

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT BAUCHAM,)
)
Petitioner,)
)
v.) CASE NO. 89-0712
)
FLORIDA DEPARTMENT OF)
PROFESSIONAL REGULATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing in Tallahassee, Florida on September 5, 1989 before Ella Jane P. Davis, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert Baucham, pro se
1021 Idlewild Drive P-161
Tallahassee, FL 32301

For Respondents: D. Harper Field
Deputy General Counsel
Department of Professional Regulation
Suite 60
1940 North Monroe Street
Tallahassee, FL 32399-0792

STATEMENT OF THE ISSUES

Did Respondent, State of Florida, Department of Professional Regulation, commit an unlawful employment practice by discriminating against Petitioner on the basis of race?

PRELIMINARY STATEMENT

Petitioner presented the oral testimony of Cindy Dexter, Louise Bull, Diane Orcutt, and Melinda Wagoner, and testified on his own behalf. He had admitted in evidence P-1 page 1, P-2, P-3 and P-4. P-1 page 2 was not admitted in evidence. Other exhibits tendered by Petitioner were withdrawn before being marked for identification. Respondent presented the oral testimony of Terri Jones and Evelyn McNeely and had R-1 (a composite) admitted in evidence.

The Human Relations Commission tape-recorded the formal hearing. The parties agreed to 15 days in which to submit post-hearing proposals. All timely-filed proposed findings of fact have been ruled upon pursuant to Section 120.59(2), F.S. in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a 35-year-old Black male.

2. Prior to December 1986, Petitioner was employed by Respondent in an OPS position in "Central Files". His work performance in Central Files was both superior and exemplary, and he was offered a State Career Service position as a Senior Clerk within Respondent's "Complaint Section". Upon accepting the Career Service position, Petitioner entered into a mandatory six months' probationary period.

3. In the Senior Clerk position, Petitioner's primary duties were to answer the phone a specific 4-hour daily shift; to assist or act as backup for phone answering during Senior Clerk Terri Jones' (Black female) 4-hour daily phone shift; to prepare and distribute Class II complaint cases to Respondent's "Legal Section"; and to distribute mail and other materials as assigned by his immediate supervisor, Louise Bull (white female).

4. On January 5, 1987, Petitioner took 4 hours unauthorized leave without pay for which he received a written reprimand on January 6, 1987. He had previously been orally reprimanded for the same practice.

5. It was established by competent substantial evidence that Petitioner's immediate supervisor, Louise Bull, had had a number of absences without leave, some of which occurred before Petitioner's termination and some of which occurred after his termination, and that she also received at least one written reprimand for these absences. For some of her absences, Ms. Bull was required to reimburse money to the State, however it was not clear whether the reimbursement was because she was absent when she falsely claimed to be present or was standard reimbursement procedure when the leave actually taken is not covered by accrued leave time. Either way, Ms. Bull was not in a probationary status at any material time and, clearly, as Petitioner's supervisor, hers was not a substantially similar position to that of Petitioner.

6. Petitioner and Cindy Dexter testified that many permanent employees in addition to Ms. Bull were playing fast and loose with tardiness and absenteeism, but their evidence is very indefinite and the race and gender of the employees accused was not established. Ms. Dexter's testimony was vague and not credible on this point. Their testimony on this subject was not confirmed by other credible witnesses nor was it ever established that any of the permanent employees accused by Petitioner held positions substantially similar to his.

7. From almost the beginning of his probationary period, Petitioner had difficulty adjusting to his new position. He evidenced difficulty accepting supervision from Ms. Bull. This disrupted standard office practice. Over the probationary term, Ms. Bull orally counselled Petitioner approximately seven times concerning his lack of acceptance of her supervision as well as excessive tardiness and excessive personal phone usage. Diane Orcutt, the regular Complaint Office Supervisor and Ms. Bull's superior, described Petitioner as avoiding Louise Bull and coming directly to her about problems he perceived in the office operation. Petitioner and Terri Jones, his female job counterpart who is also Black, had an early but undefined job-related dispute, after which he sent her flowers to "make-up".

8. On one occasion, after a loud and disruptive argument arose between Petitioner and Ms. Bull in the general office area, Evelyn McNeely, who was acting supervisor to them both during Ms. Orcutt's vacation, required Ms. Bull

to prepare a memorandum clarifying Petitioner's job duties because, in Ms. McNeely's view, the Petitioner did not seem to understand his duties. This was done on June 17, 1987. This memorandum, headed "Performance Evaluation" from Ms. Bull to Petitioner also warned Petitioner that Ms. Bull would recommend extension of his probationary period because he was falling short on acceptable performance in several areas.

9. Louise Bull prepared, delivered, and discussed with Petitioner her performance evaluation, indicating, based upon her personal observations, his failure to satisfactorily perform in the following areas: repeatedly tardy over the last several weeks; failure to properly handle routine telephone duties; failure to comply with their section's procedures for routing of case files; and continued failure to accept supervision under their section's chain of command.

10. Ms. Bull admitted that she suffered emotional problems while Petitioner worked for her and apparently thereafter. She had crying jags and consulted a psychologist. She also received a prescription from some source for the tranquilizer valium. Ms. Bull denied that she and the psychologist ever identified a reason for her emotional state. Melinda Wagoner testified that Ms. Bull related to her that her emotional problems stemmed from living in a Black neighborhood and fighting with Black children when she was a child. The foregoing hearsay is admissible as an admission of a party (DPR) through its supervising agent (Louise Bull), but even if fully credible, this evidence would be insufficient to establish a nexus between Bull's behavior and the reason for Petitioner's eventual termination, in light of the record as a whole.

11. Terri Jones, the permanent employee most substantially similar to Petitioner, was also a Senior Clerk. She is also Black. Her job duties were identical to those of Petitioner, except that they had primary responsibility for phone calls during different parts of each day. Ms. Jones had no supervisory problems of her own with Louise Bull. Ms. Jones asserted that Petitioner had excellent telephone manners but confirmed that Petitioner's regularity in answering the phone either on his shift or as her backup was often insufficient.

12. The Complaint Section's phone was often placed on "hold" with no one waiting on the other end. Although anyone in the office could place a call on "hold" and any caller could hang up before an employee returned to the phone, the inference from all witnesses' testimony as a whole was that this "hold" procedure was being done excessively by Petitioner.

13. Diane Orcutt, regular Complaint Office Supervisor, reviewed Petitioner's phone logs prior to evaluating him at the six months' point. The representative phone logs of the two substantially similar employees, Petitioner and Terri Jones, show that Petitioner logged only 34 calls in the same period that Ms. Jones logged 359. This vast discrepancy can be interpreted in a number of ways: either Petitioner was not answering the phone as directed, or he was not logging all calls as directed, or he was not maintaining the logs as directed. By any interpretation of this empirical data, Petitioner was not fulfilling a prime requirement of his job.

14. At the time of his six months' evaluation, on June 22, 1987, Diane Orcutt made a joint decision with Louise Bull to extend Petitioner's six months probationary period by four months. Ms. Orcutt did this for a number of reasons: his early absences without leave, oral complaints from lower echelon

employees that Petitioner would frequently neglect his telephone duties in one way or another, and the disruptive nature of his failure to accept Ms. Bull's supervision.

15. In requiring the additional probation, Ms. Orcutt gave greater weight to the administrative/managerial friction and less weight to Petitioner's reprimanded early absences; however, with regard to the complaints of other employees, she testified that she felt sure Petitioner could do the work because of his past excellent performance on OPS and because of her personal observation but that he needed more time to actually do the job instead of engaging in uncooperative disputes with Ms. Bull. Additionally, Ms. Orcutt was giving Petitioner the benefit of any doubt by taking additional time to sort out whether the disruption problem arose from Ms. Bull or from Petitioner, because at that point, Ms. Bull had no problems supervising other Black or white employees; no oral complaints had been made by other employees against Ms. Bull; and oral complaints against Petitioner confirming Ms. Bull's unrecorded observations of Petitioner had been received personally by Ms. Orcutt.

16. When presented with Orcutt's Mid-Cycle Appraisal and the 4 months' additional probation plan on June 22, 1987, Petitioner was hostile, refused to sign the appraisal, and another disruptive scene arose among Petitioner, Ms. Bull and Ms. Orcutt. Petitioner spent all of the workday of June 23, 1987 in "Personnel" complaining that his evaluation and the 4 months' additional probation was unjust. On two of the remaining successive days of that work week, Petitioner accomplished some work. On one of the remaining successive days in that week, he took his "Personal Leave Day". A weekend intervened, and on Monday, June 28, 1987, Diane Orcutt reassessed the situation, determined that Petitioner was not intending to cooperate, and terminated him, as had always been her option during his probationary period.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

18. Under the provisions of Section 760.10(1)(a), it is an unlawful employment practice for an employer:

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, natural origin, age, handicap, or marital status.

Subsection 8(b) of the same statute provides, however, that:

This subsection shall not be construed to make unlawful the rejection or termination of employment when the individual applicant or employee has failed to meet bona fide requirements or the job or position sought or held

19. When an individual alleges he is subjected to disparate treatment in employment because of his race or national origin, he has the initial burden of establishing, prima facie, a case of discrimination by a preponderance of the evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Once a complainant has done so, the burden of going forward then shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the action complained of. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Where a legitimate, nondiscriminatory reason for the employer Respondent's actions is shown, the claimant then must establish and prove that the proffered reason was in fact "pretextual". Texas Department, supra; Simmons v. Camden Board of Education, 757 F.2d 1187, 1189 (11th Cir. 1985), reh'q en banc den., 767 F.2d 938 (11th Cir. 1985), cert. den., 106 S.Ct. 385 (1985). See also, Suson v. Zenith Radio Corp., 763 F.2d 304 (7th Cir. 1985).

20. Petitioner alleged a conspiracy to terminate him because he is both a Black and a male (race and sex). Although he may have demonstrated that Louise Bull held some prejudice or fear of him either as a Black or personally, he did not prove that due to unpleasant experiences with Black children of both sexes, she was prejudiced against Black males specifically. Moreover, he did not establish the necessary nexus that Ms. Bull's prejudice, unenlightened and unfounded as such prejudices always are, resulted in a discriminatory termination of Petitioner's employment. Moreover, the fact that Ms. Bull had no problems with Black female employees strongly militates against Petitioner's allegation of racial prejudice. Although Diane Orcutt consulted with Louise Bull, she also had independent knowledge and empirical data demonstrating Petitioner's failure to meet his job requirements before she, not Louise Bull, terminated the Petitioner. One may argue that Ms. Orcutt should have stuck to her original intention to give Petitioner four more months to successfully fulfill his probation requirements, but it has not been demonstrated that she was under any requirement to do so.

21. Petitioner has not met the first level of proof: that he was fired or received bad evaluations solely because of his race or gender or both. Respondent has established that valid non-pretextual, job-related reasons existed for his termination. This cause should be dismissed.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is recommended that the Florida Human Relations Commission dismissing the complaint and petition for relief filed by Robert Baucham.

DONE and ENTERED this 3rd day of November, 1989, at Tallahassee, Florida.

ELLA JANE P. DAVIS
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 1989.

APPENDIX TO RECOMMENDED ORDER
IN CASE NO. 89-0712

The following constitute specific rulings, pursuant to Section 120.59(2), Florida Statutes, upon the parties' respective proposed findings of fact (PFOF):

Petitioner's Proposed Findings of Fact

None filed

Respondent's Proposed Findings of Fact

Respondent's proposals have been accepted in substance and modified to conform to the record. Where they have not been accepted, they are rejected as misleading as stated or not supported by the record as stated.

COPIES FURNISHED:

Robert Baucham Hearings
1021 Idlewild Drive, P-161
Tallahassee, FL 32301

E. Harper Field
Deputy General Counsel
Department of Professional Regulation
Suite 60
1940 North Monroe Street
Tallahassee, FL 32399-0792

Dana Baird, General Counsel
Florida Commission on Human
Relations
Building F, Suite 240
325 John Knox Road
Tallahassee, FL 32399-1570

Kenneth D. Easley, General Counsel
Department of Professional Regulation
Suite 60
1940 North Monroe Street
Tallahassee, FL 32399-0792

Donald A. Griffin, Executive Director
Florida Commission on Human
Relations
Building F, Suite 240
325 John Knox Road
Tallahassee, FL 32399-1570