

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

D. PAUL SONDEL,)
)
 Petitioner,)
)
 vs.) Case No. 03-1985
)
 APALACHEE CENTER FOR HEALTH)
 SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on August 12, 2003, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: D. Paul Sondel, pro se
2135 Victory Garden Lane
Tallahassee, Florida 32301

For Respondent: W. Douglas Hall, Esquire
Lannie D. Hough, Jr., Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment action in violation of Section 760.10(1), Florida

Statutes, by failing to hire Petitioner based on his race, sex and age.

PRELIMINARY STATEMENT

On or about August 2002, Petitioner, D. Paul Sondel (Petitioner) filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The charge alleged that Respondent, Apalachee Center for Health Services (Respondent) violated Section 760.10, Florida Statutes (2002), by discriminating against him based on his race, age, and sex.

On May 19, 2003, FCHR issued a Determination: No Cause, finding that there was no reasonable cause to believe that an unlawful employment practice had occurred. A Notice of Determination: No Cause, issued that same day, advised Respondent that he had 35 days to request an administrative hearing by filing a Petition for Relief

On May 22, 2003, Petitioner filed a Petition for Relief. The Petition alleged that Respondent discriminated against Petitioner based on his age by failing to hire him.

FCHR referred the Petition for Relief to the Division of Administrative Hearings on May 28, 2003.

A Notice of Hearing dated June 16, 2003, scheduled the hearing for August 12, 2003.

During the hearing, Petitioner testified on his own behalf and offered two exhibits that were admitted into evidence.

Respondent presented the testimony of three witnesses and offered eight exhibits that were admitted into evidence.

A transcript of the proceeding was filed on September 8, 2003.

Petitioner filed a proposed order entitled Petitioner's Response to Hearing on August 22, 2003. Respondent filed a Proposed Recommended Order on September 18, 2003.

All citations are to Florida Statutes (2002) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is a white male who was born on August 13, 1928. He was 73 years old, and retired from state employment, when he applied for the employment positions at issue here.

2. Petitioner majored in sociology/psychology, earning a Bachelor of Arts degree from San Jose State University, San Jose, California, in 1954. He completed post-graduate work in English and education, earning a master of science degree at Purdue University, Lafayette, Indiana, in 1980. Petitioner became a paralegal after earning an associate of science degree at Tallahassee Community College, Tallahassee, Florida, in 1995.

3. Petitioner received teaching certificates in California in 1960 and in Florida in 2001. He has over 22 years of teaching and administrative experience. He was qualified to work as a behavioral specialist in a skills program.

4. Petitioner's recent job history includes, but is not limited to, the following: (a) from February 27, 2001 to August 17, 2001 (approximately six months), contract administrator for the Florida Department of Juvenile Justice; (b) from August 15, 2000 to December 27, 2000 (approximately four months), counselor for inmates in drug treatment program at Jefferson County Correctional Institution; (c) from December 4, 1994 to June 30, 2000 (approximately five and one-half years), coordinated offender placement program for Florida Department of Labor and Employment Security; and (d) from March 11, 1992 to September 18, 1992 (approximately six months), drug counselor for Liberty County Correctional Institution.

5. Petitioner's prior work experience also includes, but is not limited to, the following: (a) 1990/91 school year as a teacher at the Dozier School for Boys in Mariana, Florida; (b) 1990/91 school year as residence hall manager for Chipola Junior College; (c) five months in 1988 as coordinator of a drug program for the Florida Department of Education; (d) 1985/86 school year as instructor of military personnel in Korea and Japan for Central Texas College; (e) one year and three months in 1984/85 as a program coordinator for Florida Department of Transportation; (f) from 1975 to 1989, as a contractor on state and national governmental projects; (g) six months (1980/1981) as assistant safety director for George Washington University;

(h) from 1968 to 1976 as teacher in California secondary schools; (i) from 1965 to 1968 as teaching supervisor for Job Corps program in California; (j) 1964/65 school year as instructor for University of Nevada; and (k) 1961 to 1964 as teacher/principal in a California elementary school.

6. Respondent has a written procedure for processing job applications. One purpose of the procedure is to maintain a pool of qualified applicants for each position. Another purpose is to assure each applicant or employee an equal employment opportunity without regard to a person's age, race, color, sex, religious creed, national origin, handicap, military or marital status.

7. Respondent's Human Resources Department is responsible for receiving and taking the initial steps in processing employment applications. As applications are processed, they are checked for completeness and evidence of minimum qualifications for the position or positions for which the applicant is applying.

8. First, essential information about each applicant is typed into the corresponding computerized position requisition file. The input data includes the following: (a) applicant name; (b) applicant sex and race; (c) applicant veteran status; (d) how applicant learned of position; (e) date of application; (f) applicant current employment status; and (g) applicant met

minimum qualifications. Respondent's Human Resources Department then prints a computerized applicant referral form, which does not contain any reference to the applicant's age or birth date.

9. Next, Respondent's Human Resources Department copies the applications except for certain sections. One section that is not copied is the EEO Survey, which contains a statement directing applicants who believe they have been discriminated against to file a complaint with FCHR. The EEO Survey also requests information about the applicant's sex, birth date, and race. It is not mandatory for applicants to provide Respondent with the information requested in the EEO Survey.

10. Respondent's Human Resources Department sends the original applicant referral form and a copy of the application to the hiring supervisor. The materials reviewed by the hiring supervisor do not include the EEO Survey or refer to the applicant's age or birth date.

11. Finally, the original application in its entirety is filed alphabetically by name of applicant in the application file. The application file is purged twice a year, eliminating any applications that are one year old.

12. An employment position is open or available on the date that the hiring supervisor fills out a position requisition form. The employment position remains open until someone is hired to fill the position.

13. On or about January 28, 2002, Respondent's Director of Clinical Skills, Alicia Conger, Ph.D., completed a position requisition form for position #2055. The position related to a behavioral specialist in a skills program at Stewart Street Elementary School in Quincy, Florida.

14. On or about February 22, 2002, Respondent's behavioral analyst and clinical supervisor at Pace School, Ginger Stodard, completed a position requisition form for position #2129 for a behavioral specialist in a skills program at Pace School in Tallahassee, Florida. The position requisition form indicated that the position would not be available until March 1, 2002.

15. Dr. Conger subsequently reviewed the applications sent to her by Respondent's Human Resources Department for position #2055. The applications included one submitted by Adrian Mills. On February 26, 2002, Dr. Conger completed a personnel action form, recommending that Respondent hire Ms. Mills to fill position #2055 for \$11.50 per hour. Respondent's Chief Administrative Officer accepted this recommendation on February 28, 2002. Ms. Mills was hired effective March 4, 2002.

16. In the meantime, Petitioner became aware of Respondent's February 27, 2002, advertisement for position nos. 2055 and 2129. Petitioner was not aware that position #2055 was closed on February 28, 2002, before he submitted his employment application.

17. Petitioner filed an employment application with Respondent on March 4, 2002, while position #2129 was still available. His application referenced five employment positions in which he was interested. Petitioner was especially interested in working as a behavioral specialist in position #2055 or #2129. The application clearly states that Petitioner's minimum acceptable salary was \$12.10 per hour.

18. Respondent's Human Resource Department processed Petitioner's application pursuant to Respondent's written procedure. His application, among others, was sent to Ms. Stodard for consideration of Petitioner as a candidate for position #2129.

19. Ms. Stodard reviewed the applications for position #2129 as she received them. However, she did not interview any applicants because, about the time the position became vacant, Respondent placed a hold on the hiring procedure for position #2129.

20. Respondent funds behavioral specialists positions using Medicaid dollars. Respondent must have six Medicaid eligible students for every behavioral specialist position.

21. Pace School's student population is very transient. After Respondent advertised position #2129 in February 2002, Pace School lost three Medicaid eligible students to a program operated by the Florida Department of Juvenile Justice. Another

student lost his Medicaid eligibility when he became 18 years old. Consequently, the Pace School did not have a sufficient number of Medicaid eligible students to support the hiring of another behavioral specialist when position #2129 became vacant on March 1, 2002.

22. The training that Respondent provides to persons hired as behavioral specialists is very intensive. Typically, it takes from six months to one year before a person is proficient in that position. Accordingly, Ms. Stodard always considers an applicant's work history, focusing on the length of time spent in prior jobs.

23. Ms. Stodard reviewed Petitioner's application when she received it even though she was not interviewing applicants at that time. She noted that he had stayed in his last two jobs for only six months and four months respectively. She was not impressed with Petitioner's work experience because she wanted to hire a person with better staying potential.

24. People hired as behavioral specialist stay in that position for about two years on average. Some employees remain in that position for a much longer period of time.

25. On or about June 17, 2002, Ashley Doyle submitted an application for employment as a behavioral specialist in position #2129. The application indicated that Ms. Doyle could begin working on July 10, 2002.

26. In April 2002, Ms. Doyle earned a bachelor of science degree in Family and Child Sciences/Counseling from Florida State University, in Tallahassee, Florida. Ms. Doyle's work experience included the following: (a) from January 7, 2002 to April 9, 2002, intern guidance counselor at an elementary school; (b) from August 2001 to December 2001, after-school teacher at a private preparatory school; and (c) from July 2000 to June 2001, psychometrist for Psychology Associates of Tallahassee, Florida. Ms. Doyle was qualified to work as a behavioral specialist in a skill program.

27. Petitioner testified that Ms. Doyle was a female in her twenties. There is no evidence to the contrary.

28. By the time Respondent took position #2129 off hold, Ms. Stodard had received a stack of applications. Ms. Stodard decided who she would interview by reviewing the stack of applications that she had received in the last month. After finding candidates to interview, Ms. Stodard did not reconsider Petitioner's application or any of the earlier filed applications.

29. On June 20, 2002, Ms. Stodard recommended that Respondent hire Ms. Doyle for position #2129. Dr. Conger accepted Ms. Stodard's recommendation and completed the paperwork on June 26, 2002. Respondent's Chief Administrative Officer subsequently approved Dr. Conger's decision to hire

Ms. Doyle effective July 12, 2002. Position #2129 was closed in Respondent's records on June 28, 2002.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11.

31. Pursuant to Section 760.10(1), it is unlawful for an employer to fail or refuse to hire individuals because of their race, sex, or age.

32. Decisions construing Title VII, United States Civil Rights Act of 1962, as amended, 42 U.S.C.A. Section 2000e, et seq., and the Federal Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C.A. Section 621 et seq., are applicable when evaluating a claim brought under the Florida Civil Rights Act of 1992, as amended in Sections 760.01 through 760.11. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (citing Ranger Insurance Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989)); Florida State University v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1997).

33. Petitioner has the burden of proving that he has a cognizable claim of discrimination under Section 760.10, and if so, he bears the ultimate burden of persuasion that Respondent intentionally discriminated against him based on race, sex, or

age. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). To meet this burden, Petitioner can produce either direct or circumstantial evidence of discrimination. In this case no direct evidence was shown. Therefore, the case must be analyzed under the shifting burden framework established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See, e.g., Schoenfeld v. Babbit, 168 F.3d 1257, 1267 (11th Cir. 1999); and Clark v. Coats and Clark, Inc., 990 F.2d 1217, 1226 (11th Cir. 1993).

34. The McDonnell shifting burden framework is as follows: (a) the claimant has the initial burden of establishing a prima facie case of discrimination; (b) if the claimant establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason the claimant's rejection; and (c) if the employer successfully articulates such a reason, then the burden shifts back to the claimant to show that the proffered reason is a pretext for unlawful discrimination. See, e.g., McDonnell Douglas Corp., 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); and Schoenfeld v. Babbit, 168 F.3d 1257 (11th Cir. 1999).

35. Under federal law, a claimant establishes a prima facie case in a traditional failure-to-hire case by showing

that: (a) the claimant was a member of a protected class; (b) the claimant applied and was qualified for a position for which the employer was accepting applications; (c) despite the claimant's qualifications, the claimant was not hired; and (d) after the claimant's rejection, the position remained open or was filled by a person outside the protected class. See Schoenfeld v. Babbitt, 168 F.3d 1257, 1267 (11th Cir. 1999). With respect to age discrimination, the FCHR has expanded the scope of protection under Chapter 760, for individuals subject to its provision, by providing protection for persons of all ages. See, e.g., Sims v. Niagara Lockport Industries, Inc., 8 F.A.L.R. 3588 (Fla. Comm. Hum. Relations 1989); and Spears v. Ewell Industries, Inc., 12 F.A.L.R. 432 (Fla. Comm. Hum. Relations 1989).

36. Review of the entire record indicates that Petitioner has not presented a prima facie case of discrimination based on his race. In fact, he conceded at the final hearing that he does not believe Respondent discriminated against him based on his race. Indeed, there is no record evidence indicating the race of Ms. Mills or Ms. Doyle.

37. Additionally, Petitioner conceded in his post-hearing submission that Respondent did not discriminate against him when it hired Ms. Mills to fill position #2055. Competent evidence

confirms that position #2055 was filled before Petitioner filed his employment application.

38. In regard to position #2129, it is arguable that Petitioner has presented a prima facie case of discrimination based on sex and age. As a 73-year-old male, Petitioner was a member of a protected age group. He applied and was qualified to work as a behavioral specialist. He was not hired. Instead, Respondent hired Ms. Doyle, who is a female in her twenties.

39. However, the most persuasive evidence indicates that Respondent had legitimate, non-discriminatory reasons for not hiring Petitioner. First, Petitioner's application was not among those ultimately considered for position #2129 because Ms. Stoddard only considered the recently submitted applications once the position was taken off hold. Second, Ms. Stoddard would not have interviewed Petitioner in any event based on her prior review of Petitioner's application because he only lasted a few month at his last two jobs.

40. Petitioner made no attempt to show that Respondent's reasons for not hiring him were pretextual. See Issenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436 (11th Cir. 1996) ("Conclusory allegation of [age] discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for

its actions.") (quoting Young v. General Foods Corp., 840 F.2d 578, 584 (11th Cir. 1989) ("Once a legitimate, non-discriminatory reason for dismissal is put forth by the employer, the burden returns to the plaintiff to prove by significant probative evidence that the proffered reason is a pretext for discrimination."))

41. Indeed, the 11th Circuit has squarely held that "job skipping" is a legitimate basis upon which to distinguish among applicants:

Here, the proffered reason clearly meets the test of being one that might motivate a reasonable employer. Indeed, leaving several employers in a recent and short period of time, or job-skipping, is an eminently reasonable basis upon which to choose between job applicants . . . Furthermore, it makes sense for an employer to be concerned about how often an applicant has changed employers in recent years, instead of his career total or average. An employer could reasonably conclude that a job applicant who has not stayed with any recent employer for very long is unlikely to stay with it for long, either, and that what the applicant will do in the near- and mid-range future is better predicted from recent behavior than from what happened ten or twenty years ago.

Chapman v. AI Transport, 229 F.3d 1012, 1031 (11th Cir. 2000).

42. Moreover, it is not the role of the courts to second-guess an employer's business judgment. In Chapman, 229 F.3d at 1030, the 11th Circuit reiterated that:

[f]ederal courts 'do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior.

See also Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991); Nix v. WLCY Radio-Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.").

43. Accordingly, Petitioner failed to prove his ultimate burden that Respondent refused to hire him due to his race, sex or age. Respondent had legitimate, non-discriminatory reasons for not hiring Petitioner. The greatest weight of the evidence indicates that Respondent did not commit an unlawful employment practice.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That FCHR enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 1st day of October, 2003, in
Tallahassee, Leon County, Florida.

Suzanne F. Hood

SUZANNE F. HOOD
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Division of Administrative Hearings
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Filed with the Clerk of the
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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.