

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SARA WRIGHT,)
)
 Petitioner,)
)
 vs.) CASE NO. 92-5565
)
 DEPARTMENT OF HIGHWAY SAFETY)
 AND MOTOR VEHICLES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled case on July 21, 1993, in Orlando, Florida.

APPEARANCES

For Petitioner: Sara Wright, pro se
Post Office Box 142
Winter Park, Florida 32789

For Respondent: Michael J. Alderman, Esquire
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, A-432
Tallahassee, Florida 32399-0504

STATEMENT OF THE ISSUES

Petitioner, Sara Wright, alleges that the Department discriminated against her because of age by demoting her into a position she could not perform in order to get rid of her, and retaliated against her for filing her complaint with the Commission, in violation of section 760.10, F.S. The issues are whether the alleged discrimination and retaliation took place, and, if so, what relief is appropriate.

PRELIMINARY STATEMENT

Petitioner's allegations are found in her complaint filed with the Florida Commission on Human Relations on December 19, 1991. The complaint alleges that because of her age and in retaliation for filing a charge of discrimination (FCHR No. 103-79), she has been harassed, threatened with being fired, reassigned to another position and notified on November 15, 1991, that she was being demoted.

After a determination of "no cause" was entered by the Commission, Ms. Wright filed a petition for relief, reiterating her allegations. The case was referred to the Division of Administrative Hearings for formal hearing.

Petitioner testified in her own behalf and presented the testimony of one other witness.

Respondent presented the testimony of two witnesses and offered 6 exhibits, all of which were received in evidence.

A transcript was filed and the Respondent submitted a proposed recommended order on August 12, 1993. Respondent's proposed findings of fact are substantially adopted here. On September 15, 1993, Petitioner filed thirty-one numbered paragraphs, styled "proposed findings of fact". These have been considered as a summary of Petitioner's argument. To the extent that they are accounts of incidents which were not raised at hearing, or do not relate to the allegations of the complaint, they are rejected.

FINDINGS OF FACT

1. Petitioner, Sara Wright has been continually employed by the Florida Department of Highway Safety and Motor Vehicles for twenty-seven years. She started as a clerk and moved up the career ladder to inspector, then to supervisor and was assigned duties as a records technician. She was demoted back to inspector (License and Registration Inspector) in February 1992, with no reduction in pay. This is her current position. She is sixty years old.

2. Glenn Turner is currently the assistant director of the Division of Motor Vehicles of the Department of Highway Safety and Motor Vehicles. Prior to becoming assistant director, Glenn Turner was chief of the Bureau of Licenses and Enforcement (herein after "the Bureau") having assumed that position on July 9, 1990.

3. The Bureau has two primary missions, to handle consumer complaints against motor vehicle dealers and to license motor vehicle dealers and auctioneers.

4. When Mr. Turner became the bureau chief, a review of the Bureau's needs was developed, entitled "State of the Bureau", setting forth the Bureau's mission, goals and objectives, and needs assessment for fiscal years 1990-91 and 1991-92.

5. At the time the State of the Bureau Report was issued, there were 63 License and Registration Inspector positions assigned to the Bureau. The Bureau's goal was to bring that number up to 65. Additional inspector positions were needed because of the increased volume of work.

6. Inspectors carry out the functions of the Bureau by investigating consumer complaints, regulating motor vehicle dealers, issuing notices of violations to improperly registered motor vehicles and verifying motor vehicle identification numbers.

7. Since becoming bureau chief, Mr. Turner has instituted a program to upgrade inspectors as money becomes available. To date, 56 inspector positions have been upgraded. Ms. Wright's position is the next one scheduled to be upgraded.

8. At the time Mr. Turner became bureau chief, Ms. Wright was a records technician in the Bureau's Region V, Winter Park office, but reported directly to the bureau chief rather than the regional administrator, which was unusual.

9. Based upon his review of the State of the Bureau Report and his knowledge of the Bureau, Mr. Turner determined that Ms. Wright's position should be changed to an inspector position to better utilize her position. Ms. Wright's duties as a records technician should have been performed by other personnel.

10. Around August of 1990, Ms. Wright told Mr. Turner that she was dissatisfied with her current position because she was not receiving a uniform allowance and did not have a state vehicle to drive to and from work. Mr. Turner told Ms. Wright that he had concerns about her position of records technician and thought it would be better for her to be an inspector. Bureau reorganization was under way, but had not been completed and reclassification was not done at that time.

11. In 1991, Ms. Wright requested that her position be audited, claiming that she was being worked out of class.

12. On October 29, 1991, Hazel Drombolis, chief of personnel services for the Department, submitted a position audit report to Mr. Turner. The audit concluded that Ms. Wright was being worked out of class and recommended that Ms. Wright's position be reclassified to Highway Safety Specialist.

13. Mr. Turner agreed with the finding in the position audit that Ms. Wright was working out of class, and as a result of the analysis of the needs of the agency, he felt that Ms. Wright should be reassigned to the position of License and Registration Inspector.

14. Mr. Turner prepared a response to the audit in the form of a memorandum to Charles J. Brantley, Director of the Division of Motor Vehicles, recommending that Ms. Wright's position be reclassified to License and Registration Inspector, a one paygrade demotion. The work load for inspectors in Region V had increased significantly from fiscal year 1989/90 to fiscal year 1990/91. For example, notices of violation increased 261 percent; consumer complaints increased 113 percent; dealer location inspections increased 23 percent and dealer application assists increased 34 percent. Even though the work load had increased, as of the date of the report, there was one less inspector position in the region than there had been in 1988. There was a need for another inspector position and a legitimate basis to reclassify Ms. Wright's position.

15. Ms. Wright suffered no reduction in salary as a result of her demotion.

16. Ms. Wright has been doing an outstanding job as a License and Registration Inspector, according to the Region V Administrator.

17. The Department has received a written report of a physical examination by a medical doctor which concluded that Ms. Wright was physically able to perform her job functions. The Department has not been supplied by Ms. Wright with any written doctor's report stating that she was unable to perform her job functions.

18. The regional administrator in charge of Ms. Wright's office has told her that if she needs to rest on the job that she could do so. Ms. Wright's work load is about average for her position. Inspectors, including Ms. Wright, are not required to walk parking lots, and are permitted to drive; they are not required to crawl under automobiles.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this proceeding pursuant to Section 120.57(1), F.S.

20. Respondent is an "employer", defined in subsection 760.02(7), F.S., (1992) as "...any person employing 15 or more employees for each working day in each of 20 or more calendar weeks..."

21. Subsection 760.10(1)(b), F.S., provides that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

22. Since Florida's employment discrimination statute is patterned on Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2, resort to federal court interpretations of that act is appropriate. *School Board of Leon County v. Hargis*, 400 So.2d 103 (Fla. 1st DCA 1981).

23. In *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the U.S. Supreme Court established the basic allocation of burden of proof in discrimination cases. Petitioner retains the burden of proof throughout the proceeding, although once a prima facie case of discrimination is established, the Respondent must articulate some legitimate, nondiscriminatory reason for the challenged action. Then Petitioner must prove that the reasons offered are not true, but rather a pretext for discrimination. The prima facie case "...raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors..." *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), cited in *Burdine*, supra. This evidentiary scheme is reiterated in *St. Mary's Honor Center v. Hicks*, 113 S.Ct 2742 (1993).

24. The Petitioner has failed to establish a prima facie case either as to the demotion or to the retaliation. Petitioner's theory as to the demotion is that the Department placed her in a job whose functions she was physically unable to perform in an effort to get rid of her. The Petitioner produced no credible evidence proving that the Department demoted her because of her age. In addition, the Petitioner produced no credible evidence to show either that she could not perform the functions of her new job or that the Department had ever been provided with a physician's statement that she could not. In fact, the evidence points to the opposite conclusion. As to her claims of retaliation, Petitioner produced no credible evidence that she was being harassed or mistreated because of having filed a complaint. Rather, the evidence shows that she is being treated no differently than other employees in her position.

25. Even though the Petitioner has not established a prima facie case, the evidence produced by the Department shows that it had legitimate, nondiscriminatory reasons for the demotion. First of all, the propriety of the

demotion has already been litigated in Wright v. Department of Highway Safety and Motor Vehicles, (Final Order entered 4/8/92). In that case the Public Employee's Relations Commission found that:

Wright's demotion resulted from a reclassification of her position in good faith to promote the Agency's legitimate interests and the Agency did not act arbitrarily, capriciously, or with an impermissible motive in making its decision. Its decision to demote Wright was therefore proper and her appeal should be dismissed.

(Department's Exhibit #1)

26. The order in the PERC case bars the Petitioner from relitigating these issues under the doctrine of collateral estoppel. Questions common to both the PERC case and this FCHR case that were actually adjudicated in the PERC case may not be relitigated. Seaboard Coast Line Railroad Company v. Industrial Contracting Company, 260 So.2d 860, 864 (Fla. 4th DCA 1972). Impermissible motive and the reason for the demotion were issues resolved in the PERC case.

27. Even if these issues could be relitigated, the Department has proven that it had sound management reasons for abolishing Ms. Wright's Records Technician position and demoting her to License and Registration Inspector. The Department has established that it had a need for more inspectors, both statewide and in its Region V, and that it has been in the process of reorganizing to meet this need at least since 1990. It also established that the main duties of the Records Technician position should be performed by other employees, lessening the need for that position. Based upon the record as a whole, the Department acted in good faith in demoting Ms. Wright. Petitioner failed to meet her burden of proof.

RECOMMENDATION

Based on the foregoing, it is, hereby,

RECOMMENDED:

That a final order be entered dismissing Ms. Wright's petition.

DONE AND RECOMMENDED this 27th day of October, 1993, in Tallahassee, Leon County, Florida.

MARY CLARK
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of October, 1993.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.