

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LADORIS G. TUTSON,)
)
 Petitioner,)
)
 vs.) Case No. 01-4316
)
 DEPARTMENT OF CHILDREN AND)
 FAMILY SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 28, 2003, in Fort Lauderdale, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Randy A. Fleischer, Esquire
4801 South University Drive
Suite 3070
Davie, Florida 33328

For Respondent: Sondra R. Schwartz, Esquire
John Copelan, Esquire
Department of Children
and Families
201 West Broward Boulevard
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether the Respondent discriminated against the Petitioner by failing to promote the Petitioner as set forth in the claim.

PRELIMINARY STATEMENT

On November 2, 2001, the Florida Commission on Human Relations (Commission) forwarded the instant case to the Division of Administrative Hearings for formal proceedings. The Petitioner, Ladoris Tutson, named the Respondent, Department of Children and Family Services, as the party that had committed an unlawful employment practice. Essentially, the Petitioner maintained she had been discriminated against when she was not promoted at the South Florida State Hospital. The Petitioner claimed damages in the amount of \$50,000. The last act of alleged discrimination took place in June of 1997. Thereafter the matter took a tortuous route to the final hearing that was conducted on January 28, 2003.

At the hearing, the Petitioner testified in her own behalf and offered testimony from Henry Crawford, Daisy Johnson, Judy Smith, and Pat Morrow. The Petitioner's Exhibits numbered 1-25, 28, and 33 were admitted into evidence. The Respondent presented testimony from Andrew Reid, Barbara Nickels, and Annie Thomas. The Respondent's Exhibits numbered 1-3 were admitted into evidence.

A transcript of the proceeding has not been filed. Both parties timely filed Proposed Recommended Orders that have been fully considered in the preparation of this order.

FINDINGS OF FACT

1. The Petitioner was an employee at the South Florida State Hospital (the Hospital) from October 15, 1979, until approximately October 31, 1998.

2. On the latter date, a private company assumed full management of the hospital. From that time neither the Respondent nor its predecessor (Florida Department of Health and Rehabilitative Services) has maintained management or administration of the facilities.

3. Prior to October 31, 1998, the Hospital was operated by a State of Florida agency. As of October 31, 1998, the Petitioner ceased to be a State of Florida employee.

4. The Petitioner is a black female.

5. On or about May 6, 1997, the Petitioner applied and interviewed for a job at the Hospital. She sought the position of Unit Treatment and Rehabilitation Director.

6. At that time, the Hospital advertised two open positions for Unit Treatment and Rehabilitation Director.

7. Three applicants were ranked for the open positions. Among the three, the Petitioner was ranked third by the selection committee.

8. At or near the same time, the administrator of the Hospital received notice that he would have to cut positions from his budget. This slashing of employee positions was in

response

to budget demands created at the agency level. It had nothing to do with the job performances of employees at the Hospital.

9. In fact, the Petitioner has always received favorable employee performance evaluations. She was a valued employee at the Hospital and was considered to be hard working by peers and supervisors alike.

10. Nevertheless, when faced with the directive to cut positions, the administrator elected to eliminate open or unfilled positions. Pertinent to this case is the slot that the Petitioner would have filled had it not been eliminated.

11. At least under one theory, the Petitioner would have been promoted to Unit Treatment and Rehabilitation Director had the position not been deleted. The promotion would have happened because one of the higher-ranked applicants for the job chose to reject the Hospital's offer of employment. Thus as the third-ranked applicant, the Petitioner would have been selected.

12. Notwithstanding the foregoing, the Petitioner maintained she should have received the position of Unit Treatment and Rehabilitation Director that was filled by an individual named Driscoll. She maintains that although Driscoll was the highest-ranked applicant, she was equally or better qualified for the promotion.

13. Driscoll is a white male.

14. Prior to his employment at the Hospital, Driscoll had served as the director of a short-term residential facility. He had also been the director of case management for a hospital and had supervised other case managers and support staff. The Petitioner had no similar or equivalent supervisory experience. The Petitioner had never supervised employees to any level of supervision as demonstrated by Driscoll at the time of the selection process.

15. The advertised opening sought an individual with "a bachelor's degree and four years of professional direct services experience in a social, rehabilitative or health care treatment program, two of which must have been in a supervisory capacity." The Hospital's consideration of the Petitioner's role as a "lead worker" was a generous allowance. Technically, the Petitioner did not meet the job description requirements.

16. Additionally, the Petitioner's advanced degree did not qualify her for the position of Unit Treatment and Rehabilitation Director. The advertisement for the position of Unit Treatment and Rehabilitation Director provided that a:

. . . masters degree in health, special education or one of the behavioral or rehabilitative sciences can substitute for one year of the required [sic] nonsupervisory experience. A doctorate degree in health, special education or one of the behavioral or rehabilitative sciences can substitute for the required

[sic] nonsupervisory experience.

17. The Petitioner did not hold either the referenced master's degree or doctorate degree.

18. The Petitioner was not an equally qualified or a superiorly qualified applicant for the position of Unit Treatment and Rehabilitation Director.

19. Nevertheless, when she was not chosen for the position the Petitioner wrote a memorandum to the Commission to complain about the selection of Driscoll. The memorandum stated:

A blatant campaign of racism reigns at South Florida State Hospital. Most recently, the hospital advertised for the position of Unit Treatment and Rehabilitation Director. Two (2) positions were to be filled as a result of that advertisement. Qualified applicants were interviewed from within the hospital. There were two (2) Afro-American and three (3) Anglo-Saxon applicants. Of the two (2) Afro-American applicants applying, I met all of the qualifications to fill one (1) of the positions. Over the dissent of others on the interviewing committee, Patricia Espinosa Thomson (acting hospital administrator) re-advertised the position(s).

20. On September 12, 1997, the Commission acknowledged receipt of the Petitioner's Memorandum of June 27, 1997, and, in accordance with a Worksharing Agreement with the Equal Employment Opportunity Commission (EEOC), the complaint was forwarded to the Miami District Office of the EEOC. This complaint became the subject matter of the instant case. The Commission's notice to the Petitioner provided:

Within 35 days of notice of EEOC's Letter

of Determination regarding the above
referenced complaint, you may request the
FCHR to review the final finding and orders
of the EEOC by requesting a Substantial
Weight [sic] Review.

21. There is no evidence regarding whether the Miami District issued a Letter of Determination. It is undisputed, however, that the Commission did not issue its Notice of Determination until October 9, 2001.

22. The Notice of Determination represented that the Respondent was advised of the Petitioner's claim in January of 1998. The Notice of Determination also recognized that the Respondent had asserted that the claim was "time-barred" and that it would not provide information regarding the claim.

23. Based upon the inference found in Rule 60Y-5.003(4), Florida Administrative Code, the Commission entered a determination of cause.

24. The Commission apparently did nothing to timely investigate the complaint, did not act within 180 days of its filing, and did not notify the Hospital that its records should be maintained in connection with the allegations of this case.

25. When the Hospital went to private management all public records that had been maintained were stored or destroyed according to agency rules. There was no effort to conceal or destroy records related to this matter. The Hospital administrators faced the daunting tasks of trimming the Hospital FTEs, preparing for and transitioning to the private company, and organizing records for storage. There

was no effort to single Petitioner out for discriminatory purposes.

26. When eventually questioned regarding this case, the Department elected not to participate in the investigation as under the then known precedent it was not required to do so. The Department's decision predated Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000).

27. Both parties claim prejudice as a result of the delays in pursuing this cause. The Petitioner maintains that records that would have helped her assessment of the matter have been either lost or destroyed. The Respondent maintains that witness unavailability, loss of records, and the fact that it does not even manage the Hospital anymore compounds its inability to appropriately respond to the Petitioner's claim.

28. What is certain is the fact that the Department cannot award the position to the Petitioner. Further, even at the time in question, the Hospital could not have awarded the position to the Petitioner since the position had been eliminated. The only way the Petitioner could have gotten the position would have been if Driscoll had been removed. And, as previously noted, the Petitioner was not equal to or superior to Driscoll in her qualifications for the position.

29. In June 2002, the instant case was heard on a motion to dismiss. That motion was granted. The conclusions of law from the Recommended Order of Dismissal found that the

Division of Administrative Hearings does not have jurisdiction over the subject matter of this proceeding. Despite that conclusion, the Commission entered an Order Remanding Petition for Relief from an Unlawful Employment Practice. Accordingly, this matter was re-opened and scheduled for hearing.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties to this proceeding. As set forth in the Recommended Order of Dismissal, the Division of Administrative Hearings does not have jurisdiction over the subject matter. Nevertheless, as directed by the Commission, it is concluded:

31. The Petitioner bears the burden of proof in this cause to establish an act of discrimination. She has failed to meet that burden. The Petitioner's qualifications were neither equal to nor superior to those of the applicant who received the position. Moreover, had the Hospital not been required to slash positions, the Petitioner would have been placed in a position of Unit Treatment and Rehabilitation Director. None of the positions would be state-employee positions today.

32. Section 760.10, Florida Statutes, makes it unlawful for an employer to refuse to hire or promote an individual based upon race or gender. In this case, the Petitioner

failed to establish that she was not chosen based upon her race (black) or gender (female). The Department interviewed her and the hiring committee ranked the Petitioner third. She was not passed to third due to her race or gender.

33. Moreover, even if Petitioner were deemed to have met an initial burden, the Respondent has articulated legitimate, nondiscriminatory reasons for the selection of Driscoll. Additionally, it has demonstrated and articulated a basis for the elimination of the open position that could have been given to Petitioner. Agency mandates based upon legislative funding reductions caused the Hospital to eliminate the vacant position. It was entirely appropriate that the open position be cut (versus a filled position).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a Final Order dismissing the Petitioner's claim.

DONE AND ENTERED this 25th day of March 2003, in Tallahassee, Leon County, Florida.

Hearings

J. D. Parrish
Administrative Law Judge
Division of Administrative

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Filed with the Clerk of the
Division of Administrative

Hearings

this 25th day of March, 2003.

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.