise and of the Pensacola area. People would come into the store and ask where Mr. Parsons was. Mr. Irving stated that "people buy from people," and McGee Tire was losing business because Mr. Parsons was not there to take care of his customers. According to Mr. Irving, Mr. Rainy lasted in the job only until July 2018.

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[3] Mr. Parsons testified that Esther Neal was aware that he was working while receiving workers' compensation and told him to stop.

[4] Mr. Irving's recollection as to the date cannot be correct, because Mr. Parsons was not injured until March 9, 2018. Based on context, it is assumed that the hiring decision was made in April or May of 2018.

30. In November 2018, Monro hired Tyler Thompson to replace Mr. Rainy. Mr. Irving testified that Mr. Thompson has done a better job but still does not measure up to Mr. Parsons as a salesperson. Mr. Irving stated that Mr. Parsons is “gold” and Mr. Thompson is “silver” in terms of sales. As of the hearing date, Mr. Thompson was still working at McGee Tire.

31. Mr. Irving testified that no one from Monro consulted him as to any accommodations that could be made to allow Mr. Parsons to return to work. Mr. Irving specifically suggested to the company that tire technicians could be used to help Mr. Parsons load and unload tires, but he received no feedback on his suggestion.

32. Mr. Irving believed that Mr. Parsons was a “rainmaker.” His ability to sell tires was far more important than his ability to physically deliver them. Other staff persons could help Mr. Parsons with the deliveries. Mr. Irving testified that he would have liked to have Mr. Parsons back in the sales job.

33. Mr. Thompson testified that he has worked for McGee Tire off and on for four years. He was originally hired by Mr. Parsons at Florida Tire Service as a “tire technician,” i.e., the employee who performs the manual labor of changing and repairing tires and going out on road service calls.

34. When Monro purchased Florida Tire Service, Mr. Thompson went with Mr. Parsons to McGee Tire. Mr. Thompson testified that Mr. Parsons insisted Mr. Thompson be part of the package when Monro bought the company because Mr. Parsons knew that he could not afford to lose his job.

35. Mr. Thompson had quit his job at McGee Tire and was working in marine construction when he was contacted by McGee Tire’s general manager Peter Brown in November 2018 and offered the tire sales position.

36. Mr. Thompson testified it was his understanding that he was coming in to take Mr. Parsons’s old job. Mr. Thompson was 29 years old at the time he accepted the sales position. He agreed to a salary of less than $50,000.

37. Mr. Thompson testified that he never heard any discussions about bringing Mr. Parsons back to work. He had the impression that Mr. Parsons was not coming back.

38. Mr. Thompson was friendly with Mr. Parsons. They sometimes went hunting together. Mr. Thompson testified that he knew Mr. Parsons wanted to come back to McGee Tire. He recalled Mr. Parsons telling him that McGee Tire would not let him come back to work because of his injury.

39. Mr. Thompson testified that he normally comes in to work at 7:30 a.m., and does paperwork for about an hour. From about 8:30 a.m. until 3:30 p.m., he is on the road. He drives to customers' businesses, looks over their fleets and assesses their needs. Mr. Thompson stated that most businesses are beginning to wind up their day by 3:30 p.m. and do not want a salesperson "in their face" when they are trying to go home. He finishes up his day at the office.

40. Mr. Thompson testified that while his position mostly involves sales, it can also be a physical job. Sometimes he must carry tires, load them on a trailer, drive them to the customer, then unload them at the customer's place of business.

41. Mr. Thompson testified that he was injured on the job about three months prior to the hearing date. He loaded about 30 commercial tires weighing roughly 100 pounds each into his truck and made the two hour drive to the customer's location. He dropped off the tires and drove back to McGee Tire to close out the work day. He drove home. When he stepped out of his truck, his back "just kind of took me to my knees."

42. His physician prescribed anti-inflammatories and placed him on a five-pound lifting restriction. McGee Tire gave him the option of sitting at his desk rather than driving his truck because driving increased his back pain. Mr. Thompson testified that he tried working from his desk for a couple of days but decided there was money to be made on the road selling tires and went back out.

43. Mr. Thompson testified that Mr. Brown directed the tire technicians to help him load and unload tires while he convalesced. His back improved over the course of two months. Mr. Thompson testified that his lifting restriction had recently been raised from five to 15 pounds.

44. Mr. Thompson confirmed that Mr. Parsons had given him the lead that helped him make a large sale to Esfeller Construction, around 280 tires at $300 per tire. Mr. Thompson also confirmed that Mr. Parsons received nothing for helping with that sale.

45. Anita McGuinness, Monro's Director of Commercial Operations, testified on behalf of her employer. Ms. McGuiness testified that she was hired to consolidate the operations of three recently acquired tire companies, including McGee Tire, into one streamlined, profitable entity.

46. Ms. McGuiness testified at some length about the reorganization she oversaw in 2018, but little of her testimony was directly relevant to the issues raised by Mr. Parsons. She made a point of stating that a salesperson has no supervisory authority over tire technicians, presumably as a way of stating that someone in Mr. Parsons's position could not order a tire technician to help him load tires into his truck. This statement fails to acknowledge that the actual supervisor, Tory Irving, was perfectly willing to order the tire technicians to assist Mr. Parsons if the company would agree to bring him back to work.

47. The statement also fails to acknowledge that tire technicians in fact assisted Mr. Thompson when he injured his back. Mr. Thompson testified that his supervisors have told him that he is above the tire technicians in the chain of command and has the authority to direct them when something needs to be done. He characterized the McGee Tire workforce as a "team" and stated that no one has ever refused to help him load tires.

48. Ms. McGuiness testified that the main difference between Mr. Parsons and Mr. Thompson was that the former was "an ex-owner." She stated that Mr. Parsons's main job was to keep the store profitable during the transition

to Monro, while Mr. Thompson's job was to sell tires and generate new business.

49. While it is true that Mr. Parsons spent the first several months of the transition finding and equipping the new McGee Tire location, the evidence was clear that this transition had more or less been accomplished by the time Mr. Irving came to work at the Cantonment location in July 2017. Mr. Irving's undisputed testimony was that Mr. Parsons worked primarily as a salesperson. Mr. Irving wanted to bring Mr. Parsons back to sell tires. Mr. Thompson, hired as a tire salesperson, explicitly understood himself to be taking over Mr. Parsons's position.

50. Ms. McGuiness testified that Monro employs salespersons who are over the age of 40. She stated that when the company hires a salesperson, it first looks at sales knowledge and experience, commercial knowledge and experience, industry knowledge and experience, and whether the person lives in the area to be served. She did not explain how these criteria would favor Mr. Thompson over Mr. Parsons.

51. Mr. Parsons testified that he pursued every avenue available to try and return to work for McGee Tire, but the company's actions made it clear that "stronger, younger, and less money is what they were after." Based on the facts adduced at hearing, Mr. Parsons's conclusion is persuasive.

52. The evidence presented by McGee Tire offered little more than testimony that the company employs other sales representatives over 40 years old. No effort was made to directly rebut the prima facie showing that Mr. Parsons was let go because of his age and disability.

53. McGee Tire never offered a coherent explanation for Mr. Parsons's dismissal, aside from a weak assertion that he "resigned" as part of a much later workers' compensation settlement. Mr. Parsons convincingly testified as to the desperate financial circumstances, caused by McGee Tire, which led him to accept the settlement. The greater weight of the evidence is that

Mr. Parsons had been constructively discharged by McGee Tire well before he signed the resignation letter.

54. McGee Tire offered no explanation for why it accommodated Mr. Thompson when he was injured on the job, allowing him to spend more time in the office and directing tire technicians to load his tires, but could not offer the same accommodations to Mr. Parsons.

55. McGee Tire offered no explanation for why it did not act on Mr. Parsons's suggestion that a lift-gate be installed on his truck. Ms. McGuinness testified that the company uses lift-gates. She stated that any budget request for a lift-gate would come through her office. Nothing in her records indicated that the question of a lift-gate for Mr. Parsons ever reached her level in the corporation.

56. Ms. McGuiness attempted to show that Mr. Thompson was not a proper comparator to Mr. Parsons. Her attempt was refuted by Mr. Irving's testimony that Mr. Thompson was doing the same sales job as Mr. Parsons, and by Mr. Thompson's testimony that from the outset he understood himself to be taking Mr. Parsons's position. It is found that Mr. Parsons and Mr. Thompson were engaged in the same job, selling commercial tires for McGee Tire.

57. McGee Tire offered no non-discriminatory business reason for failing to bring Mr. Parsons back to work after his injury. The evidence adduced at the hearing leads ineluctably to the finding that McGee Tire constructively discharged Mr. Parsons and then hired a younger person willing to do the same job for a lower salary.

58. The evidence further established that McGee Tire treated Mr. Parsons as unable to perform his job duties due to his back injury, yet made accommodations for Mr. Thompson when he suffered a similar back injury. McGee Tire offered no explanation for its disparate treatment of the two employees or its failure to act on Mr. Parsons's reasonable request for a lift-gate to be installed on his truck.

CONCLUSIONS OF LAW

59. 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.

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

61. 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.

62. McGee Tire 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.

63. Florida courts have determined that federal case law applies to claims arising under the Florida Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under section 760.10, absent direct evidence of discrimination. *See Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *Paraohao v. Bankers Club, Inc.*, 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); *Fla. State Univ. v. Sondel*, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); *Fla. Dep't of Cmty. Aff. v. Bryant*, 586 So. 2d 1205 (Fla. 1st DCA 1991).

64. "Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'" *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987)(*quoting Black's Law Dictionary* 413 (5th ed. 1979)). In *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989), the court stated:

> This Court has held that not every comment concerning a person's age presents direct evidence of discrimination. [*Young v. Gen. Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988)]. The *Young* Court made clear that remarks merely referring to characteristics associated with increasing age, or facially neutral comments from which a plaintiff has inferred discriminatory intent, are not directly probative of discrimination. *Id*. Rather, courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of discrimination.

Petitioner offered no evidence that would satisfy the stringent standard of direct evidence of discrimination.

65. As noted by the Florida Fourth District Court of Appeal in *City of Hollywood v. Hogan*, 986 So. 2d 634 (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.

Id. at 641, *citing Brown Distrib. Co. of W. Palm Beach v. Marcell*, 890 So. 2d 1227, 1230 n.1 (Fla. 4th DCA 2005).

66. As to disability discrimination, the Florida Civil Right Act is construed in conformity with the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112. *Cordoba v. Dillard's, Inc.,* 419 F.3d 1169, 1175 (11th Cir. 2005).

"Because Florida courts construe the FCRA in conformity with the ADA, a disability discrimination cause of action is analyzed under the ADA." *Wimberly v. Sec. Tech. Grp., Inc*, 866 So. 2d 146, 147 (Fla. 4th DCA 2004).

67. Under the *McDonnell* analysis, in employment discrimination cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual. *See Texas Dep't of Cmty. Aff. v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

68. In order to prove a prima facie case of unlawful age discrimination, Petitioner must establish that: 1) he is a member of the protected group, i.e., at least 40 years of age; 2) he was otherwise qualified for the position; 3) he was discharged or demoted from the position; and 4) the position was filled by a person substantially younger than Petitioner. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996); *City of Hollywood v. Hogan*, 986 So. 2d 634, 641 (Fla 4th DCA 2008).

69. The undersigned is aware that the FCHR has long taken the position that the protections of FCRA's age discrimination prohibition are not restricted to persons who are 40 years or over. The FCHR takes the position that a prima facie case of age discrimination under the FCRA requires only a showing that individuals similarly-situated to Petitioner were treated more favorably, regardless of whether Petitioner was over or under 40 years of age. *See, e.g., Torrence v. Hendrick Honda Daytona*, FCHR Order No. 15-027 (May 26, 2015). In the instant case, application of the FCHR's formula would not change the outcome, given that Mr. Parsons was 55 years old at the time he was discharged and Mr. Thompson was 29 at the time he was hired.

70. In order to prove a prima facie case of disability discrimination, Petitioner must show that: 1) he is disabled; 2) he was a "qualified individual"; and 3) he was discriminated against because of his disability. *See Frazier-White v. Gee*, 818 F.3d 1249, 1255 (11th Cir. 2016); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001). The employee may satisfy the third prong through showings of intentional discrimination, disparate treatment, or failure to make reasonable accommodations. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008).

71. To prove unlawful discrimination in a failure to accommodate claim, Petitioner must show that he was discriminated against as a result of Respondent's failure to provide a reasonable accommodation. Petitioner bears the burden both to identify an accommodation and show that it is "reasonable." *Lucas*, 257 F.3d at 1255. "[T]he duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made." *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999).

72. A qualified individual is not entitled to the accommodation of his choice, but rather only to a "reasonable" accommodation. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997). An accommodation is "reasonable" and, therefore required under the ADA, only if it enables the employee to perform the essential functions of the job. *LaChance v. Duffy's Draft House*, 146 F.3d 832, 835 (11th Cir. 1998). An employer need not accommodate an employee in any manner the employee desires, nor reallocate job duties to change the essential functions of the job. *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000). The intent of the ADA is that "'an employer needs only to provide meaningful equal employment opportunities' … '[t]he ADA was never intended to turn nondiscrimination into discrimination' against the nondisabled." *U.S. EEOC v. St. Joseph's Hosp. Inc.*, 842 F.3d 1333, 1346 (11th Cir. 2016)(*quoting Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998)).

73. In the instant case, Mr. Parsons set forth a prima facie case of age discrimination. As to the first element, it was undisputed that Mr. Parsons was 55 years old at the time of the hearing and was older than 40 years old at all relevant times. As to the second element, the evidence established not only that Mr. Parsons was qualified for the position, but that he has a history of excelling in the job of selling commercial tires. As to the third element, the evidence established that Mr. Parsons was constructively discharged from his position. As to the fourth element, the evidence established that Mr. Parsons's position was filled by a 29-year-old man. The evidence established that Mr. Thompson, the younger substitute employee, was treated more favorably by McGee Tire.

74. McGee Tire presented little evidence to rebut the prima facie case made by Mr. Parsons. The company articulated no clear non-discriminatory business reason for McGee Tire's dismissal of Mr. Parsons. Ms. McGuinness testified as to a company-wide reorganization, but did not link that to Mr. Parsons's situation. She attempted to show that Mr. Parsons and Mr. Thompson were not working the same job, but the greater weight of the evidence proved otherwise. Mr. Parsons believed that part of the company's reasoning was a desire to cut costs, but Ms. McGuinness did not testify that Mr. Parsons's salary was a factor in his dismissal. Given the lack of a legitimate, non-discriminatory reason for the adverse employment action taken against Mr. Parsons, it is concluded that McGee Tire discriminated against Mr. Parsons based on his age.

75. Section 760.11(6) provides, in relevant part:

> If the administrative law judge, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay... In any action or proceeding under this subsection, the

> commission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

76. "[O]nce a plaintiff has proven discrimination, back pay should be awarded 'unless special circumstances are present.'" *Lengen v. Dep't of Transp.*, 903 F.2d 1464, (11th Cir. 1990)(*quoting Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1391 (5th Cir. 1978)). No special circumstances were stated that would cause this tribunal to decline an award of back pay in this case.

77. Some evidence was presented at the hearing regarding Mr. Parsons's salary at McGee Tire, but the evidence was insufficient to determine the exact date of his dismissal; the amount of workers' compensation he received and when those payments began and ended; whether he received supplemental income aside from workers' compensation during his period of unemployment; what efforts Mr. Parsons made to find other employment and the impact of the non-compete clause on those efforts; or any other efforts to mitigate the damages caused by his dismissal. Based on the record of this proceeding, it is not possible to determine the amount of back pay/lost wages due to Mr. Parsons.

78. Mr. Parsons failed to set forth a prima facie case of disability discrimination. To determine whether a person is disabled, a three-step approach has been mandated: 1) a consideration of whether the Petitioner has a physical impairment; 2) the identification of the life activity claimed to be impaired and a determination whether it is a "major life activity"; and 3) whether the impairment substantially limits the major life activity. *Hudson v. Tyson Farms, Inc.*, 769 Fed. Appx. 911, 915 (11th Cir. 2019), *citing Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

79. Mr. Parsons demonstrated that his back injury was a physical impairment, but did not establish that it was a "disability" for purposes of the ADA. The claimed major life activity identified by Mr. Parsons was working.

"A plaintiff claiming that she is substantially limited in the major life activity of working must establish that her condition significantly restricts her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." *Hudson*, 769 Fed. Appx. at 916, *citing Rossbach v. City of Miami*, 371 F.3d 1354, 1359 (11th Cir. 2004). "An impairment does not substantially limit the ability to work merely because it prevents a person from performing either a particular specialized job or a narrow range of jobs." *Hudson* at 916. The "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Williamson v. Int'l Paper Co.*, 85 F. Supp. 2d 1184, 1194 (S.D. Ala. 1999).

80. At best, Mr. Parsons demonstrated that his physical impairment prevented him from performing all the tasks of his tire salesperson position at McGee Tire. The evidence demonstrated that McGee Tire could easily have accommodated Mr. Parsons's impairment in a way that would have allowed him to continue working. However, the case law cited above establishes that McGee Tire was not obligated to do so under the ADA.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue an interlocutory order finding that Monro d/b/a McGee Tire & Auto committed an act of unlawful age discrimination against Petitioner, Jeff B. Parsons. It is further recommended that the Florida Commission on Human Relations remand this case to the Division of Administrative Hearings 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 Petitioner.

DONE AND ENTERED this 2nd day of March, 2020, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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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.