

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ANDREA SPAINHOUR, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-0509  
 )  
 DEPARTMENT OF INSURANCE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on October 8, 2004, by videoconference between sites in Fort Lauderdale and Tallahassee, Florida.

APPEARANCES

For Petitioner: Andrea Spainhour, pro se  
400 North Main Avenue  
Clermont, Florida 34712

For Respondent: Mechele R. McBride, Esquire  
Division of Legal Services  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

The issue presented is whether the Department committed an unlawful employment practice by terminating Petitioner's employment due to her age or her sex or by retaliating against Petitioner.

PRELIMINARY STATEMENT

Petitioner Andrea Spainhour filed with the Florida Commission on Human Relations an Employment Charge of Discrimination alleging that Respondent Department of Insurance, now known as the Department of Financial Services, had discriminated against her by terminating her employment. Upon a determination by the Executive Director of the Commission that there was no reasonable cause to believe that an unlawful employment practice had occurred, Petitioner filed her Petition for Relief, and the Commission forwarded that Petition to the Division of Administrative Hearings to conduct an evidentiary proceeding.

Petitioner testified on her own behalf. The Department presented the testimony of Mary Kowalski, Fred Chaplin, Amy Peebles, Ashley Caron, and Michael Long. Additionally, Petitioner's Exhibits numbered 1-15 and the Department's Exhibits numbered 1 and 3-12 were admitted in evidence.

Both parties submitted Proposed Recommended Orders after the conclusion of the hearing. Those documents have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. Fred Chaplin supervises the fire protection specialists (fire inspectors) for the southeast region of the Bureau of Fire Prevention, Division of State Fire Marshal, Department of

Financial Services. The headquarters for the southeast region is in West Palm Beach, with a field office in Plantation.

2. For approximately five months there had been a vacant fire inspector position in the southeast region, and Ashley Caron, a fire protection specialist, was covering all of the counties in the southeast region during that time. She worked out of the Plantation field office where Amy Peebles was the administrative assistant.

3. Michael Long, another fire protection specialist, worked out of the West Palm Beach office. He, like Ashley Caron, was responsible for inspecting state-owned and state-leased buildings and new construction. He was also responsible for all fire alarms in the southeast region whether they were in new construction or in existing buildings. He investigated fire alarm systems when he received complaints from outside contractors or other fire inspectors.

4. When Petitioner Andrea Spainhour interviewed for the vacant position in the southeast region, she was interviewed by Caron, Long, and Joe Furiatto from the Department's Tallahassee personnel office. Prior to her interview, Long had talked with Peebles about whether they should re-post the vacancy since there were only two candidates. He erroneously thought there had to be a minimum of three applicants for a vacancy in order to fill it.

5. Long, Caron, and Furiatto were impressed with Petitioner during her interview. She had an excellent background and extensive experience. The three interviewers rated Petitioner, a 50-year-old female, as superior to the other applicant, a younger male, and recommended that she be hired. When Petitioner accepted the offer of employment, Long, Caron, Peebles, and Chaplin were all excited that Petitioner would be working with them.

6. Petitioner's first day of work was May 7, 2001. She reported to the Plantation office where Chaplin spent time with her in orientation over the next several days. He advised Petitioner that Caron would train her during May and June and that Petitioner would become responsible for the inspections in Miami-Dade County. He further advised Petitioner, as he had before she began work, that she was a probationary employee and that the Legislature was considering "privatizing" fire protection specialists. He further advised Petitioner that hers was a job "out in the field," but that she was expected to come into the office to pick up phone messages and mail, turn in inspection reports, and sign documents. He told Petitioner the guideline was that it would take approximately eight hours a week to take care of duties in the office.

7. Amy Peebles assisted Petitioner by answering her questions, showing her how to use her Nextel telephone and the

computer, and creating forms on the computer so that Petitioner could fill them out and e-mail them to her when Petitioner was out of the office. Caron also assisted Petitioner by answering questions and showing her how to fill out forms. Long told Petitioner to call on him if she had any questions. Everyone tried to make Petitioner feel part of "the team."

8. On May 10 Petitioner sent Chaplin an e-mail saying that Caron and Peebles had given her a plant for her office and that she already felt like part of the family. Although not mentioned in the e-mail, Caron also gave Petitioner some shirts like Caron and Long wore when they made inspections identifying Petitioner as a fire inspector so she would be recognized as a member of the fire inspectors team. Caron also gave Petitioner a mapping program of Miami-Dade County that Caron had purchased to assist Petitioner in becoming familiar with the locations of facilities she would be inspecting.

9. When Chaplin advised Long and Caron by e-mail that they had been complimented for their professionalism by the construction administrator at the Department of Juvenile Justice (DJJ), Long immediately advised Chaplin by e-mail that Petitioner was also present at the referenced meeting and had acted professionally and been an asset to the inspection team. Chaplin forwarded those e-mails to Petitioner to let her know that Long had included her in the compliment.

10. When Petitioner began making inspections, she did not always submit the proper forms to Peebles or fill them out properly so that Peebles could send the required letters to those responsible for the inspected facilities. Peebles reported this problem to Chaplin. Petitioner also made mistakes on her vehicle logs that Chaplin corrected for her before forwarding them to Tallahassee.

11. On June 12, Caron and Long car-pooled down to Miami-Dade County to attend a meeting at Florida International University (FIU). After the meeting, Long, who was responsible for fire alarm systems in the region, took the opportunity of being in Miami-Dade to evaluate the fire alarm system at the DJJ, which was located close to FIU, in order to ascertain how long his final inspection of the system would take. Their visit to DJJ was not an official visit and did not include an inspection. When Petitioner learned that they had gone to one of "her buildings" without her, she thought they intentionally excluded her from official business. She concluded they did not want her in her position due to her experience.

12. At about that same time, Caron asked Long for assistance at one of her facilities in Broward. Prior to Petitioner's employment, Caron had told Long she had some concerns regarding a fire alarm system at the Coconut Grove Playhouse. When they finished in Broward, Long reminded Caron

he needed to look at the Playhouse; so, they car-pooled down to Miami-Dade. This was an informal visit, and no official inspection took place. Again, when Petitioner learned they had gone to the Playhouse without her, she assumed they were intentionally excluding her from official business meetings.

13. On July 25, 2001, Petitioner asked Chaplin to come to the DJJ in Miami-Dade because she had some questions about the Code. After they went through the facility and were in the parking lot, Petitioner began making allegations that gave Chaplin concern. She said that Long and Caron were trying to make her quit because they did not like her. She said she resented their making courtesy visits without her. She told him that Long and Caron were intentionally excluding her from meetings. Chaplin told her that she was misinterpreting their behavior and that he was sure there was a reasonable explanation for their attending meetings without Petitioner.

14. She also told Chaplin that she had had a problem in the past working with other females.

15. The following morning Chaplin directed Long and Caron to cancel their appointments and come to his office. He told them what Petitioner had said. They told him that the courtesy visits were not scheduled meetings but spur-of-the-moment visits when Long was in Miami-Dade. They were shocked at Petitioner's accusations because they had selected her for her position and

had thought their relationships with Petitioner were good. Chaplin directed them to make Petitioner feel part of the team.

16. That same day Petitioner sent Chaplin an e-mail that included a reminder that she was concerned about the matters she had discussed with him the previous day.

17. On the following day, Chaplin received a call from Caron, who advised him that Peebles was quite upset and he should call her. When Chaplin called, Peebles sounded distraught and on the verge of tears. She told him that Petitioner had been in the office and was really mad at Chaplin, Long, and Caron. Peebles told him the negative things Petitioner had said about her co-workers and her supervisor. Peebles said she was somewhat afraid for her safety due to Petitioner's behavior. Chaplin told her to write a report, and she did.

18. Based upon the description of the incident between Petitioner and Peebles, his own concerns from his meeting with Petitioner two days earlier, and Petitioner's failure to consistently submit accurate and timely vehicle logs and inspection reports, Chaplin made the decision to terminate Petitioner. He was concerned that Petitioner was creating a hostile atmosphere among her co-workers and with him.

19. Chaplin contacted his supervisor and then sent a memo regarding Petitioner's behavior. A few days later he sent a



follow-up memo detailing other concerns he had regarding Petitioner's job performance: inspection reports turned in late or not at all, vehicle logs with errors, and failure to follow standard office procedures. Petitioner's age and her sex were not considered when Chaplin made his decision.

20. Chaplin's recommendation that Petitioner be terminated was processed and approved through his chain of command. Petitioner's employment by the Department was terminated August 23. Since she was terminated during her probationary period, she did not have any career service appeal rights.

21. Petitioner was replaced by a 50-year-old male who was even more qualified for the position than was Petitioner.

22. Only administrative assistants had access to the TMIC computer program. Although Petitioner wanted access, no fire protection specialists could access that program. Petitioner was told several times that she did not need to access TMIC and that no inspector had access.

23. The "red book" contains information about the various facilities in a geographic area that are inspected. It is only a guide for inspectors to track when they last inspected a facility. It is not a necessary tool for an inspector to perform his or her job duties and only contains information also available in the office files. Petitioner was not discriminated

against by not being given an updated red book until the end of July since the information in it exists elsewhere in the office.

24. Petitioner believes that Chaplin discriminated against her because he did not like her, did not want to hire her, and provided her with a faulty vehicle. Prior to assigning the car to Petitioner, he drove that vehicle for a few days, had it cleaned, and had it serviced and inspected. He knew of no problems with that vehicle. When Petitioner later questioned the condition of the tires, he told her to get the car checked and bring him something in writing. He never received anything in writing from her regarding the condition of the tires.

#### CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. §§ 120.569 and 120.57(1), Fla. Stat.

26. Section 760.10(1)(a), Florida Statutes, provides that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of age or sex. Similarly, Section 760.10(7) provides that it is an unlawful employment practice for an employer to discriminate against any person because that person has opposed an unlawful employment practice or has charged an employer with such a practice.

27. Petitioner alleges discrimination and retaliation by being given faulty equipment, by not being trained, by having information withheld from her by a younger female inspector, by Chaplin giving her erroneous information, by Chaplin giving her no guidance or training, by not being included in meetings, by the withholding of her reports in order to prevent her from turning them in on time, by not being treated the way she should have been treated, and by having her reports altered. However, Petitioner has failed to prove that the Department discriminated against her or that the Department retaliated against her.

28. Petitioner bears the burden of proof established by the Supreme Court of the United States in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under this well-established case law, Petitioner bears the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. If a prima facie case is established, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action. The employee then has the burden of showing that the business reason is pretextual and that a discriminatory reason more likely than not motivated the decision.

29. In order to establish a prima facie case, Petitioner must prove that (1) she is a member of a protected class, (2)

she was qualified for her position, (3) she suffered an adverse employment action, and (4) she was treated less favorably than similarly-situated employees who were not members of her protected class. Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997). Petitioner has failed to establish a prima facie case of discrimination.

30. Petitioner offered no evidence that she was terminated due to her sex. Rather, the evidence shows that when Petitioner was hired, she was chosen over the other candidate, a male. Further, her position was in a field office at which only two other employees were assigned, and those employees were both female. The only mention of gender during the final hearing in this cause involved the evidence that on July 25 in her meeting with Chaplin, Petitioner told him that she had had problems working with other females in the past.

31. Petitioner offered no evidence that she was terminated due to her age. Rather, the evidence shows that when Petitioner was hired, she was chosen over the other candidate, who was younger than Petitioner. Further, when Petitioner was terminated, she was replaced by a candidate who was the same age as Petitioner. The fact that Petitioner accepted a position in an office where the other employees were younger does not prove her claim that she was discriminated against based upon her age.

32. Assuming arguendo that Petitioner had established a prima facie case, her claim still fails because the Department has articulated legitimate, non-discriminatory reasons for its actions, and Petitioner has failed to meet her burden of showing that the reasons the Department gave are a pretext for discrimination. The Department offered credible evidence in response to each specific raised by Petitioner.

33. For example, in response to her allegation that she was denied access to TMIC, the evidence is clear that no employee in her position had access to that system. In response to her allegation that she could not perform her duties because the red book was not updated, the evidence is clear that the red book was not required to perform those duties. In response to her allegation that she was excluded from meetings, the evidence is clear that her presence was not necessary at the two impromptu courtesy visits made by another fire protection specialist responsible for inspecting systems Petitioner was not responsible for inspecting. Lastly, Petitioner's allegation that she was not trained conflicts with her more-pervasive position that she was more knowledgeable than her co-workers and her supervisor, and she failed to identify any training she lacked other than training on TMIC which was not within her area of responsibility.

34. Rather, the evidence is clear that Petitioner was having difficulty getting along with the other employees and was having difficulty following required procedures. Due to an angry outburst wherein Petitioner questioned the competency of her supervisor and her co-workers, the only employee physically present in the Plantation field office was afraid of her. The Department's decision to terminate her during her probationary period was a legitimate business decision based on non-discriminatory reasons, and Petitioner has not proven a single reason articulated by the Department to be pretextual.

35. An employer may terminate an employee for a good reason, for a bad reason, for a reason based upon erroneous information, or for no reason at all, as long as the termination was not based upon a discriminatory reason. See Dept. of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991), and the cases cited therein. The Department has articulated good reasons for Petitioner's termination, and Petitioner has not shown that any of those reasons was discriminatory by any direct evidence, statistical evidence, or even circumstantial evidence.

36. In addition to claiming discrimination, Petitioner asserts that her termination constituted unlawful retaliation. Retaliation claims are analyzed under the same burden-shifting approach as are discrimination claims. However, Petitioner's

lack of evidence to support her allegations of discrimination makes it difficult to analyze her claim of retaliation as a separate event from her claim of discrimination. There is simply no evidence that Petitioner engaged in a protected activity or that there was a causal link between that protected activity and her termination. Stavropoulos v. Firestone, 361 F.3d 610 (11th Cir. 2004).

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding that Petitioner failed in her burden of proof and dismissing the petition filed in this cause.

DONE AND ENTERED this 15th day of December, 2004, in Tallahassee, Leon County, Florida.

*Linda M. Rigot*

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Filed with the Clerk of the  
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this 15th day of December, 2004.

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.