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**STAE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

RONALD GUINN,

CASE NO.: 22-3434

Petitioner,

v.

**FLORIDA DEPARTMENT
OF AGRICULTURE AND
CONSUMER SERVICES,**

Respondent.

PETITIONER'S PROPOSED ORDER

Pursuant to notice, a final hearing was conducted on this matter on January 18, 2023. Judge E. Gary Early presided, a duly designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:

Ryan M. Barnett
Whibbs Stone Barnett Turner, P.A.
801 W. Romana Street, Suite C
Pensacola, Florida 32502

For Respondent:

Carla Jane Oglo
Florida Department of Agriculture and Consumer Services
407 South Calhoun Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether the Respondent discriminated against the Petitioner based upon his age, in violation of 760.10, Florida Statutes.

FINDINGS OF FACT

1. The Respondent is an employer as that term is defined in section 760.02(7). Notation to the Transcript will be noted by (Tran ____) and the applicable page number.
2. Mr. Guinn is a male who was employed with the Respondent as a _____. At the time of the hearing, he was (77) years old. At all times relevant to the determination in this case, Mr. Guinn was older than (40) years old.
3. Ronald Guinn (may be referred to herein as “Guinn”) was born in Folkston, Georgia, on December 3, 1945. (Tran 19)
4. Guinn was (77) years old at the time of the hearing. (Tran 19)
5. After working for nearly (20) years as the owner of a trucking company, Guinn began volunteering on trails. His first volunteering position was at Hard Labor Creek in Georgia. (Tran 19)
6. After Guinn’s daughter moved to the Pace area, Guinn became acquainted with the Coldwater Recreation Area and in the process became acquainted with David Creamer, who worked for the State of Florida in forestry. (Tran 21)
7. Guinn worked at Coldwater for approximately seven or eight years. (Tran 22)
8. Guinn testified that David Creamer reached out and let him know that a new opportunity had come up at an OHV park. (Tran 22)
9. Guinn testified that this new position would be as an OSP Ranger. (Tran 22)
10. The OHV Park was called “Clear Creek OHV Park.” (Tran 23)
11. When Guinn was first hired at Clear Creek, he could only work 29 hours a week. (Tran 23)
12. Guinn lived onsite at the Clear Creek OHV Park. (Tran 23)
13. Guinn began work at Clear Creek on August 5, 2017. (Tran 25)
14. The Clear Creek position became full time in May of 2020. (Tran 25)
15. Guinn described a ridership that grew from approximately 15 – 20 riders up to over 800 annual pass holders and additional day riders, with many riders traveling from out of town. (Tran 26-27)
16. Clear Creek consists of 50 – 55 miles of trails. (Tran 27)
17. The trails were maintained with a tractor and various other pieces of equipment. (Tran 28)

18. Guinn testified that safety was a very important consideration in his work at Clear Creek.
(Tran 31)
19. Of particular contention in this case is the issue of the “seat.” This question relates to a seat that would be attached to the back of a four-wheeler. (Tran 32)
20. The rules at the park were such that only one person could ride a four-wheeler, unless there was an approved seat on the back of the four-wheeler. (Tran 32)
21. Frequently, customers who were coming from out of town would be upset to find that they could only ride one passenger to a set. (Tran 33-34)
22. Guinn would get complaints about the rule and spoke with David Creamer about getting a seat in the spring of 2017. (Tran 34).
23. Guinn had no budget and had to go through David Creamer for any purchases. (Tran 35)
24. Guinn testified that after he was told there was no budget for the seat, he told David Creamer that he intended to personally purchase a seat that would be available for use by donation. (Tran 38)
25. Guinn ultimately purchased the seat at Wal-Mart in Pace, for \$70.
26. Guinn’s best estimate was that (20) people used the seat and that he received \$23 in donations. (Tran 40)
27. Guinn testified that there were occasions when the seat would be used by visitors without donation. (Tran 41)
28. Guinn testified that there were no occasions when the seat was denied to a visiting member of the public because they did not give a donation. (Tran 41)
29. The seat itself was kept in the office at the gatehouse and was readily visible to David Creamer. (Tran 41)
30. Guinn testified that after a number of relatively minor injuries there were comments by David Creamer to the effect that Guinn was, “not a spring chicken anymore.” (Tran 49)
31. Guinn testified about an email from a disgruntled rider that referred to Guinn as possibly suffering from dementia approximately (2) months prior to his termination. (Tran 53)
32. Guinn provided documentation from Dr. Flurry about the status of his health. (Tran 59)
33. Guinn testified that he was replaced by Hunter Glover, a (33) year old male. (Tran 60)
34. The day that Guinn was terminated, Glover took over the trail work. (Tran 61)
35. Scott Calderwood (hereinafter may be referred to as “Calderwood”) testified at the

hearing. (Tran 76)

36. Calderwood is a regular rider at Clear Creek. (Tran 78)

37. Calderwood testified that he was very surprised to hear that Guinn had been terminated.
(Tran 79)

38. Calderwood testified that Guinn did an excellent job maintaining Clear Creek. (Tran 79)

39. Calderwood never observed Guinn charge for the use of the “seat.” (Tran 81)

40. Calderwood was an active member of a Facebook group with approximately 1,500 users of the Clear Creek OHV park. He did not personally observe any complaints that Guinn was charging for use of the seat. (Tran 83-84)

41. Calderwood testified that Guinn was very professional on the issue of safety. (Tran 84)

42. Calderwood testified that he never observed any indication that Guinn was unable to perform his duties due to his age. (Tran 88)

43. Roger Dixon (may be referred to hereafter as Dixon) testified at the hearing. (Tran 91)

44. Dixon had been a rider at the park for many years. (Tran 91)

45. Dixon never observed Guinn to be physically unable to carry out his job. (Tran 93)

46. Dixon never observed Guinn require anyone pay to use the seat. (Tran 95)

47. Dixon had never heard anybody complain that Guinn was requiring payment for use of the seat. (Tran 95)

48. Dixon further corroborated that out-of-town guests had been observed using the seat after arriving and learning that the rules prohibited multiple riders without proper seating.
(Tran 96)

49. Bill Driscoll also testified at the hearing. (Tran 100)

50. Driscoll had never heard any complaints about the seat. (Tran 105)

51. Driscoll never observed anything negative about Guinn’s age. (Tran 106)

52. David Creamer (may be referred to herein as “Creamer”) was called to testify. (Tran 115)

53. Creamer is the recreation administrator and manages 220,000 acres. (Tran 115-116)

54. Creamer testified that there were other older employees in addition to Guinn. (Tran 118)

55. Creamer testified that he was made aware of an incident with the seat on November 8th, with the event occurring the day prior on November 7th. (Tran 125)

56. Creamer testified that he was unaware the seat was being made available prior to November 8th. (Tran 126)

57. Creamer was unable to confirm for sure whether the seat had been mentioned to him.
(Tran 126)
58. On cross examination, Mr. Creamer testified that Hunter Glover had been orally counseled on attempting to promote products that he would receive a benefit from (the “energy drink” issue). (Tran 133-134)
59. Creamer testified that there had been emails received regarding the energy drink issue.
(Tran 135)
60. Creamer’s explanation for the difference in Guinn’s treatment (termination) vs. Hunter Glover (oral counseling) was that Glover was essentially a new employee. (Tran 136)
61. Creamer did not allow Guinn and opportunity to participate in discussions with Ms. Loftin, despite the fact that those reports from Loftin were the basis for termination.
(Tran 140)
62. Of note, Creamer testified that he did not recall whether he asked any specific questions of Loftin as to whether the money given was, in fact, a donation. (Tran 141)
63. Creamer did indicate that he did not believe this was a “for profit” situation, but that he believed Guinn was attempting to recover his costs. (Tran 142)
64. Creamer indicated that there had been no documented disciplinary issues with Guinn to his knowledge. (Tran 143)
65. Creamer also acknowledged that he may have made the “spring chicken” comment that Guinn testified to on direct examination. (Tran 147)
66. Sam Leneave testified at hearing. (Tran 155)
67. Leneave works as the Chief of Field Operations, Florida Forest Service. (Tran 156)
68. Leneave testified there were very short conversations about whether the seat was DOT approved or not. (Tran 163)
69. When asked whether he could direct the parties to the rule that would have prohibited the conduct as described by Guinn (the seat being made available for donation), Leneave was unable to do so. (Tran 165)
70. Of importance, Leneave testified that he was not made aware of the energy drink situation with Glover. (Tran 170)
71. Anthony Tipler testified at the hearing as well. (Tran 177)
72. Tipler works for the Florida Department of Agriculture and Consumer Services as the

Employee Relations Manager. (Tran 179)

73. Tipler did not speak with Guinn prior to any action in the case, which is standard practice in non-career employee cases. (Tran 192-195)
74. Tipler was unable to recall being made aware of Guinn's description of the events in question (donation versus rental). (Tran 197)
75. Tipler testified that had Guinn's version of events been filtered to him, it would have warranted additional factfinding. (Tran 198)

CONCLUSIONS OF LAW

76. 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.
77. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "FCRA"), chapter 760, prohibits discrimination in the workplace.
78. Section 760.10 governs these proceedings.¹
79. 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.

¹ (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. The respondent 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.

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).

80. “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.

81. 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).

82. 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).

83. 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).
84. 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).

CONCLUSIONS OF LAW

85. In the instant case, the Petitioner has set forth a prima facie case of age discrimination. It was undisputed that Guinn was (77) at the time of the hearing, and older than (40) years old at all relevant times. As to the second element, the evidence established not only that Guinn was qualified for his position, but that he had excelled at it and dramatically increased the ridership at the park. He was clearly well liked by the ridership as well. As to the third element, I conclude that the evidence establishes that Guinn was terminated. As to the final element, I conclude that for all practical purposes, Guinn was replaced by a (33) year old male, Hunter Glover.
86. The Respondent presented little compelling evidence to rebut the prima facie case made by Guinn. The Respondent did put on evidence that Guinn was terminated for having allegedly "rented" a seat at the park. This claim is found to be pretextual. As a threshold matter, the rental of the seat question is riddled with problems. Respondent's witnesses could not point to a written statement from the customer, were unable to fully define what rules had allegedly been violated, and the procedures for review of disputed factual allegations is practically non-existent for non-career employees. While this may be legally permissible to some degree due to Petitioner's status as an at-will employee, the treatment here raises questions. What is also troubling is that the much younger

employee in this case (Hunter Glover) engaged in similar conduct. It was undisputed that he was promoting usage of products and that his promotion stood to benefit him.

However, his conduct was completely overlooked and never passed the first stage of discipline in getting past David Creamer. This coupled with “spring chicken” comments convinces the undersigned that Guinn’s termination was problematic from the first stage with David Creamer, and that it was at least partially motivated by age. While the Respondent may employ other older workers, this does not mean that it can never be found to have engaged in age discrimination. Petitioner was on the upper side of the age range of employees and the evidence in this case meets the requisite burden.

87. 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... .

88. This court finds that it is appropriate to set a separate hearing on damages.

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 the Respondent committed an unlawful act of age discrimination against Petitioner. 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 determine the amount of back pay/lost wages owed to the Petitioner and to determine the amount of attorney’s fees and costs owed to Petitioner.

Done and entered this _____ day of _____, 2023, in Tallahassee,
Florida.

Judge E. Gary Early
Administrative Law Judge
Division of Administrative Hearings
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