

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GESSNER T. HARRIS,)
)
 Petitioner,)
)
 vs.) Case No. 05-2405
)
 LAKE COUNTY SCHOOL DISTRICT,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on December 13-14, 2005, in Leesburg, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Larry H. Colleton, Esquire
The Colleton Law Firm, P.A.
Post Office Box 677459
Orlando, Florida 32867

For Respondent: Stephenie J. McCulloch, Esquire
McLin & Burnsed, P.A.
Post Office Box 491357
Leesburg, Florida 34749-1357

STATEMENT OF THE ISSUE

Whether Respondent Employer is guilty of an unlawful employment practice, pursuant to Chapter 760, Florida Statutes, by its failure to promote Petitioner, an African-American

female, and its promotion of a Caucasian female who was less qualified.

PRELIMINARY STATEMENT

On November 29, 2004, Petitioner filed a Charge of Discrimination with the Equal Employment Opportunity Commission and the Florida Commission on Human Relations (FCHR). Therein, she alleged that Respondent School Board of Lake County, Florida, had discriminated against her based upon her race because it did not select her for promotion to Property Control Specialist on or about January 13, 2004.

FCHR entered a Determination: No Cause, on May 31, 2005. Petitioner timely-filed a Petition for Relief.

The cause was referred to the Division of Administrative Hearings on or about July 5, 2005. Respondent's Motion for Summary Final Order was denied by a November 23, 2005, Order.

At the commencement of the disputed-fact hearing, in response to Respondent's Motion in Limine, Petitioner withdrew her retaliation claim so that the only issues to be tried were promotion entitlement, entitlement to back pay at the promotion level, and attorney's fees.

At the disputed-fact hearing, Petitioner testified on her own behalf and presented the oral testimony of Darlene Elliot and Chloe Womack. Petitioner's Exhibit 1 and Exhibits 8 through 12 were admitted in evidence.

Respondent cross-examined the witnesses called by Petitioner and presented the oral testimony of Paul Haskins, Rebecca Nelsen, Sonja Charlene Gore, Laura Dee Sullivan, Jane Adams, Beth Minnix, and Barbara Harper. Respondent's Exhibits 2-12 and 14-16 were admitted in evidence. Exhibit R-2 was the deposition of Ann Isaacs with attachments. Exhibit R-3 was the deposition of Stephen Miller.

Joint Exhibit A, the parties' Joint Stipulation filed on September 2, 2005, was also admitted in evidence.

A three-volume Transcript was filed on January 5, 2006. Each party timely-filed its respective Proposed Recommended Order which has been considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American female.
2. Respondent School Board of Lake County, Florida, is the corporate body politic responsible for the administration of schools within the Lake County School District.
3. At all times material, Paul Haskins (Caucasian male) was the supervisor of the Warehouse and Grounds Department. In that capacity, he supervised the functions of Plant Operations, Central Warehouse, Grounds, and Property Control, including the Property Control Specialist position. Mr. Haskins has been employed with the School Board for approximately 33 years. For

the past 20 years of his employment with the School Board, Mr. Haskins has served in a supervisory capacity. In that position, he has the authority to hire and fire employees under his supervision. Mr. Haskins made the decision to hire Jane Adams (a Caucasian female) for the Property Control Specialist position in 2003-2004. His hiring of Ms. Adams is the subject of Petitioner's charge of discrimination/Petition for Relief.

4. In 1976-1977 Petitioner worked for the federal government at Robbins Air Force Base as a clerk typist, where she performed numerous duties at Pay Grade GS XI, Civil Service Supervisor.

5. While at Robbins Air Force Base, Petitioner held the position of Shipping Clerk. In her last year at Robbins Air Force Base, she held a temporary position supervising four clerks.

6. Petitioner continued work at MacDill Air Force Base, where she concluded her civil service career of over 10 years.

7. During the course of her civil service experience, Petitioner was Custodian of Records, Classified Air Craft Designs.

8. Immediately prior to being hired by Respondent, Petitioner worked in a clerical position for the City of Eustis, Florida.

9. Petitioner has been employed with Respondent Lake County School Board for approximately 17 years.

10. Petitioner was hired by Respondent in April of 1988, as a Maintenance Worker III.

11. In 1992, Petitioner was promoted to the position of Fiscal Assistant II with Respondent's Maintenance Department. She continues to be employed in that capacity today.

12. Petitioner has worked for Respondent in the capacity of Fiscal Assistant II for approximately 15 years. However, she has never worked under the supervision of Mr. Haskins and has never worked directly with Ms. Adams.

13. The Fiscal Assistant II position is an accounting support position and does not require an accounting degree.

14. The duties Petitioner performs as a Fiscal Assistant II include assisting and preparing the documents related to budgets and purchase orders in the maintenance department. She prepares orders for materials for that department. She maintains property for the department with respect to its locations, and if the materials have a value of over \$1,000.00, Petitioner is responsible for in-putting the data in the SA 400 computer software system, which is Respondent's current financial network. Petitioner is very skilled in using the SA 400, but Petitioner's computer system work has been primarily

office or secretarial work related to accounting for its four million dollar budget.

15. By the date of hearing, Petitioner had completed over 30 semester hours at Lake-Sumter Community College in Leesburg, Florida, towards an Associate of Arts degree. The hearing occurred nearly two years after any date material to the promotion involved in this case.

16. In December 2003, Darlene Elliot (Caucasian female), Respondent's Property Control Specialist, announced her retirement. The Property Control Specialist position operated under the umbrella of the Warehouse and Grounds Department, managed by Mr. Haskins. The opening was posted and advertised. The pay grade for the position was Level Eleven.

17. Current School Board employees could apply for the upcoming vacancy simply by providing a letter of intent or completing an application for the position. Several applicants applied for the position.

18. Petitioner submitted a letter of interest, along with her resume which detailed her qualifications and background for the position.

19. Ms. Adams submitted only an application, which was not signed or dated.

20. Several other employees from different departments also submitted their letters of intent for the Property Control Specialist position.

21. Mr. Haskins unilaterally selected only six applicants to be interviewed. All the applicants selected to be interviewed were already employees of Respondent. Petitioner and Ms. Adams were among them.

22. The six applicants interviewed were: Petitioner, Ms. Adams, Sonja Charlene Gore, Stephen Miller, Debra Parker, and Laura D. Sullivan. Of the applicants, both Ms. Gore and Petitioner are African-American, and both are Fiscal Assistants. The remainder of the applicants are Caucasian. All six applicants, with the exception of Mr. Miller, were female. Mr. Miller also was a Fiscal Assistant II, with a background in data processing and records keeping. He also had already earned an associate's degree. Ms. Sullivan was a Grounds Worker III with prior bookkeeping experience. Ms. Parker's experience is not clear.

23. Petitioner's charge of discrimination initially stated an allegation of sex discrimination, but she did not pursue that claim at the disputed-fact hearing.

24. The job description for the Property Control Specialist position listed the requisite job duties for that position. Among the requisite job duties were: performing

audit and inventory procedures pursuant to state and federal statutes and pursuant to rules of the Auditor General; inservicing each school's new property custodian and insuring correct records at each school; coordinating purchasing, bookkeeping, and warehouse and grounds maintenance with each school; tagging all new equipment; processing tags, titles and registrations on rolling stock; reconciling property records with expenditures; working with various auditors; preparing lists of equipment and rolling stock for insurance renewal each year; coordinating disposal of surplus equipment; and preparing and reviewing audit reports and dispositions to go to the School Board.

25. The Property Control Specialist job description also sets forth the necessary knowledge and skills for that position. Among the knowledge and skills listed are: knowledge of accounting procedures; knowledge of equipment used in schools; ability and desire to establish and maintain an amiable relationship with vendors and all School Board personnel; physically move student desks, chairs, and equipment from one cost center to another; ability to withstand extreme heat and cold for extended periods of time; ability to lift 30 lbs; and ability to walk, bend, stoop, and climb stairs. Also, a valid Florida Driver's License was required, and a high school diploma or a GED was preferred.

26. The Property Control Specialist position was described as very physical. Many audits are performed in the summer, and much of the work is done out in the field, which can be very hot and dusty.

27. Mr. Haskins, Beth Minnix (Caucasian female), and Barbara Harper (Caucasian female), participated in interviewing the six candidates selected for interviews. However, the selection of one of the interviewees to fill the position was made unilaterally by Mr. Haskins.

28. The retiring Ms. Elliot had hurt feelings because Mr. Haskins did not make her a member of the interview team.

29. During the six interviews, Ms. Minnix and Ms. Harper did not ask the interviewees questions, but they were encouraged to take notes and privately offer their opinions to Mr. Haskins on each of the applicants interviewed. They were also intended to serve as witnesses, in the event that Mr. Haskins needed them to recall an applicant's response. They were also intended to observe Mr. Haskins' conduct of the interviews.

30. Ms. Adams has a high school education and has worked as a farm worker and a custodian. For 14 years she has been a grounds worker in Respondent's employ. She was familiar with all the schools in the District and had done heavy duty deliveries and pest control at most of them. She had covered for Ms. Minnix, Mr. Haskins' Purchasing Agent, during

Ms. Minnix's two pregnancies and had been cross-trained by her in purchasing. Ms. Harper, Mr. Haskins' Fiscal Assistant, was also familiar with Ms. Adams' training, experience, and personality, because Ms. Adams had covered for Ms. Harper during Ms. Harper's vacation.

31. At the time of the interviews, Ms. Adams had worked for the School Board for approximately 14 years, and her current primary function was pest control. She was initially hired in a custodial position. Five months later, she was promoted to the position of Grounds Worker III. At all times during her 14 years of employment with the School Board, she had worked under Mr. Haskins' supervision. Over that period of time, she had performed various duties such as "jack rabbit" mail courier to all the schools; general secretarial work; answering phones; filing; processing purchase and work orders; inventory and warehouse receiving; tagging inventory, property, and equipment; transferring property; performing custodial work; using the SA 400 computer system; inventorying and auditing of physical, tangible property; payroll; setting up new schools' physical plants; pest control; and supervision and direction of summer employees.

32. A few of Ms. Adams' foregoing skills and functions had been performed under Ms. Elliot's direction. However, a lot of Ms. Adams' work for Ms. Elliott, which was directly that of the

position she sought in 2003-2004, had occurred 10 years before the vacancy at issue.

33. In approximately 1994, Mr. Haskins, who was always Ms. Elliot's supervisor, had given Ms. Elliot a choice of selecting either Ms. Adams or Ronnie Calloway to become her assistant Property Control Specialist. Ms. Elliot had selected Ronnie Calloway (an African-American male) over Ms. Adams (a Caucasian female). In Ms. Elliot's view, Ms. Adams was not dependable, was consistently tardy in her arrival at work; and took off early from work. However, Ms. Elliot had no factual knowledge that Ms. Adams was abusing sick or annual leave. Indeed, there is affirmative evidence that Ms. Adams often left work early with permission to care for a sick husband. In Ms. Elliot's opinion, Mr. Calloway was an excellent worker in every respect, so she hired him. Ms. Elliot did no interviewing for the assistant position to which she promoted Mr. Calloway at that time.

34. Mr. Calloway retired after approximately six years. His position was filled by another male (race unspecified).

35. After Ms. Elliot hired Mr. Calloway as her assistant Property Control Specialist about 1994, Ms. Adams did much less work with property control. However, over the intervening years until 2003-2004, Ms. Adams had sporadically worked in the

property control office for Ms. Elliot, helping her in some periods less than others.

36. Race was not discussed during the interviews conducted by Mr. Haskins to replace Ms. Elliot or during any of the discussions among the interviewers regarding the candidates.

37. Mr. Haskins asked the same initial questions of each applicant. Those questions were: (1) Tell me about yourself from school up to today's date, including education and employment; (2) Tell me what you know about the Property Control Specialist position; (3) Why are you applying for this position; (4) Explain a situation where you had a conflict and how you handled the situation; and (5) Tell me about your knowledge of all the various computer programs that you have used.

38. After his initial six questions, Mr. Haskins then asked follow-up questions based upon each applicant's individual responses to the initial questions posed.

39. Each applicant also was required to draft and type a letter on the topic of why s/he should be hired for the position. Ms. Harper administered that portion of the interview process to each of the interviewees in another room.^{1/}

40. After the interviews, Mr. Haskins scored the applicants in the following nine categories, which he deemed important for the position: appearance; verbalization; knowledge; experience; technology skills; compatible with

operations; physical demands per job description; written expression; and initiative.

41. Mr. Haskins' scoring methodology was his own and had not been previously approved by Respondent's School Board or Human Resources Director. No standard criteria was used. No key for assigning scores was used. The assignment of points was at Mr. Haskins' will. No School Board requirement provided otherwise.

42. Prior to the interviews, Mr. Haskins had knowledge of Ms. Adams' work performance for him over the whole of her employment. He had conducted evaluations of Ms. Adams' work performance each year. Each of his evaluations had complimented her positive attitude, her flexibility in the various tasks assigned to her, her ability to fill in wherever needed, or her initiative in enhancing her computer skills. Prior to conducting the interviews in December 2003, Mr. Haskins also had knowledge that Ms. Adams had a very good rapport with the school principals, custodians, and other personnel from working out in the schools, got on well with the other office staff, and had taken some computer classes.

43. It is entirely possible, and, frankly, probable, that Mr. Haskins allowed his prior high opinion of Ms. Adams to color his rating of her interview sheet. However, there is no

indicator that race or racial animus played any part in his scoring system or in his actual scoring of any interviewee.

44. Indeed, Ms. Elliot (Caucasian female) and Chloe Womack (African-American female), both of whom testified on Petitioner's behalf, would not say they believed race affected Mr. Haskins' dealings with employees. They both testified that African-Americans were only hired by Ms. Haskins for outside jobs, and Ms. Womack testified that Fiscal Assistants like herself and Petitioner had always been discouraged from applying for work in the Grounds and Warehouse category by being told how dusty and physical it was.^{2/} However, Ms. Womack further testified that "the good old buddy" system was apparent in Mr. Haskins' office and that those who worked there, including Ms. Adams, probably got preferential treatment in promotions for that reason, as well as for having more inside knowledge of the jobs there. This belief that office preference or favoritism was the reason for promoting from within the Warehouse and Grounds Department or from the vicinity of Mr. Haskins' office also was expressed by other witnesses who had been applicants for the promotion in question. Ms. Elliot testified that she had no factual information that Mr. Haskins discriminated in hiring on the basis of race but that she felt he discriminated on the basis of whom he liked and disliked. She conceded she did not know how he came to like some people, and not others,

and that she could not relate his dislikes specifically to race.^{3/}

45. Mr. Haskins scored each applicant on a possible 100 points. He assigned total scores to the applicants as follows: Jane Adams 94; Charlene Gore 91; Stephen Miller 81; Petitioner 80; Dee Sullivan 78; and Debra Parker 65.

46. Charlene Gore, an African-American female who received the second highest score of all applicants, testified that she did not feel that there was anything racially discriminatory about the selection process or the selection of Ms. Adams. Had she felt there were race discrimination, she would have complained about it.

47. Ms. Adams, Ms. Gore, and Petitioner were scored by Mr. Haskins as follows:

	Adams (Caucasian)	Gore (African- American)	Petitioner (African- American)
Appearance	10	10	10
Verbalization	8	10	8
Knowledge	10	8	5
Experience	15	10	10
Technology Skills	13	14	13
Compatible with Operations	10	9	8
Physical Demands per Job Description	10	10	10

Written Expression	8	10	9
Initiative	<u>10</u>	<u>10</u>	<u>7</u>
	94	91	80

48. No weighting clearly in favor of the Caucasian candidate over the African-American candidates is evident in the foregoing scores rated by Mr. Haskins. Ms. Adams was rated highest, by comparison to the others, in the categories of knowledge, experience and compatible with operations. All three of these categories were ones in which Mr. Haskins had personally observed Ms. Adams over many years.

49. Mr. Haskins testified that he considered a good attitude to be important for the Property Control Specialist position. He also looked for an individual who would fit in with the structure of his department. He explained that the nature of the position required the Property Control Specialist to possess the ability to work cooperatively with the other individuals in the department and in the School District. He wanted to select a person with "people skills" who had the demonstrated ability to handle conflict effectively and deal with school administrators regarding sensitive issues.

50. Upon Mr. Haskins' inquiry during the interview, Petitioner cited as an example of handling conflict, an incident where another employee asked her to order supplies and she replied, "I can't buy pencils, that's not my job. I don't do

that. I buy trucks." This response caused Mr. Haskins concern that Petitioner would not be a good fit for the position. Her answer was confrontational, and Mr. Haskins had concerns with her willingness to multi-task and to be flexible in performing job duties. Mr. Haskins explained that the employees who work under him are often called upon to perform tasks that are technically outside their job description.

51. Petitioner has been critiqued in a past evaluation by a different supervisor for her lack of ability to maintain composure when dealing with stressful situations with co-workers or vendors. However, Petitioner has been evaluated as improving in this regard.

52. At one point during her interview, Petitioner's voice became elevated when describing a perception that the women in her department did not get along, and asserted that such a perception was not accurate. Petitioner became very loud and confrontational, and spoke about the topic for several minutes. This left a bad impression with the whole of the interview committee.^{4/}

53. Mr. Haskins perceived Petitioner as lacking knowledge of what the Property Control Specialist position entailed, particularly in comparison to Ms. Adams, because when he asked Petitioner during the interview what she knew about the Property Control Specialist position, she replied, "You go out and tag

property, I guess." Ms. Adams' response included a detailed explanation of the process and paperwork involved in the position she sought.

54. Several of the applicants, including Petitioner, Ms. Gore, and Mr. Miller had experience as fiscal assistants. Experience as a fiscal assistant and working with budgets were not preferred criteria for Mr. Haskins and the remainder of his committee, nor did they feel such qualifications warranted any particular weight in considering the requirements for the Property Control Specialist position.

55. Mr. Haskins selected Ms. Adams for the position. He felt Ms. Adams was the most qualified applicant, since she was familiar with many of the duties of a Property Control Specialist and had experience in performing them. He may have believed her experience under Ms. Elliot was greater than it actually was or not realized that much of her experience with Ms. Elliot was remote in time (see Findings of Fact 32 and 35), but among the relevant duties Ms. Adams had performed prior to the interviews were: taking inventory; tracing and reconciling any discrepancies in inventory; servicing property custodians; coordinating with schools; purchasing; bookkeeping; warehouse and grounds, and maintenance; tagging new equipment; transfer of equipment when cost centers separate, move, or disband; and working with various auditors. Mr. Haskins also had observed

Ms. Adams perform receiving, accounts payable, work on the budget; other work involving accounts procedures and mathematical computations. He observed that she kept her secretarial and computer skills up-to-date and was very knowledgeable of all the equipment used in schools. Because of the physicality of her then-current job position, he felt Ms. Adams also had demonstrated the physical ability to lift 30 pounds, move equipment, and withstand extreme heat and cold. Ms. Adams also demonstrated the ability to make decisions and to work independently. She was familiar with the relevant computer program, the SA 400, and had been authorized to use it since 2000.

56. Ms. Minnix and Ms. Harper agreed with Mr. Haskins' assessment of Ms. Adams as the most qualified applicant for the position.

57. In an attempt to establish a pattern of racial discrimination by Mr. Haskins, Ms. Elliot testified that years prior to her retirement, Mr. Haskins had given her a choice of selecting whom she wanted to assist in her office and had approved her selection of Ronnie Calloway, an African-American male, to assist her instead of Jane Adams. (See Finding of Fact 33.) This does not pass muster as discrimination against African-Americans. Ms. Elliot then testified that on multiple occasions, several Caucasian male employees called Mr. Calloway

"Shine;" that Mr. Haskins heard them; and that Mr. Haskins, himself, had referred to Mr. Calloway as "Shine." Mr. Haskins vehemently denied ever using that term. Mr. Haskins testified without refutation that he had overheard another employee use that term toward Mr. Calloway, and thereafter, in the presence of several other employees, he had reprimanded the employee for using the racially derogatory nickname. Mr. Calloway never reported any further problems to Mr. Haskins, so Mr. Haskins believed the problem with the nickname "Shine" had been resolved. Ms. Elliot conceded that Mr. Calloway previously told her he was not offended by the nickname, anyway.

58. Likewise, to establish a pattern of racially disparate treatment, Ms. Elliot asserted that an African-American male who smelled of alcohol was fired, while three Caucasian males who smelled of some controlled chemical substance were not fired. Her evidence on this issue was not corroborated by anyone, and it was not clearly indicated what was known by Mr. Haskins or anyone else in management about any of the four men.

59. Petitioner believed that Mr. Haskins did not select her for the Property Control Specialist position because of her race. She testified that she did not know of any African-American females that Mr. Haskins had ever hired; knew of only two African-American males he had hired; and believed that none of the African-American males Mr. Haskins had hired worked

inside the office, as opposed to working in the warehouse or in the grounds.

60. Petitioner admittedly was unaware of how many individuals Mr. Haskins had hired in the last 20 years, of how many African-Americans applied for open positions under Mr. Haskins' supervision or control during that time, or of any instance where Mr. Haskins hired a less qualified Caucasian candidate over a more qualified African-American candidate.

61. The greater weight of the evidence demonstrates that Mr. Haskins has hired at least 20 African-Americans for positions under his supervision in the Warehouse and Grounds Department, including Petitioner's daughter for a summer job. The evidence also demonstrates that there were only three employees who actually worked in the office setting for the majority of the day. Of those positions, there was very little turnover. Caucasians have been hired to replace Caucasians recently.

62. However, the credible evidence as a whole demonstrates that Mr. Haskins hired Ronnie Calloway as an assistant Property Control Specialist in the office upon Ms. Elliot's request, and hired Archie Mitchell, who worked in the warehouse. Both were African-American males.

63. One element of office turnover appears to have been Bernice Odums, an African-American female fiscal assistant, who

voluntarily took early retirement six months to a year after a reorganization placed her in Mr. Haskins' office, under the supervision of, or at least in close contact with, Ms. Harper and Ms. Minnix. Ms. Elliot and Ms. Womack credibly represented that Ms. Odums was desperately unhappy due to her relocation and the atmosphere in the Warehouse and Grounds Office. However, whether Ms. Odums' extreme unhappiness was the result of the physical move of her office, was the result of being overseen by others as opposed to being in charge of fiscal matters in the way she had been previously, was the result of having a mere secretary with no prior fiscal experience placed over her as a superior, was the result of personality problems among the women, was the result of racial animus, or was the result of something else entirely is simply not clear. No racial reason for Ms. Odums' tearful retirement was clearly proven.

CONCLUSIONS OF LAW

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

65. Florida law prohibits employers from discriminating against employees on the basis of race.

66. Disparate treatment claims require proof of discriminatory intent either through direct or circumstantial

evidence. See Harris v. Shelby County Board of Education, 99 F.3d 1078 (11th Cir. 1996), which observed that "a plaintiff must, by either direct or circumstantial evidence, demonstrate by a preponderance of the evidence, that the employer had a discriminatory intent to prove disparate treatment claim."

67. To establish a prima facie case of discriminatory failure to promote based on circumstantial evidence, Petitioner must show: (1) that she is a member of a protected class; (2) that she was qualified for and applied for the promotion; (3) that she was rejected; and (4) that another equally or less qualified employee who was not a member of the protected class was promoted. See Barron v. Federal Reserve Bank of Atlanta, 129 F. Appx. 512 (11th Cir. April 19, 2005, citing Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001). Once the complainant establishes the prima facie case of discriminatory failure to promote, Respondent has the burden of producing a legitimate, non-discriminatory reason for its decision. Cooper v. Southern Co., 390 F.3d 695, 725 (11th Cir. 2004), reversed in part on other grounds in Ash v. Tyson Foods, Inc., 126 S. Ct. 1195 (February 21, 2006), discussed infra. If such a reason is produced, the Petitioner has the ultimate burden of proving the reason given by the employer to be a pretext for unlawful discrimination. See Denney v. City of Albany, supra.

68. Herein, Petitioner has demonstrated a prima facie case of discrimination based on race, in that she is a member of a protected class (African-American); she qualified for and applied for the position of Property Control Specialist; she was not hired for the position; and a Caucasian female with less fiscal experience received the promotion.

69. In reaching the foregoing conclusion of law, the undersigned has given Petitioner the benefit of the doubt that fiscal experience was an important criterion in this hiring decision. However, the evidence is clear that fiscal experience of the secretarial type that Petitioner possessed was not a high priority, if considered at all, by the interview committee and the decision-maker, Mr. Haskins.

70. More to the point, however, is that Respondent has presented a legitimate non-discriminatory reason for hiring the Caucasian female, Ms. Adams. According to Mr. Haskins, he believed that Ms. Adams was the most qualified applicant for the job based on her knowledge of the position, her experience, and her personality and attitude.

71. In rebuttal of Respondent's stated reasons for denying Petitioner a promotion, the Petitioner put forth two arguments: First, she asserted that a pattern of discrimination existed, in that over a 17-year period, Mr. Haskins had never hired an African-American. This was not proven. Second, Petitioner

asserted that Ms. Adams had less experience, was less knowledgeable in the area of property control and the school system, was not part of the purchasing unit, and was unfamiliar with the procedures and guidelines set forth by the School Board. However, the most that Petitioner was able to demonstrate was that there were disparities in Petitioner's and Ms. Adams' qualifications. Prior cases have held that disparities in qualifications are not enough, in and of themselves, to demonstrate discriminatory intent, unless those disparities are so apparent as to virtually "jump off the page and slap you in the face." See Cooper v. Southern, Co., supra.; Alexander v. Fulton County, 207 F.3d 1303, 1340 (11th Cir. 2000), citing Lee v. GTE Florida, Inc., 226 F.3d 1249, 1253-54 (11th Cir. 2000). Within the last month, the United States Supreme Court has articulated a less flamboyant test. In Ash v. Tyson Foods, Inc., supra, that court stated:

"The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications. Federal courts, including the Court of Appeals for the Eleventh Circuit in a decision it cited here, have articulated, various other standards, see, e.g. Cooper supra., at 732 (noting that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question" (internal

quotation marks omitted)); Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1194 (CA9 2003) (holding that qualifications evidence standing alone may establish pretext where the plaintiff's qualifications are "clearly superior" to those of the selected job applicant); Aka v. Washington Hospital Center, 332 U.S. App. D.C. 256, 156 F.3d 1284, 1294 (CADC 1998) (en banc) (concluding the fact finder may infer pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job"), and in this case the Court of Appeals qualified its statement by suggesting that superior qualifications may be probative of pretext when combined with other evidence, see 129 Fed. Appx., at 533. This is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications. Today's decision, furthermore, should not be read to hold that petitioners' evidence necessarily showed pretext. The District Court concluded otherwise. It suffices to say here that some formulation other than the test the Court of Appeals articulated in this cause would better ensure that trial courts reach consistent results.

72. Attempting to apply these directions, it is here concluded that Petitioner probably did possess more fiscal-related job experience and more recent fiscal-related job experience than Ms. Adams. However, two of the other interviewees, one African-American female (Gore), and one Caucasian male (Miller), also possessed more, or different, fiscal experience than Ms. Adams and were likewise denied the position. One Caucasian female (Sullivan) with similar, but different experience, also was denied the position. One

Caucasian female (Parker) whose qualifications are not clear was also denied the position. Under these conditions, a discriminatory intent related to race is not so obvious as to jump off the page and slap one in the face. In addition to fiscal-related experience, which was not very important to him, Mr. Haskins was looking for other qualifications, which he rated more highly: flexibility, the ability to get along with people out in the field, and being a "good fit" with his current staff. Given these additional considerations, Petitioner's qualifications are not "clearly superior" to those of Ms. Adams or any other candidate.

73. On the whole, it cannot be said that "no reasonable person in the exercise of impartial judgment could have chosen Ms. Adams over Petitioner."

74. Apparently, Mr. Haskins hired Ms. Adams for the job of Property Control Specialist on the basis of, at best, more familiarity with her work ethic and experience than showed up in the interview questions, or at worst, on the basis of old-fashioned favoritism. Like it or not, this attitude of hiring someone who is easy to get along with or who is personally preferred by the one who does the hiring is not considered unlawfully discriminatory, even where it benefits a friend or relative at the expense of a more qualified, protected person. See Neal v. Roche, 349 F.3d 1246, 1251 (10th Cir. 2003), citing

Brandt v. Shop'n Save Warehouse Foods, Inc., 108 F.3d 935, 938 (8th Cir. 1997). See also Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) to the same effect. Unlike Chandler, there are insufficient acts of prior discrimination or of pattern discrimination herein to support a conclusion that race played any part in the promotion of Ms. Adams over Petitioner.

75. In Florida, an employer may promote for any reason, even a discriminatory one, provided the basis of his discrimination is not one of the forbidden reasons listed in Florida Statutes Section 760.10(1)(a): race, color, religion, sex, national origin, age, handicap, or marital status. Friendship, personality, and favoritism may not be good reasons to promote, and they are certainly not fair reasons, but Chapter 760 does not forbid them.

76. Here, Petitioner scored lower in some areas than Ms. Adams; in some, she scored higher. She was never the second highest scorer. The second highest scorer was another African-American female. Petitioner would not be entitled to the position under any construction of the facts, and she has not demonstrated that the reasons given by the Respondent for the promotion of Ms. Adams were a pretext.

77. The burden of proof is upon Petitioner. A burden of production only is upon Respondent. Respondent having produced

evidence of a non-discriminatory reason for the employment action taken, and Petitioner having been unable to refute same, Petitioner cannot prevail.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief and Charge of Discrimination.

DONE AND ENTERED this 13th day of April, 2006, in Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
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 13th day of April, 2006.

ENDNOTES

^{1/} This Finding of Fact is made on the weight of the credible evidence as a whole and is contrary to Petitioner's testimony that Ms. Adams administered the typing test to Petitioner.

^{2/} This latter statement is not credible in that of the six finalists (interviewees) selected by Mr. Haskins in 2003-2004, at least three were fiscal assistants.

^{3/} This Finding of Fact is directed specifically to the testimony about Mr. Haskins' hiring and promotion practices. See also Findings of Fact 57-63, concerning testimony about Mr. Haskins' racial attitudes, generally.

^{4/} On rebuttal, Petitioner attempted to show that she was not loud or confrontational on this topic and that the discussion of trucks (see Finding of Fact 50) never occurred in the interview. The former explanation is a matter of opinion. The latter explanation is not persuasive.

COPIES FURNISHED:

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

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

Larry H. Colleton, Esquire
The Colleton Law Firm, P.A.
Post Office Box 677459
Orlando, Florida 32867

Stephenie J. McCulloch, Esquire
McLin & Burnsed, P.A.
Post Office Box 491357
Leesburg, Florida 34749-1357

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.