

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VIRITTI JACKSON,)
)
 Petitioner,)
)
 vs.) Case No. 05-1243
)
 DEPARTMENT OF CHILDREN AND)
 FAMILY SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 1, 2005, in Jacksonville, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Viritti Jackson, pro se
2173 West 15th Street
Jacksonville, Florida 32209

For Respondent: Scott D. Leemis, Esquire
Northeast Florida State Hospital
7487 South State Road 121
Macclenny, Florida 32063

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding is whether Petitioner was the subject of unlawful employment practices by her employer because of her race and age.

PRELIMINARY STATEMENT

On December 21, 2004, Petitioner, Viritti Jackson, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The Charge of Discrimination alleged that Respondent had subjected Petitioner to unlawful employment actions based on her race and age, and in retaliation for a complaint to FCHR/EEO. The Charge does not allege discrimination based on Petitioner's sex. Specifically, the Charge of Discrimination alleges that Respondent discriminated against Petitioner during the hiring process when educational materials were intentionally omitted from Petitioner's hiring packet and an allegedly less-qualified, older, white female was hired for a similar position at a higher salary than Petitioner. The charge also alleges that Respondent retaliated against Petitioner for her FCHR/EEO Complaint of November 28, 2004, when the hospital transferred her to another unit on December 9, 2004, and when it issued Petitioner a paycheck that had an alleged discrepancy in it on December 10, 2004. No other facts were alleged by Petitioner in support of her Charge of Discrimination.

On February 25, 2005, FCHR entered a Notice of Determination: Cause on Petitioner's Charge of Discrimination. The determination was based on imposition of an "adverse inference" from the fact that Respondent did not provide any

information within its control to FCHR relative to Petitioner's Charge of Discrimination. Petitioner was advised of her right to request an administrative hearing by filing a Petition for Relief.

Petitioner filed a Petition For Relief on April 1, 2005. The Petition For Relief added significantly more alleged instances of discrimination that were not contained in the Charge of Discrimination and were not considered by FCHR in making its determination. The Petition For Relief also requested relief such as circumstantial damages that cannot be awarded in an administrative forum. To the extent that the Petition For Relief alleges instances of discrimination not covered in the Charge of Discrimination and requests damages which cannot be awarded in an administrative forum, such allegations are not part of the underlying agency determination and cannot be determined in this case.

The Petition was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in her own behalf and introduced 42 exhibits into evidence. Respondent did not offer any testimony or exhibits into evidence.

After the hearing, Petitioner filed a Proposed Recommended Order on July 22, 2005. Respondent filed a Proposed Recommended Order on July 27, 2005.

FINDINGS OF FACT

1. Petitioner is a 28-year-old African-American female.

2. Respondent operates one of the State's largest psychiatric hospitals. In April 2004, Respondent had at least 3 openings for a full-time Secretary Specialist at different units of the hospital.

3. In April 2004, Petitioner along with two other female applicants were contacted and asked if they were interested in being considered for three Secretary Specialist positions with Respondent. The positions' duties involved, among other things, typing medical records and compiling reports on the units' patients and recording, transcribing and disseminating all staff meetings held on these units. Petitioner and the two other women indicated that they would like to be considered for the positions. One of the women who applied for the positions was an older, white female who had worked at the hospital for at least 10 years. No evidence demonstrated the actual age of this older woman or how much older she was than Petitioner. The evidence also did not demonstrate if her work history extended beyond 10 years outside the hospital. The other applicant, like Petitioner, was a beginning employee at the hospital. Other than the fact she met the minimum qualifications for the positions, the evidence did not establish her race, age, or work experience.

4. Petitioner's application was not introduced into evidence. At the time, Petitioner had about 6 years of work experience as an office manager and /or an executive secretary. The experience does not appear to be in the medical or psychiatric field. As can be seen from a review of the evidence and pleadings in this case, Petitioner's writing skills are very poor and are replete with poor grammar and incorrect word usage to the point of being almost incomprehensible. Therefore, the quality of her executive secretary skills are questionable.

5. As part of her application packet, Petitioner submitted several educational/professional credentials to Respondent. The credentials consisted of certificates in the areas of Office Supervision II and III and Post Secondary Office Supervision and Administration. Petitioner claims that these credentials entitled her to a higher salary than she would have received as a beginning employee or at the least allowed her to negotiate for a higher salary. However, no evidence was offered that supported Petitioner's contention that such credentials entitled her to a higher salary or that she lost her opportunity to negotiate for a higher salary. The fact that the position may have been advertised as "open-competitive" does not mean that an applicant is entitled to or will receive a higher salary offer. The classification only enables an employer or employee to negotiate a salary based on qualifications. The employer and

employee are not required to negotiate and either may elect not to negotiate. Indeed, negotiation may be non-existent based on budget considerations and the availability of other applicants willing to work for less pay.

6. At some point, an interview was scheduled for Petitioner by Deborah Joyce. In setting up the interview, Ms. Joyce advised Petitioner that the starting salary for the position was \$766.52 every two weeks. Petitioner indicated that she wished to be interviewed for the positions.

7. All three womens' application packets were reviewed by a hiring committee. All three women were offered employment as Secretary Specialists at different units. Petitioner and the other beginning applicant were offered employment at \$766.52 every 2 weeks. The older, white woman was allegedly offered employment at a higher salary than the two beginning employees. However, there was no evidence that demonstrated how much the older woman's salary was, whether it differed from Petitioner's and its relationship to the salary she had been receiving in her then current position at the hospital. Petitioner did not introduce into evidence the pay scale for the position to which she applied. Some evidence suggests that the offered salary was the beginning and lowest salary for that position. Petitioner testified that the offered salary was at the low-end of the

scale for the position that she applied for. Her testimony in that regard is accepted.

8. Petitioner was informed by telephone of the Respondent's offer of employment to work on the unit known as Cypress Village. The telephone call was made by Lela Parker-Clark, a black female and the medical unit's specialist (MUS). The unit's treatment and rehabilitation director (UTRD) was Sateria Gunter, a black female. Ms. Gunter and Ms. Parker-Clark would be Petitioner's supervisors. The evidence indicated that both women had been working on the unit for several years and apparently had done various routines and reports in the same manner for some time. No evidence was offered as to the actual age of Ms. Gunter or Ms. Parker-Clark, other than they were both older than Petitioner and had possibly worked their way up to their administrative positions from direct care staff.

9. Because the offered salary was not what Petitioner desired, she inquired further of Ms. Parker-Clark about the salary. Petitioner learned that her educational credentials had been lost and possibly had not been reviewed by the committee. Ms. Gunter indicated that she would have the committee review its offer if Petitioner would fax her the documents. Petitioner faxed the documents to a fax machine at the hospital. It is unclear whether the documents were received and reviewed by the committee or whether the committee was made aware of

Petitioner's additional educational documents. The evidence conflicts on this point. At the time of the hearing, neither the original nor faxed documents were in Petitioner's personnel file. Indeed, only copies of later-supplied documents that were specially marked by Petitioner are in Petitioner's personnel file. In any event, the salary offer was not changed. No one from the committee testified at the hearing regarding the documents reviewed by the committee or otherwise made known to the committee. No evidence was offered that demonstrated that such added credentials would have made a difference in the salary offered to Petitioner. Petitioner offered no evidence that Respondent elected to negotiate any salaries with any of the people it hired as Secretary Specialists. The fact that a white, 10-year employee of Respondent may have been offered a higher salary than Petitioner does not demonstrate that the salary was negotiated or that Respondent otherwise discriminated against Petitioner based on her race or age since the employee in question was already an employee with more years of experience at the hospital. Without such evidence, it is impossible to determine whether the absence of the documents was deliberate or unintentional, motivated by Petitioner's race or age or even caused an adverse impact in the conditions or terms of Petitioner's employment.

10. Ms. Gunter informed Petitioner that the position was still available at the original salary offer of \$766.52. Instead of attempting to negotiate further by declining the offer, Petitioner accepted employment and began working at the unit on May 21, 2004. Petitioner accepted the offer because she needed the income. There was no evidence that demonstrated Petitioner, who is a competent adult, was somehow coerced into her decision to accept the offer by Respondent.

11. In the beginning, the relationship between Ms. Gunter, Ms. Parker-Clark and Petitioner was reasonably good. However, once Petitioner began to question the manner in which Ms. Parker-Clark did things the relationship deteriorated. Ms. Parker-Clark became abrasive and, Petitioner claims, more strict regarding Petitioner's leave than with co-workers. She would belittle Petitioner in front of co-workers. Ms. Parker-Clark had the security desk record when Petitioner arrived at work. Based on the recorded time, both women claimed Petitioner was falsifying her timesheet and forced her to change her claimed time on several occasions. Many of the accusations arose from the fact that Petitioner was often late because of difficulties with her daughter, who had learning disabilities. Additionally, Petitioner sometimes arrived early and sometimes stayed late; that, in Petitioner's view, made up her time.

However, per hospital policy, such early arrival or late stay was not credited unless pre-approved by Petitioner's supervisor.

12. Outside of Petitioner's claims of forced time-sheet changes based on time she had to take to deal with her daughter's disability or disallowed overtime, etc., there was no evidence that other similarly-situated employees were treated differently than Petitioner. In fact, the only testimony regarding Ms. Parker-Clark's and Ms. Gunter's treatment of other employees was that there were some employees they treated well and some employees they did not treat well and that there may have been ongoing "management problems" on the unit. There was no evidence that such treatment was based on the race or age of the individual employee.

13. Petitioner assumes and asserts that she was entitled to family medical leave, credit for overtime for staying late or more flexible hours. However, she offers no proof that she was entitled to such. Without such evidence Petitioner cannot show that she has suffered an adverse impact in the terms or conditions of her employment. Petitioner also claims she received unwarranted disciplinary actions. Again there was no evidence offered that such discipline was unwarranted. Indeed Petitioner admits that actions she received written reprimands for occurred.

14. Around September 28, 2004, relationships between Ms. Parker-Clark and Petitioner came to a head when Petitioner came to the conclusion that Ms. Parker-Clark had never placed her educational credentials in her personnel file. Petitioner based this conclusion on the fact that, while training herself to use the new computerized personnel system, Peoples First, adopted and, at the time, being implemented, by the State, she discovered that her educational credentials were not listed on the system. Petitioner was training herself because Ms. Parker-Clark refused to train her. Petitioner contacted the personnel office for the hospital and was told that her file was not in their office because it had been sent to Peoples First to be scanned into the system. Unfortunately, the Peoples First system is known for glitches and errors in its records.

15. Petitioner met with Ms. Gunter and Ms. Parker-Clark in a very heated meeting to discuss the lack of information on the Peoples First system and her feelings that Ms. Parker-Clark had intentionally lost the educational documents. Petitioner also voiced her opinion that she was entitled to an increased salary based on her credentials. Petitioner was not satisfied with the response from Ms. Gunter in the meeting.

16. Around October 5, 2004, Petitioner met with Ennis Harris, the assistant administrator of the hospital, over her "issues" with Ms. Parker-Clark and what she should do.

17. Mr. Harris suggested she apply for a transfer to another unit. On October 7, 2004, Petitioner, applied for a transfer to the position of Internal Senior Clerk on another unit. He also indicated that he would approve flex-time for her if Petitioner requested it and that she might be entitled to leave under the Family Medical Leave Act.

18. Around October 13, 2004, Petitioner requested flexible working hours. As promised, Mr. Ennis approved her schedule. At about the same time, Petitioner requested transfer to a Senior Clerk position on another unit.

19. On October 18, 2004, Petitioner requested that her salary be increased by 16 1/2 percent and that she receive such increased pay from the beginning of her employment. There was no evidence that demonstrated the basis for a 16 1/2 percent increase or that such an increase was warranted. On October 21, 2004, the increase was denied by Ms. Gunter.

20. On October 27, 2004, Petitioner grieved Ms. Gunter's decision. Personnel policy requires that a grievance be filed within 14 days of the act that caused the grievance. The human resources manager returned the grievance without action because 14 days had passed since Petitioner began employment on May 21, 2004, and Petitioner had the opportunity to decline the offered salary if she so desired.

21. On November 1, 2004, Petitioner's request for transfer was declined because of personnel rules based on the Union contract with the State that prevented transfer of a probationary employee to a higher position.

22. On November 10, 2004, Petitioner appealed the return of her grievance and appealed or grieved the denial of her requests for salary increase and transfer to the hospital administration. The denial was upheld. During this review, Ms. Gunter claimed that Petitioner's educational/professional certificates had been reviewed by the committee and claimed that the documents in Petitioner's file were the actual documents reviewed and considered. However, the documents were the certificates that had been specially marked by Petitioner and later placed in her file. Ms. Gunter was unaware of the special demarcation of the documents. Claims of dishonesty were now mutual. Eventually, Petitioner did not wish to deal with Ms. Parker-Clark, unless her job duties required such.

23. Petitioner complained to various administrators of the facility often about her treatment on the unit. Mr. Harris told her that the salary issue was dead and all options to have her salary increased had been explored.

24. On November 22, 2004, Petitioner submitted a letter of resignation at a future date not expected to go past December 13, 2004. In that letter, Petitioner requested

overtime hours with pay to complete her job assignments. The same date, Ms. Gunter denied the requested overtime and requested Petitioner to supply a date certain for her resignation. On November 23, 2004, she filed complaints that Ms. Gunter and Ms. Parker-Clark discriminated against her based on her race and age with the hospital's equal employment office and similar complaints at PERC. On December 7, 2004, Petitioner forwarded an e-mail to the hospital attorney that stated she was leaving early and did not know when she would be back because she was tired of the harassment she was receiving on the unit. Sometime after that e-mail, Petitioner met with the hospital attorney. The hospital did not want to lose Petitioner as an employee and in an effort to help Petitioner, on December 9, 2004, the administration transferred Petitioner to another unit where she has performed well. Even though Petitioner had been requesting a transfer, it is this transfer that Petitioner alleged as a discriminatory action by the hospital. On this point Petitioner's claim of discrimination has no merit and was clearly not demonstrated by the evidence.

25. Petitioner has also been approved for a promotion at a higher salary, but the promotion has not yet taken effect. The promotion has been on hold because the hospital administrator retired and his replacement had recently taken over prior to the hearing. No evidence demonstrated that the delay was due to any

unlawful employment practice. There was no evidence offered regarding a paycheck discrepancy around December 10, 2004.

26. Ultimately, Petitioner's case rests on assumption and speculation about others' intentions and terms of employment that she claims she was entitled to. The problem is that there was no or insufficient evidence offered to demonstrate such unlawful intentions or entitlement. Indeed, assuming that Petitioner's treatment was unjustified, it is more likely that Ms. Gunter and Ms. Parker-Clark engaged in such treatment because Petitioner was a new employee who questioned the old way of doing things and did not hesitate to go around them when she felt a need to do so. Assumptions and speculations are not enough. Therefore, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat.

28. Under the provisions of Section 760.10, Florida Statutes, it is an unlawful employment practice for an employer:

(1)(a) 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.

29. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); Cooper v. Lakeland Regional Medical Center, 16 FALR 567 (FCHR 1993).

30. 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 to be used in cases alleging discrimination under Title VII such as the one at bar. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

31. Pursuant to this analysis, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for its employment action. If the employer articulates such a reason, the burden of proof then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "[t]he fact

finder must believe the Plaintiff's explanation of intentional discrimination." 509 U.S. at 519.

32. In Hicks, 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.

33. In order to establish a prima facie case, Petitioner must establish that:

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

Canino v. EEOC, 707 F.2d 468, 32 FEP Cases 139 (11th Cir. 1983); Smith v. Georgia, 684 F.2d 729, 29 FEP Cases 1134 (11th Cir. 1982); Lee v. Russell County Board of Education, 684 F.2d 769, 29 FEP Cases 1508 (11th Cir. 1982), appeal after remand, 744 F.2d 768, 36 FEP Cases 22 (11th Cir. 1984).

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

35. 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 this non-discriminatory reason is offered by Respondent, the burden shifts back to Petitioner. Petitioner must then demonstrate that the offered reason was merely a pretext for discrimination.

36. In the instant case, Petitioner alleges that she was discriminated against based on race or age. Thus, Petitioner must prove, by a preponderance of the evidence, that Respondent acted with discriminatory intent. Case law recognizes two ways in which Petitioner can establish intentional discrimination. First, discriminatory intent can be established through the presentation of direct evidence. See Early v. Champion International Corporation, 907 F.2d 1081 (11th Cir. 1990). Second, in the absence of direct evidence of discriminatory intent, intentional discrimination can be proven through the introduction of circumstantial evidence.

37. In this case, Petitioner's race is African-American and as such, she belongs to a protected class. Petitioner was not terminated from her job with Respondent, but instead was hired at a salary that Petitioner claims should have been higher. However, the evidence did not show that Petitioner's salary should have been higher or that the salary offer she

accepted was based on her race or age. Likewise, the evidence did not demonstrate that the salary she accepted constituted an adverse impact in the terms of her employment. Since these facts were not established, Petitioner has not established a prima facie case of discrimination

38. Petitioner also claimed that her transfer on December 9, 2004, was a discriminatory act. However, the evidence established that Petitioner had requested such a transfer and that the transfer was beneficial to her. Clearly no adverse impact occurred. Therefore, Petitioner did not establish a prima facie case.

39. Finally, Petitioner claimed a "paycheck discrepancy" was a discriminatory act. There was no evidence submitted on this issue and Petitioner's claim must; therefore, fail.

40. Additionally, Petitioner did not establish that similarly situated non-minority employees were treated more favorably. The burden is on Petitioner and not on Respondent to introduce admissible evidence that her conduct was similar in nature to other employees outside her protected classification and that the other employees were treated more favorably. Jones v. Gerwens, 874 F.2d 1534, 1541 (11th Cir. 1989). In order to establish that employees are similarly situated, Petitioner must show she and comparable employees are similarly situated in all respects, including dealing with the same

supervisor, having been subject to the same standards and that Petitioner engaged in approximately the same conduct as the other employees. See Gray v. Russell Corporation, 681 So. 2d 310, 312, 313 (Fla. 1st DCA 1996); Jones 137 F.3d at 1311-13. In this case, the older white employee used as a comparable was dissimilar to Petitioner because she had been a 10-year employee at the hospital and had more experience in the hospital environment. Such characteristics are a reasonable basis for offering a higher salary to an older non-minority employee. Therefore, Petitioner has not established a prima facie case of race or age discrimination and the Petition For Relief should be dismissed.

RECOMMENDATION

Based upon the 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 16th day of September, 2005, in
Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 16th day of September, 2005.

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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.