

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUAN ELSO,)
)
 Petitioner,)
)
 vs.) Case No. 01-3465
)
 CITY OF HIALEAH GARDENS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on November 16, 2001, by video teleconference at sites in Miami and Tallahassee, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gary A. Costales, Esquire
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For Respondent: J. Frost Walker, III, Esquire
Law offices of Charles A. Citrin
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STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent discriminated against the Petitioner on the basis of age for the reasons stated in the Charge of Discrimination and Petition for Relief in violation of Section 760.10(1), Florida Statutes.

PRELIMINARY STATEMENT

On or about February 5, 2001, the Petitioner executed a Charge of Discrimination against the Respondent. The charge was filed with the United States Equal Employment Opportunity Commission (EEOC) on or about February 12, 2001. In his Charge of Discrimination, the Petitioner asserted that he had been subjected to "age discrimination" when the Respondent's Mayor "demoted me from the position of Maintenance Supervisor in October 2000 and replaced me with Nivaldo Rodriguez, who is in his twenties." On July 26, 2001, the EEOC issued a "Dismissal and Notice of Rights," in which it stated, in pertinent part: "Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes." On August 24, 2001, the Petitioner filed a Petition for Relief with the Florida Commission on Human Relations (FCHR). The Petition for Relief asserted that the Petitioner in this case had been subjected to age discrimination. The Petition for Relief also asserted age discrimination claims on behalf of two other petitioners who were former employees of the Respondent.¹

At the final hearing in this case, the Petitioner testified on his own behalf and also presented the testimony of three additional witnesses. The Petitioner also offered one exhibit, which was received in evidence. The Respondent presented the

testimony of two witnesses and offered eleven exhibits, all of which were received in evidence.

At the conclusion of the hearing, neither party wished to order a transcript. The parties were allowed ten days from the date of the hearing within which to file their proposed recommended orders. Thereafter both parties filed timely Proposed Recommended Orders. The parties' proposals have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner was born in 1953. At the time of the events which form the basis for his claim, he was more than forty years old. The Petitioner was born in Cuba and spent most of his life in Cuba. The Petitioner came to the United States of America approximately two years before the events which form the basis for his claim. The Petitioner speaks fluent Spanish, but does not speak English.

2. In October of 1999, the Petitioner was hired by the City of Hialeah Gardens as a laborer in the Parks Department at a pay rate of \$6.50 per hour. The Petitioner is still employed by the City of Hialeah Gardens as a laborer in the Parks Department at a pay rate of \$6.50 per hour. The Petitioner's pay rate has never been changed during his employment with the City of Hialeah Gardens.

3. During his employment with the City of Hialeah Gardens, the Petitioner has never held either the position of "Maintenance Supervisor" or the position of "Assistant Parks Director." During his employment with the City of Hialeah Gardens, the Petitioner has never been demoted from either the position of "Maintenance Supervisor" or the position of "Assistant Parks Director."

4. The Mayor of the City of Hialeah Gardens has the sole authority and responsibility to make employment decisions. The Mayor appointed Nivaldo Rodriguez (Rodriguez) to the position of Assistant Parks Director. At the time of the appointment, Rodriguez was in his late twenties. At the time of the appointment, Rodriguez spoke fluent English and Spanish. At the time of the appointment, Rodriguez was a friend of the Mayor and the Mayor was aware of his qualifications for the position. The Mayor appointed Rodriguez to the position of "Assistant Parks Director" because he thought he was qualified for the position. The Mayor also thought that the Petitioner was not qualified for the position because, among other things, the Petitioner did not speak English. It is necessary to be able to speak English in order to fulfill all of the duties of the position of "Assistant Parks Director."

5. The Mayor had credible non-discriminatory reasons to appoint Rodriguez as "Assistant Park Director," and not to

appoint the Petitioner to that position. There is no credible evidence that the Mayor's reasons for appointing Rodriguez were pretextual. Age was not a factor in the decision to appoint Rodriguez rather than the Petitioner.

6. The evidence regarding the Respondent's hiring and termination practices does not establish any pattern of age based discrimination.

CONCLUSIONS OF LAW

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

8. The basic legal principles applicable to a case of this nature were described as follows in Donald R. v. Seminole Community College, DOAH Case No. 99-2483 (Final Order issued September 17, 1999):

12. Section 760.10(1), in relevant part, makes it an unlawful employment practice for Respondent to discriminate against Petitioner because of Petitioner's age. Chapter 760, entitled the Florida Human Relations Act (the "Act"), adopts the legal principles and judicial precedent set forth under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C., Section 2000e et seq. (the "ADA").

13. The law affords no protection from discrimination unless Respondent engages in an adverse employment action. Morisky v. Broward County, 80 F.3d 445 (11th Cir. 1996); Bristow v. Daily Press, 770 F2d 1251 (4th Cir. 1985). Respondent engaged in an adverse employment action when Respondent

did not hire Petitioner for either of the positions for which Petitioner applied. The remaining issue is whether Respondent engaged in the adverse employment action because of Petitioner's age.

14. Petitioner submitted no direct evidence of age discrimination. In the absence of such evidence, Petitioner must provide sufficient inferential evidence of age discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas v. Green, 411 U.S. 792 (1973).

14. [sic] The initial burden of proof is on Petitioner. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Petitioner must satisfy its burden of proof by a preponderance of the evidence. Section 120.57(1)(g).

15. Petitioner must establish a prima facie case of discrimination. Rosenbaum v. Southern Manatee Fire and Rescue District, 980 F.Supp 1469 (M.D. Fla. 1997); Andrade v. Morse Operations, Inc., 946 F.Supp 979, 984 (M.D. 1996). Petitioner must show by a preponderance of evidence that: he is a member of protected class; he suffered an adverse employment action; he received disparate treatment from other similarly situated individuals in a non-protected class; and that there is sufficient evidence of bias to infer a causal connection between his age and the disparate treatment. Id. Failure to establish the last prong of the conjunctive test is fatal to a claim of discrimination. Mayfield v. Patterson Pump Company, 101 F.3d 1371 (11th Cir. 1996); Earley v. Champion International Corp., 907 F.2d 1077 (11th Cir. 1990).

16. Petitioner made a prima facie showing that he is a member of a protected class and that he suffered an adverse employment action. However, Petitioner failed to make a prima facie showing that he received

dissimilar treatment from individuals in a non-protected class; that there was any bias against Petitioner; or that, even if evidence of bias did exist, it was sufficient to infer a causal connection between Petitioner's age and the alleged disparate treatment. (Emphasis in original.)

9. Application of the foregoing legal principles to the facts in this case leads to the conclusion that this case should be dismissed because of the absence of any persuasive evidence of any age-based discrimination against the Petitioner. To the extent that the Petitioner's claim for relief is based on an assertion that he was improperly demoted, the claim fails, because the evidence clearly shows that the Petitioner was never promoted to any position other than his initial position as a laborer. To the extent that the Petitioner's claim for relief is based on an assertion that the promotion of Rodriguez, rather than the Petitioner, was based on age discrimination, the claim fails because there were legitimate non-discriminatory reasons for promoting Rodriguez, and there is no persuasive evidence of any age-based discrimination.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing the petition in this case and denying all relief sought by the Petitioner.

DONE AND ENTERED this 3rd day of January, 2002, in
Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of January, 2002.

ENDNOTE

1/ The claims of the other two petitioners were docketed as separate cases at the Division of Administrative Hearings; Boada v. City of Hialeah Gardens, DOAH Case No. 01-3463, and Martinez v. City of Hialeah Gardens, DOAH Case No. 01-3464. Hearings were previously held in the Boada and Martinez cases before Administrative Law Judge Robert Meale.

COPIES FURNISHED:

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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.