STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEATRICE CRITTENDON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-3678
	)	
BAY COUNTY,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 6, 2003, in Panama City, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Cecile M. Scoon, Esquire
Peters & Scoon
25 East Eighth Street
Panama City, Florida 32401

For Respondent: Robert C. Jackson, Esquire
Harrison, Sale, McCloy
& Thompson, Chartered
Post Office Box 1579
Panama City, Florida 32402

STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner in her employment because of her race and alleged disability in violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On November 15, 2000, Petitioner, Beatrice Crittendon, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). Petitioner's charge alleged that the Bay County School Board failed to transfer her to an exceptional student education (ESE) clerk position in January 2000 because of her race and alleged disability. Petitioner also alleged in her charge that she was required to work in a physically strenuous environment despite being in a light duty status. After investigation, on August 15, 2002, FCHR issued a "Notice of Determination: No Cause," finding no reasonable cause to believe that any unlawful employment practice had occurred. On September 24, 2002, Petitioner filed a Petition for Relief based on the same allegations contained in her charge of discrimination. The Petition was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in her behalf, called six other witnesses, and introduced two exhibits into evidence. Respondent called two witnesses and offered four exhibits into evidence.

After the hearing Petitioner and Respondent filed Proposed Recommended Orders on May 27, 2003, and May 28, 2003, respectively.

FINDINGS OF FACT

1. Petitioner is an African-American female. She began working for Respondent in January 1982 at the Margaret K. Lewis School (MKL School). She was employed at the MKL school as a teacher's aide for approximately 18 years, from January 1982 through January 2000. Since January 2000, Petitioner remained employed with Respondent at the A.D. Harris High School as a clerical assistant.

2. The MKL School is a specialized school whose students are severely physically or mentally handicapped. The school environment is both challenging and rewarding. Many of the students exhibit behavioral and/or physical problems in an educational environment. Most of the students require some type of assistance either educationally and/or physically. During the time period at issue here, Judith Riera was the principal of the MKL School.

3. In 1993, Petitioner injured her back at the MKL school after slipping on some food in the cafeteria. At a result of this accident, Petitioner's doctor recommended that she be placed on light duty workplace restrictions with no heavy lifting. Respondent attempted to honor her restrictions by placing Petitioner in a light duty status at the MKL School. For the most part, Petitioner was able to still function in a classroom environment after her injury. However, she

occasionally encountered situations where not enough help was available to assist her in lifting or physically helping a student. The evidence did not show this lack of help was due to Petitioner's race or was directed at Petitioner to make her job harder. Indeed, the lack of assistance appeared to be a school-wide problem.

4. In 1996, Petitioner complained to the principal that a teacher with whom she was working treated her in a hostile manner that Petitioner perceived as racially motivated, although no racial remarks were made towards her. The principal responded with a comment something like, "oh well, you know how some people are." The principal did not recall any specific detail about the 1996 incident. Given the length of time since the incident occurred and the lack of specificity about the complaint, the evidence does not demonstrate racial bias on the part of Respondent or the principal.

5. In 1998, Petitioner aggravated her existing injury in an automobile accident. The accident resulted in additional workplace restrictions. The additional restrictions included refraining from overhead work, repetitive bending, excessive amounts of time standing, and lifting anything over 20 pounds. By this time, Petitioner was also working with a vocational rehabilitation counselor provided by the State, who assisted Respondent and Petitioner in finding appropriate positions that

could accommodate Petitioner's workplace restrictions. Petitioner continued in the teacher's aide position she had been in until the vocational rehabilitation specialist working with Petitioner notified the principal that the teacher's aide position was too strenuous for Petitioner. Thereafter, Petitioner was removed from the classroom and eventually moved to another school. There was no evidence that this move was motivated by a desire to discriminate against Petitioner.

6. Despite her restrictions, Petitioner testified that she was able to (and still can) care for herself, brush her teeth, walk, drive, see, hear, and generally manage her daily living responsibilities with occasional minor assistance. She also continues to work for Respondent with these restrictions. Since no major life activity is significantly impaired by Petitioner's injury, she does not have a handicap for purposes of employment discrimination law.

7. In mid-December 1999, Respondent posted an advertisement for an ESE clerk position. The ESE clerk position was a new position funded by a federal grant. Ms. Riera testified that she felt, after speaking to the MKL School staff, that the position would be best used to assist the teachers in fulfilling the often burdensome administrative tasks necessary to assist mentally and physically disabled children. The consensus from the teachers and administrators was that the

position should be filled by someone who had: (1) good interpersonal skills and relationships with the teachers, and (2) strong organizational skills because the ESE clerk would have to organize and complete multiple and diverse administrative tasks from the entire teaching staff.

8. The existing collective bargaining agreement with para-professional personnel, including teacher's aides like Petitioner, required Respondent to advertise open positions at the work site and the district's central office for five days. Five days is the minimum set by contract for advertising a position. It is not uncommon for employment advertisements to be longer than five days and/or extended by on-site management in order to obtain the best qualified candidate pool for the job. There was no evidence that suggested the employment process used in this case was racially motivated to exclude Petitioner from the ESE clerk position.

9. Neither party presented any direct evidence about when initial applications for the ESE Clerk position were originally due. It was generally agreed that it was some time before the scheduled Christmas school break in 1999. The interviews were also originally scheduled to occur before the Christmas break. But, in light of the many student events and other tasks that had to be completed before the break, Ms. Riera decided to reschedule the ESE Clerk interviews until after the new year.

She likewise extended the deadline for applying for the position until just before the interviews. Her policy was to grant an interview to any internal MKL School candidate who expressed an interest in an advertised position at the school.

10. Petitioner applied for the ESE clerk position.

11. Sometime in January 2000 before the interviews began, Ms. Janice Rudd (white), a teacher's aide at the MKL School, contacted Ms. Riera about the ESE clerk position. Ms. Rudd explained that she wished to be considered for the position. Ms. Rudd submitted her application for the ESE position. The evidence did not demonstrate that the application was untimely or, more importantly, that the application was accepted in order to exclude Petitioner from the ESE clerk position based on her race or disability. Similar to Petitioner, Ms. Rudd was on light duty and believed that her workplace restrictions may force her to leave the classroom or, even worse to her, the MKL School.

12. Ms. Rudd was also a long time employee at the MKL School. She had been working there since August 1986. During her 14 years at the MKL School, she had volunteered to serve on several staff committees and got to know many different teachers. The members of the ESE clerk interview panel were generally familiar with Ms. Rudd's work performance prior to the interview. What the interview members liked about Ms. Rudd was

her demonstrated ability to work with the majority of the teachers at the school and her demonstrated ability to stay organized.

13. In 1993, Ms. Rudd injured her back while lifting a child. At the time of the ESE clerk interviews, her workplace restrictions included no overhead work, no repetitive bending, and no lifting objects weighing more than 25 pounds.

14. Petitioner had a chronic problem with tardiness throughout her time at the MKL School. Ms. Riera had formally counseled Petitioner in writing, at least twice, for repeated failure to timely appear at work. Petitioner's performance evaluations over this period also consistently noted that this was a continuous problem that affected not only herself, but the other staff members. At one point, Ms. Riera required Petitioner to sign in and out of the front office to reiterate how important punctuality was and to help assist Petitioner's timely arrival.

15. Timely arrival was important at the MKL School because teachers and teacher's aides, including Petitioner, at the MKL School assisted students off the morning buses and, eventually, to their classroom. If a teacher or aide was late, the other staff members would have to step in and perform the absent person's duties in addition to their own during a very hectic time at the school. Petitioner's chronic tardiness caused such

morning difficulties. All four members of the interviewing panel for the ESE clerk position knew of Petitioner's chronic tardiness and the problems it caused with the staff, and cited it as a detraction in their review of the applicants for the ESE clerk position. The evidence did not show that Petitioner had participated extensively on multiple staff committees as Ms. Rudd had.

16. On January 3, 2000, Respondent held interviews for the ESE clerk position. The interview panel consisted of Doris Pigneri, a teacher; Susan Bartholemy, a teacher; Ruth Kunuch, an assistant administrator; and Ms. Riera, the principal. Seven candidates were selected for interviews, including Petitioner and Ms. Rudd. The interview panel asked the same questions of all the candidates. After the completion of all of the interviews, the interview panel met and discussed the strengths and the weaknesses of each candidate. Both Petitioner and Ms. Rudd were liked by the staff and considered competent teacher's aides. They eventually selected Ms. Rudd as the most qualified and suitable person for the job. Ms. Riera offered Ms. Rudd the position, which she accepted.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes (2002).

18. Under the Florida Civil Rights Act, it is an unlawful employment practice for an employer:

> To discharge 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.

Section 760.10(1)(a), Florida Statutes. (2002).

19. Florida Courts have determined that federal discrimination law should be used as a guidance when reviewing provisions of the Florida Civil Rights Act. See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

20. The Supreme Court of the United States established in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis in cases alleging disparate treatment discrimination such as the one at bar. This Court reiterated

and refined this analysis in St. Marys' Honor Center v. Hicks, 509 U.S. 502 (1993).

21. Pursuant to this analysis, Petitioner has the burden of establishing a prima facie case of unlawful discrimination by a preponderance of the evidence. If Petitioner establishes a prima facie case, Respondent must articulate some legitimate nondiscriminatory reason for its employment action. If Respondent articulates such a reason, the burden then shifts back to Petitioner to prove that Respondent's proffered reason is not the true reason for its actions, but instead a pretext for discrimination. The Supreme Court, however, emphasized that before finding discrimination "the fact finder must believe the Plaintiff's explanation of intentional discrimination." Hicks, 509 U.S. at 519. The Court stressed that even if the fact finder does not believe the proffered reason given by the employer, the burden at all times remains with Petitioner to demonstrate intentional discrimination. Id.

22. In order to establish a prima facie case of discrimination, Petitioner must establish that:

(a) She is a member of a protected class;
(b) She is qualified for the position;
(c) She was subject to an adverse employment decision; and
(d) She was treated less favorably than similarly-situated person outside the protected class.

See Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983); Smith v. Georgia, 684 F.2d 729 (11th Cir. 1982); Lee v. Russell County Board of Education, 684 F.2d 769 (11th Cir. 1984).

23. If Petitioner fails to establish a prima facie case of discrimination, judgment must be entered in favor of Respondent. See Bell v. Desoto Memorial Hospital Inc., 842 F. Supp. 494 (M.D. Fla. 1994).

24. As indicated earlier, if a prima facie case is established, a presumption of discrimination arises and the burden shifts to Respondent to advance a legitimate, non-discriminatory reason for the action taken against Petitioner. However, Respondent does not have the ultimate burden of persuasion, but merely an intermediate burden of production. Once a non-discriminatory reason is offered by Respondent, the burden shifts back to Petitioner. Petitioner must then demonstrate that the proffered reason was merely a pretext for discrimination.

25. It was undisputed that Petitioner is a member of a protected class due to her race and possessed the basic qualifications to perform the ESE clerk position. However, Petitioner did not demonstrate that she was treated less favorably than others outside her protected class. All of the applicants were treated the same by the interview committee and competed under the same employment process. The evidence did

not demonstrate that Petitioner was not hired for the ESE clerk position based on her race.

26. Even assuming arguendo that Petitioner established an initial prima facie case, she failed to carry the ultimate burden of persuasion that the transfer decision was due to intentional race discrimination. Here, Respondent provided a legitimate non-discriminatory reason for its decision, that is, the interview panel thought that Ms. Rudd was better qualified and better suited for the position. Specifically, the interview panel believed that Ms. Rudd possessed more of the important qualities that they thought were crucial for the job: (1) good interpersonal skills and relationships with the teachers; and (2) strong organizational skills. This opinion was based on the extensive and multiple school committees on which Ms. Rudd had served. Such service is a reasonable basis for the committee members to form such an opinion. No similar evidence of such work was presented as to Petitioner.

27. Petitioner tried to establish that Respondent's reasons were pretextual but failed to provide any convincing evidence that Respondent's process and reasons were a sham. First, Petitioner alleged that the decision maker, Ms. Riera, had extended the application submission deadline and coerced Ms. Rudd to apply for the position because of racial bias. However, Ms. Riera stated that she extended the interviews and

application deadline for administrative convenience at the end of a busy semester. Further, it was not unusual for an on-site manager to extend an application or interview period. Moreover, acceptance of qualified applicants in order to afford all interested personnel an opportunity to apply does not demonstrate racial bias. Finally, Ms. Rudd testified that she contacted Ms. Riera directly about the position. Since Ms. Rudd contacted Ms. Riera about the position, not the other way around as Petitioner alleged, Petitioner's argument of manipulation of the process by Ms. Riera fails.

28. Next, Petitioner alleged that she was more qualified than Ms. Rudd and that the interview process was somehow biased against her. The evidence presented, however, does not support Petitioner's allegations. The interview panel asked the same questions of all the candidates and met afterwards to discuss each candidates' strengths and weaknesses. No interview panel member noted any hint of bias or favoritism during the interviews and discussions. All the interview panel members were generally aware of both Ms. Rudd's and Petitioner's performance and Petitioner's problems with punctuality and its corresponding effect on the other staff members. In the end, Ms. Rudd was the consensus recommendation for the position.

29. Courts should not second guess the legitimate employment decisions of employers. The Courts do not sit as a

super-personnel board, guaranteeing review of every workplace infraction or decision. See Cofield v. Goldkist, Inc., 267 F.3d 1264, 1269 (11th Cir. 2001). This is especially true in questions involving differing qualifications between job candidates. The employer is the best judge of what kind of person is needed for specific duties. Here, the MKL School staff reasonably judged the qualities and abilities of the person who would assist them. Therefore, Petitioner has failed to establish any discriminatory actions by Respondent and the Petition for Relief should be dismissed as to racial discrimination.

30. Finally, Section 760.10, Florida Statutes, also prohibits discrimination in employment because of an individual's handicap. "Handicap" is not defined by the statute, but Florida courts have adopted the federal definition for claims alleging handicap discrimination brought under the Florida Civil Rights Act. See Brand, 633 So. 2d at 509. Federal law requires that Petitioner prove that she (1) had a physical or mental impairment which substantially limited one or more major life activities; (2) had a record of such impairment; or (3) was regarded as having such an impairment. See 29 U.S.C. Section 706(8)(3).

31. The United States Supreme Court recently reiterated that Congress did not intend every physical limitation to be

considered a disability. In fact, most limitations will not meet the high standard required by law. See Toyota Motor Manufacturing Kentucky, Inc. v. Williams, 534 U.S. 184, 197 (2002)(requiring that there be a "demanding standard for qualifying as disabled"). Examples of major life activities that would have to be substantially impaired for a limitation to qualify as a disability are caring for oneself, walking, seeing, speaking, breathing, learning, and working.

32. Petitioner is not considered handicapped under the Florida Civil Rights Act. She testified that she was able to care for herself, brush her teeth, see, hear, drive, walk, and generally manage her daily living responsibilities with occasional assistance. She also continued to work for Respondent the entire time she had these physical restrictions. Although somewhat limiting, her physical restrictions were not a substantial limitation on a major life activity. Therefore, Petitioner's disability charge should be dismissed.

33. Even if Petitioner were to qualify as handicapped, she still would not have established a prima facie case of disability discrimination. The successful candidate, Ms. Rudd, had similar workplace restrictions. Both Petitioner and Ms. Rudd were on light duty. Both Petitioner and Ms. Rudd had problems with their backs which limited lifting, standing, and overhead work. And both Petitioner and Ms. Rudd were working

with a vocational rehabilitation counselor who was concerned that they may not be able to continue working in the classroom at the MKL School with their workplace restrictions. Thus, even if Petitioner is considered handicapped under the statute, she did not establish a prima facie case of disability discrimination, because she was similarly situated to the successful candidate, Ms. Rudd. Therefore, the Petition for Relief should be dismissed.

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 Petition for Relief.

DONE AND ENTERED this 2nd day of July, 2003, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of July, 2003.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Bill Harrison
Bay County
1311 Balboa Avenue
Panama City, Florida 32401

Robert C. Jackson, Esquire
Harrison, Sale, McCloy
& Thompson, Chartered
Post Office Box 1579
Panama City, Florida 32402

Cecile M. Scoon, Esquire
Peters & Scoon
25 East Eighth Street
Panama City, Florida 32401

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.