STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL PARMELEE,

Petitioner,

vs. Case No. 20-2036

PURE PLANET, LLC, *AMENDED AS TO APPEARANCES ONLY

Respondent.
_____/

AMENDED RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division), conducted the final hearing in this case by Zoom video conference on July 2, 7, and 8, 2020.

APPEARANCES

For Petitioner: Jason Imler, Esquire
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For Respondent: April S. Goodwin, Esquire
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STATEMENT OF THE ISSUE

Did Respondent, Pure Planet Pools, LLC (Pure Planet), discriminate in employment against Petitioner, Michael Parmelee, on account of his age in violation of section 70-53(a)(1) of the Pinellas County Code of Ordinances (Code)?

PRELIMINARY STATEMENT

Mr. Parmelee filed a complaint of age discrimination in employment by Pure Planet with the Pinellas County Office of Human Rights (Office). By Investigative Report & Determination, the Office determined that there was reasonable cause to believe that Pure Planet had discriminated against Mr. Parmelee on account of his age. The Office's efforts to mediate the matter did not succeed. On April 27, 2020, the Office referred the matter to the Division to conduct an administrative hearing to resolve the matter. The undersigned conducted the hearing.

Mr. Parmelee testified on his own behalf. He also presented the testimony of Jennifer DeFreitas, Diony Guzman, Angela McDowell, Thomas L. Thomas Sr., and Thomas L. Thomas Jr. Mr. Parmelee's Exhibits A-1, C, F (Padgett letter only), G, I, and J were admitted.

Pure Planet presented its testimony through examination of Mr. Parmelee's witnesses. Pure Planet Exhibits 4, 8, and10 through 18 were admitted into evidence.

The parties stipulated that Pure Planet was an employer for purposes of the Code and that Mr. Parmelee was an employee.

The parties filed proposed recommended orders. They have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Pure Planet was a pool cleaning and maintenance company located in Pinellas County. Mr. Thomas Sr. founded the company in July of 2013, in part to provide employment for his son, Mr. Thomas Jr. Mr. Thomas Sr. had owned and operated businesses before.

2. Mr. Thomas Sr.'s vision for Pure Planet was to create a high-end pool service company providing excellent service with courteous, well-groomed, skilled, responsive employees. He thought that there was a market for a higher-end pool company with well-trained and disciplined uniformed technicians, clean trucks, and well-groomed employees serving customers with more discretionary income. He believed that such a company could successfully charge a premium fee. He went so far as to buy a fleet of new trucks for his technicians. Mr. Thomas Sr. thought that he could compete successfully with more common companies that he characterized as having technicians wearing cutoffs and flip flops, using rusted trucks leaking oil.

3. Mr. Thomas Sr. memorialized his concept in six pages titled "Company Philosophy & Priorities," "Why Work for Pure Planet Pools," "Policies," "Employee Benefits," "Pay Policy," and "What Will Differentiate Pure Planet Pools." The governing principles recorded in the documents include:

- Customer Service is our TOP priority
- Employee personal job satisfaction and potential
- Flawless execution (deliver on our commitments)
- Committed to training and skills development
- Annual paid vacation
- Provide Updated vehicles and equipment.
- Provide Uniforms
- Personal appearance is a priority
- Clean shaven, neatly trimmed hair
- Presentable footwear—shoes, no flip flops
- Smoke and tobacco free employer
    - (vehicles/facilities/customer premises)
- Vehicles and equipment cleaned weekly (Friday's at check-in)
- Bonus incentives (company and individual goals)
- Customer satisfaction incentive (survey results)
- Best in class **TOOLS** and **EQUIPMENT**
- Personal presentation **(APPEARANCE)**

4. Mr. Thomas Sr. made the decision to hire Mr. Parmelee. Pure Planet hired Mr. Parmelee on June 29, 2018, to work as a pool technician.

Mr. Parmelee was 62. His job duties were to clean pools, adjust chemicals, and perform other pool upkeep. Before then, Mr. Parmelee had worked about ten months at Blue Aces, a pool cleaning company, performing basically the same work.

5. Mr. Parmelee had a beard when Mr. Thomas Sr. hired him and throughout his employment with Pure Planet. During the course of Mr. Parmelee's employment with Pure Planet, Mr. Thomas Sr. occasionally spoke to Mr. Parmelee about his beard. However, despite the references in Pure Planet's principles documents to "personal appearance" as a priority and to employees being clean-shaven with neatly trimmed hair, Mr. Thomas Sr. never required Mr. Parmelee to shave his beard or disciplined him for having a beard.

6. Mr. Thomas Jr. managed the technicians and was Mr. Parmelee's supervisor. Mr. Parmelee's work performance was satisfactory. According to his supervisor, Mr. Parmelee had good days and bad days, just like everyone else. He did not have more bad days than any other employee. Mr. Parmelee could do the job. Mr. Thomas Jr. only had to counsel Mr. Parmelee a few times about his work performance. These occasions were no more frequent with Mr. Parmelee than with other employees. Mr. Parmelee did an excellent job of maintaining chemical balance in the pools.

7. Mr. Parmelee serviced fewer pools on his route than the other technicians. Mr. Parmelee's routes included fewer houses than the other technicians because he worked more slowly. This meant that Mr. Parmelee generated less revenue for the company than other technicians. In addition, sometimes he did not complete his route in the scheduled time and incurred overtime. Mr. Parmelee's late completion of his route also sometimes required the office manager to stay late and also incur overtime.

8. In his time with Pure Planet, Mr. Parmelee was involved in two vehicle accidents. Both occurred when he was parked. Mr. Parmelee was not determined to be at fault in either accident.

9. In March of 2019, Pure Planet hired Christopher Padgett. He rode with Mr. Parmelee on his route as part of his training. This was standard practice for Pure Planet. Mr. Thomas Sr. practiced cross-training. Consequently new employees spent time accompanying each pool technician on his route. This indicates Pure Planet found Mr. Parmelee's performance was sufficiently satisfactory that it wanted him to participate in training a new technician.

10. In nearly one year of employment Mr. Parmelee caused only six customer complaints or "call backs." They were all before January 2019. One customer asked that Mr. Parmelee not service his pool. On the other hand, five customers wrote letters praising Mr. Parmelee's work.

11. Pure Planet did not discipline Mr. Parmelee during his employment. Mr. Parmelee was qualified for his job and performed it competently.

12. In May of 2019, Mr. Thomas Sr. negotiated the sale of Pure Planet's assets to Avedon, Inc. (Avedon). A document titled "Escrow Instructions" memorializes most of the terms of the sale. The sale closed May 31, 2019, with an effective date of June 1, 2019. The assets sold included the pool service accounts, four trucks, all rights to the trademark "Pure Planet Pools," rights to the Pure Planet website, rights to the Pure Planet email address, the Pure Planet telephone number, and additional items not identified in the record. Avedon agreed to assume Pure Planet's "debt liability and related payments."

13. Pure Planet and Avedon also agreed to transition Pure Planet's employees to Avedon. The evidence does not include a document describing this agreement. The terms of sale also included a provision requiring Mr. Thomas Sr. to replace any account discontinued before September 1, 2019, with an account of equal monthly gross income or to pay an amount equal to 11.29 times the monthly gross income of the discontinued account.

14. The parties structured the transaction so that it would be invisible to customers. This was to avoid generating concerns about the change in ownership affecting the quality of service.

15. On Friday, May 31, 2019, Mr. Thomas Sr. told Mr. Parmelee that he wanted to meet him the following Saturday at 8:00 a.m. This Saturday was the day of one of the regularly scheduled and conducted monthly staff meetings for all employees. The proposed meeting time was before the staff meeting. The meeting was brief. Mr. Thomas Sr. told Mr. Parmelee that he was "going to let him go." Mr. Thomas Sr. did not review specific reasons for the termination. He just told Mr. Parmelee that he "was going to go with a younger group." All of the employees who Mr. Thomas Sr. arranged to transition to Avedon were under 40, except for Mr. Thomas Jr. who was a part owner of the business and only worked briefly with Avedon to assist with the transition. Mr. Parmelee was 63.

16. Mr. Thomas Sr. gave Mr. Parmelee a week's severance pay. He also offered to provide a letter of recommendation. At the time Mr. Parmelee was shocked and left. He had never been terminated before. Mr. Thomas Sr. went on to hold the staff meeting and tell employees about the sale.

17. Later Mr. Parmelee called Mr. Thomas Sr. and asked for the letter of recommendation. June 3, 2019, Mr. Thomas Sr. provided the letter. The letter described the length of Mr. Parmelee's employment with Pure Planet and Mr. Thomas Sr.'s knowledge of Mr. Parmelee's work. It also stated:

> Michael was a responsible employee and satisfactorily performed his duties in a timely manner. I believe Michael would be a capable addition to other companies moving forward.
>
> Michael Left [sic] the Company in good standing.

18. Mr. Thomas Sr. denies saying that he was going with a younger group during his meeting with Mr. Parmelee. Mr. Thomas Sr. says that he terminated Mr. Parmelee because Mr. Parmelee was a poor performing technician and that he told Mr. Parmelee this. He said he feared that

Mr. Parmelee may cause Avedon to lose accounts and trigger the penalty provisions of the sale agreement.

19. The explanation is not credible. It is not consistent with Mr. Parmelee's performance at Pure Planet and the absence of discipline during Mr. Parmelee's employment. In addition, servicing fewer routes than other technicians and earning overtime may reduce the employer's revenue. But they are not characteristics that would lead to losing an account. Mr. Thomas Sr.'s testimony lacks credibility and persuasiveness.

20. The explanation is also inconsistent with the letter of recommendation. For example, Mr. Thomas Sr. said Mr. Parmelee's failure to complete his route on time was one reason for discharging him. Yet, the letter states that Mr. Parmelee "performed his duties in a timely manner." As an experienced business man, Mr. Thomas Sr. had to know that potential employers rely upon letters of recommendation and expect that they are truthful. If Mr. Thomas Sr.'s explanation that poor performance and the risks it created were the reasons for discharging Mr. Parmelee, then he was being untruthful to Mr. Parmelee's potential employers telling them Mr. Parmelee was a satisfactory employee. This too makes Mr. Thomas Sr.'s testimony lack credibility and persuasiveness.

21. In contrast, Mr. Parmelee's testimony was consistent, credible, and persuasive.

22. According to Pure Planet's payroll records (R. Ex. 12), Mr. Parmelee earned an average of $575.75 per week during the period from July 6, 2018, through March 29, 2019.[1] He has been unemployed since May 31, 2019. Mr. Parmelee has been seeking work using several job search websites but has been unable to obtain employment. Mr. Parmelee received unemployment compensation. The record, however, does not prove how much.

[1] The records reveal that Mr. Parmelee earned $14.00 per hour. The calculation of average weekly wage includes earnings of $1,052.38 for 75.17 hours worked during the period ending February 15, 2019. The records show the hours worked but not the pay the hours would have generated.

The facts establish that from June 1, 2019, through July 2, 2020, Mr. Parmelee would have earned $32,342.18.[2]

CONCLUSIONS OF LAW

23. Section 120.65(6), Florida Statutes,[3] and section 70-77(e) of the Code grant the Division jurisdiction over this matter. The question presented is: Did Pure Planet discriminate against Mr. Parmelee because of his age in violation of Code section 70-53(a)(1)? Mr. Parmelee must prove his claim of age discrimination by a preponderance of the evidence.

24. Section 70-53(a)(1) of the Code prohibits discrimination in employment against an individual on account of age. Pure Planet was an employer of Mr. Parmelee, as defined by section 70-51 of the Code. Mr. Parmelee was an employee of Pure Planet as section 70-51 of the Code defines employee.

25. The prohibitions against employment discrimination in section 70-53 are virtually identical to the prohibitions in state and federal laws. *See* §§ 760.01-760.11, Fla. Stat. (Florida Civil Rights Act of 1992); 42 U.S.C. § 2000e-2, *et seq*. (Title VII of the Civil Rights Act of 1964, as amended); *cf*. § 70-52(a)(2) of the Code (stating that a purpose of chapter 70 is to "[p]rovide for execution within the county of the policies embodied in the Federal Civil Rights Act of 1964, as amended"). As a result, section 70-53 should be construed in a manner that is consistent with those laws. *See, e.g.*, *Conway v. Vacation Break*, Case No. 01-3384 (Fla. DOAH Nov. 16, 2001) (construing chapter 70 of the Code in accordance with the comparable state and federal laws); *Blacknell v. Freight Mgmt. Servs., Inc.*, Case No. 04-2854 (Fla. DOAH Oct. 27, 2004) (same).

26. Petitioners alleging unlawful discrimination bear the ultimate burden of proving intentional discrimination. For Mr. Parmelee to prevail, he must

[2] This is calculated by multiplying the number of weeks (56.174) times the average weekly compensation ($575.75).

[3] All citations to Florida Statutes are to the 2019 codification unless noted otherwise.

prove his charge that Pure Planet purposefully terminated his employment because of his age. *See Silvera v. Orange Cty. Sch. Bd.*, 244 F.3d 1253, 1262 (11th Cir. 2001) ("Racial discrimination is an intentional wrong."); *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1273 (11th Cir. 2002) ("Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]."); *see also Byrd v. BT Foods, Inc.*, 948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

27. A party can prove discriminatory intent with direct or circumstantial evidence. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. *Maynard v. Bd. of Regents*, 342 F.3d 1281, 1289 (11th Cir. 2003). Here direct evidence proves the unlawful discrimination and circumstantial evidence reinforces the direct evidence.

28. Mr. Thomas Sr. told Mr. Parmelee that he was discharging him because he "was going with a younger group." The statement is direct evidence of discrimination. This was not a stray comment. It was not oblique. It was a statement by the decision-maker of the reason for discharge made contemporaneously with the discharge. The statement was direct and compelling evidence of age discrimination. *Tomassi v. Insignia Fin. Grp.*, 478 F.3d 111, 115 (2d Cir. 2007) ("The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be."), *abrogated in part on other grounds by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). Concluding from Mr. Thomas Sr.'s explanation that Mr. Parmelee's age was directly related to his discharge does not require inference or presumption. *See Carter v. City of Miami*, 870

F.2d 578, 581–82 (11th Cir. 1989) ("Direct evidence of discrimination would be evidence which, if believed, would prove the existence of a fact without inference or presumption.").

29. "Inferential and circumstantial proof may, however, prove unlawful discrimination." *Kline v. Tenn. Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997). Where a petitioner seeks to establish circumstantial proof of discrimination through a disparate treatment theory, opinions require the following to establish a *prima facie* case: (1) Petitioner is a member of a protected class; (2) Petitioner was subjected to adverse employment action; (3) the employer treated similarly-situated employees outside of Petitioner's protected class more favorably than Petitioner; and (4) Petitioner was qualified for the position. *City of W. Palm Bch. v. McCray*, 91 So. 3d 165, 171 (Fla. 4th DCA 2012) (citing *U.S. E.E.O.C. v. Mallinckrodt, Inc.*, 90 F. Supp. 2d 1371, 1376 (M.D. Fla. 2008); *see also Rice-Lamar v. City of Ft. Lauderdale*, 232 F.3d 842, 843 (11th Cir. 2000). All four elements are proven.

30. Mr. Parmelee, at age 63, was a member of the protected class. Discharge is an adverse employment action. None of the other similarly-situated employees, all of whom were younger than 40, were discharged. Mr. Thomas Sr. facilitated their transition to Avedon. Mr. Parmelee's year of acceptable employment proved he was qualified for the pool technician job. These facts support an inference of discrimination and confirm that Mr. Parmelee was discharged because of his age not because of his qualifications.

31. As permitted in discrimination cases, Pure Planet argued that it had a legitimate, non-discriminatory reason for the discharge. *Anderson v. Lykes Pasco Packing Co.*, 503 So. 2d 1269 (Fla. 2d DCA 1986). The argument fails. In fact, the evidence offered to justify the discharge is a manifestly implausible explanation for Mr. Parmelee's discharge, reinforcing the conclusion that age was the reason for Mr. Parmelee's discharge.

32. The purported non-discriminatory reason for discharge was fear that Mr. Parmelee was such a bad technician that he would cause Avedon to lose accounts and assess the penalties allowed by the terms of sale. However, the risk, if any, of losing accounts and therefore money because of Mr. Parmelee's alleged deficiencies existed throughout his employment with Pure Planet. If Mr. Parmelee presented a genuine risk of losing accounts, the record does not provide a persuasive explanation why he was not discharged, or at least disciplined earlier, especially in light of Mr. Thomas Sr.'s claims that Mr. Parmelee cost Pure Planet revenue by servicing fewer pools than other employees did and incurring some overtime. Also, the evidence does not establish a link between Mr. Parmelee's alleged failings and actions leading to losing an account. Far from proving a legitimate, non-discriminatory reason for discharge, the evidence reinforces what the direct evidence proved. Pure Planet discharged Mr. Parmelee solely because of his age.

33. Section 70-78 of the Code provides that "[t]he administrative law judge shall have the authority to award actual damages and reasonable costs and attorney's fees incurred by a party which were caused by a violation of this division [sic]." Although Mr. Parmelee's proposed recommended order does not address damages, the record permits calculation of Mr. Parmelee's lost wages through the date of the hearing. The sale of Pure Planet makes re-employment unavailable as a remedy. The record is insufficient to determine what cases describe as "front pay." *Armstrong v. Charlotte Cty Bd. of Cty Com'rs*, 273 F. Supp. 2d 1312 (M.D. Fla. 2003). The damages Pure Planet caused Mr. Parmelee are $32,342.18. The record does not permit reducing them by the amount of unemployment compensation received.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends entry of a final order finding that Respondent, Pure Planet Pools, LLC, discharged Petitioner, Michael Parmelee, because of his age and that he shall be awarded $32,342.18 in damages.

Jurisdiction to award reasonable costs and attorney's fees as provided in section 70-78 of the Pinellas County Code of Ordinances will be reserved. If the parties are unable to agree upon costs and fees they may file a motion seeking resolution of the disagreement.

DONE AND ENTERED this 31st day of July, 2020, in Tallahassee, Leon County, Florida.

JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 31st day of July, 2020.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the Division of Administrative Hearings to be considered by the Administrative Law Judge, who will issue the final order in this case. The exceptions shall identify the evidence of record upon which they rely and the legal authority supporting them.