

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LUCY CABRERA,)
)
 Petitioner,)
)
 vs.) Case No. 05-2974
)
 HIALEAH HOUSING AUTHORITY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 8, 2006, by video teleconference, with the parties appearing in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Joel A. Bello, Esquire
3780 West Flagler Street
Miami, Florida 33134

For Respondent: J. Frost Walter, III, Esquire
Law Offices of Citrin & Walker
100 West Sunrise Avenue
Coral Gables, Florida 33133

STATEMENT OF THE ISSUE

Whether the Respondent discriminated against the Petitioner on the basis of her age, in violation of Section 760.10, Florida

Statutes (2004),¹ the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

On February 18, 2005, Lucy Cabrera filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations ("FCHR"), naming the Hialeah Housing Authority ("Housing Authority") as the Respondent. In the complaint, Ms. Cabrera stated: "I believe I was discriminated [against] because of my age (50+)," and she set forth the basis for her complaint as follows:

I was employed with the respondent for two years,[sic] During my employment I was subjected to discrimination based upon my age (50+). Celi Ervesun, Capital Fund Coordinator, said to me that I was too old for the job. Also, she stated that I am not a fit for the job. On February 20, 2004, I was terminated, and the reason for dismissal was I failed to follow direction. In addition, I was replaced by two younger employees (20+).

On June 29, 2005, the FCHR issued a Determination: No Cause, in which it stated that it had found that "no reasonable cause exists to believe that an unlawful employment practice occurred." Ms. Cabrera timely filed a Petition for Relief with the FCHR, in which she alleged "Discrimination of Age" and noted that she would provide specifics in "other paperwork to follow." No other paperwork was attached to the Petition for Relief.

The FCHR forwarded Ms. Cabrera's Petition for Relief to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on August 8, 2006. At the hearing, Ms. Cabrera testified in her own behalf, and, pursuant to the agreement of the parties, the testimony of John Esposito was presented by deposition, the transcript of which was filed with the Division of Administrative Hearings on October 23, 2006. Petitioner's Exhibits 1 and 2 were received into evidence. The Housing Authority presented the testimony of Celi Ervesun and Jose Martinez. Respondent's Exhibits A through U were offered into evidence and received pursuant to stipulation of the parties.

The transcript of the proceedings was filed with the Division of Administrative Hearings on August 21, 2006. The parties agreed that the Proposed Recommended Orders would be filed within 20 days after the filing of the deposition transcript of Mr. Esposito with the Division of Administrative Hearings. This deposition transcript was filed on October 23, 2006, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. In February 2002, Ms. Cabrera was hired by the Housing Authority as the Assistant to the Capital Funds Program Coordinator ("CFP Coordinator"). The CFP Coordinator was, at all times material to this proceeding, Celi Ervesun, who was Ms. Cabrera's direct supervisor.

2. At the times material to this proceeding, Ms. Cabrera was over 40 years of age.

3. At the times material to this proceeding, the Capital Funds Program ("CFP") department was responsible for managing construction projects involving the modernization of the public housing buildings under the jurisdiction of the Housing Authority, as well as for any other construction work being undertaken by the Housing Authority and any major maintenance projects costing over \$12,000.

4. The position of assistant to the CFP Coordinator was advertised, and Ms. Cabrera was one of several persons in the pool of applicants chosen by the Executive Director of the Housing Authority, Jose Morales, for interviews. Ms. Ervesun interviewed Ms. Cabrera and recommended to Mr. Morales that Ms. Cabrera be offered the position. On the basis of

Ms. Cabrera's résumé and the interview, Ms. Ervesun believed that Ms. Cabrera had the qualifications necessary for the position as her assistant. Ms. Ervesun was not aware of Ms. Cabrera's age when she recommended that Ms. Cabrera be hired.

5. Among the major duties and responsibilities of the assistant to the CFP Coordinator was assisting the CFP Coordinator in preparing materials and forms for bid packages for construction work to be performed under the CFP; assisting with the preparation of numerous work documents associated with the CFP; assisting with the preparation of reports; serving as the CFP Coordinator's secretary and receptionist; and maintaining "an accurate and up-to date the [sic] file system and all records and forms that involve the construction contract administration of all modernizations works."²

6. When she first began working at the Housing Authority, Ms. Cabrera appeared to be interested in her job, and she performed her assigned tasks well and willingly. As time passed, however, Ms. Ervesun noticed that Ms. Cabrera was not completing assignments timely and was not sufficiently knowledgeable about construction management to enable her to understand fully the requirements of her job.

7. In Ms. Cabrera's annual evaluation, completed in February 2003, Ms. Ervesun rated Ms. Cabrera "Below Average" in

technical and operational job knowledge and in planning and organizing. Ms. Ervesun noted that the CFP had many ongoing projects and that Ms. Cabrera needed to improve her time-management skills and her ability to plan and use her time well. Ms. Ervesun noted that Ms. Cabrera "has a positive attitude and is ready to attend all seminars that could improve her ability to perform her tasks."³

8. When Ms. Ervesun actually asked Ms. Cabrera to attend seminars, however, Ms. Cabrera refused to travel, outside Miami, Florida. Although there were few relevant seminars in Miami, Ms. Ervesun made arrangements for Ms. Cabrera to attend one seminar in Miami. Shortly before the seminar was scheduled to take place, Ms. Ervesun was out of town and Ms. Cabrera expressed her intention not to attend the seminar. This came to the attention of Jose Martinez, who was the Director of Administration for the Housing Authority at the time, and Mr. Martinez ordered Ms. Cabrera to attend the seminar, which she did.

9. The organization and maintenance of construction-project files was of particular concern to Ms. Ervesun. The CFP department had been closed prior to Ms. Ervesun's being hired in January 2002, and the project files kept by the CFP had not been properly maintained. Because many of the projects undertaken by the Housing Authority and overseen by the CFP used government

funds, federal agencies, including the Department of Housing and Urban Development and the Army Corps of Engineers, frequently audited the project files maintained by the CFP. It was, therefore, essential that the files be kept up-to-date and organized in accordance with a checklist provided to Ms. Ervesun by the Army Corps of Engineers after it found during an audit in February 2002 that the CFP project files were in disarray.

10. At the time of the Army Corps of Engineers' audit, the CFP department was housed in a very small space. Ms. Ervesun decided to wait until the department moved into larger office space to begin the task of organizing the files in accordance with the guidelines provided by the Army Corps of Engineers. The move occurred in April 2003, and Ms. Ervesun expected Ms. Cabrera to begin working in earnest on the files at that time.

11. At any given time, the CFP Coordinator oversaw approximately 60 projects. The project files were quite extensive and included many documents that had to be organized in accordance with the guidelines provided by the Army Corps of Engineers. Ms. Ervesun suggested to Ms. Cabrera that she work on the files at least one hour each day to clear up the backlog in filing and to keep the files current. Ms. Ervesun found, however, that Ms. Cabrera made very little progress in organizing the files and also failed to complete other essential

job responsibilities timely, such as verifying payrolls for workers on construction projects, another task required by the federal agencies providing funding for the construction projects.

12. By the fall of 2003, Ms. Ervesun had become increasingly unhappy about Ms. Cabrera's failure to complete assigned tasks and her tendency to make numerous mistakes in her work. Ms. Ervesun often raised her voice to Ms. Cabrera and expressed her displeasure with the way Ms. Cabrera was doing her job. John Esposito, whose office was next to Ms. Cabrera's and Ms. Ervesun's office, overheard Ms. Ervesun, in a loud voice, tell Ms. Cabrera that she was stupid and incompetent; that the quality of her work was not satisfactory; that she needed to stop making the same mistakes over and over; and that she needed to do better work. In Mr. Esposito's opinion, Ms. Ervesun was unprofessional in some of her dealings with Ms. Cabrera, and he considered Ms. Ervesun's tone of voice to be demeaning to Ms. Cabrera and her treatment of Ms. Cabrera abusive.

13. Ms. Cabrera related one incident that she considered particularly humiliating: She was asked by Ms. Ervesun and several co-workers to take off her shoes so they could measure her height to prove that she was not really 5'3" tall, as she claimed. Ms. Cabrera believed that Ms. Ervesun made fun of her because she was short.

14. Mr. Esposito observed Ms. Cabrera in tears on a number of occasions, and Ms. Cabrera complained to him about the way Ms. Ervesun treated her and about what Ms. Cabrera considered Ms. Ervesun's incompetence.

15. Ms. Ervesun mentioned several times to Mr. Esposito that she needed to replace Ms. Cabrera because she was not doing her job.

16. In the fall of 2003, both Ms. Ervesun and Ms. Cabrera discussed with Mr. Martinez the problems each was having with the other. Ms. Ervesun told Mr. Martinez that Ms. Cabrera was making a lot of mistakes in her work and asked Mr. Martinez to talk to Ms. Cabrera about her job performance.⁴ Before he began counseling Ms. Cabrera about her job performance, however, Mr. Martinez conducted his own investigation, and he confirmed that Ms. Cabrera was, in fact, making numerous mistakes, especially in maintaining the project files. When Mr. Martinez began counseling Ms. Cabrera, she consistently denied making the mistakes identified by Ms. Ervesun and told Mr. Martinez that Ms. Ervesun was "picking on her" about her job performance.

17. After a counseling session, Ms. Cabrera would do better for a while but then lapse back into making careless mistakes in filing or in the preparation of reports. On the occasions when Ms. Ervesun complained to Mr. Martinez about Ms. Cabrera's mistakes, he personally looked at the files and

satisfied himself that Ms. Cabrera was actually making the mistakes Ms. Ervesun complained about.

18. Mr. Martinez believed the situation could be improved if Ms. Cabrera would put in the effort and if she and Ms. Ervesun would work together as a team. Mr. Martinez advised Ms. Ervesun to help Ms. Cabrera correct her mistakes in keeping the files by putting in writing the way she wanted the files organized and maintained. Ms. Ervesun had consistently told Ms. Cabrera that the files needed to be organized in accordance with the guidelines provided in February 2002 by the Army Corps of Engineers.

19. Except for the observations included in Ms. Cabrera's February 2003 evaluation, the first time Ms. Ervesun put any of her complaints in writing to Ms. Cabrera was in a memorandum dated October 10, 2003. In that memorandum, Ms. Ervesun told Ms. Cabrera to concentrate on getting the project files in order.

20. On December 12, 2003, Ms. Ervesun wrote Ms. Cabrera another memorandum regarding Ms. Cabrera's failure to finish organizing the project files and her failure to make sure that all filing was current. Ms. Ervesun referred to a discussion she and Ms. Cabrera had on "Wednesday," presumably December 10, 2003, in which Ms. Ervesun had asked Ms. Cabrera to provide her a written report on the status of the files and filing "by the

end of the day."⁵ Ms. Ervesun noted that Ms. Cabrera had not provided the status report as of December 12, 2003. Ms. Ervesun directed Ms. Cabrera to have the report on her desk by December 15, 2003, but extended the deadline to December 16, 2003, because the computers were down on December 15.

21. On December 22, 2003, Ms. Ervesun wrote to Ms. Cabrera requesting that she provide her with the status report Ms. Cabrera was to have provided on December 16, 2003. Ms. Cabrera responded that afternoon with the status of the files in five of the file drawers. Ms. Ervesun replied on December 23, 2003, that she needed the status of the files in the remaining eight file drawers.

22. At some point during her employment with the Housing Authority, Ms. Cabrera joined the employees' union. Ms. Ervesun was not aware at the time that Ms. Cabrera had joined the union and was not concerned that she had done so. When Mr. Martinez learned that Ms. Cabrera had joined the union, he involved Ms. Cabrera's union representative in the efforts to help her improve her performance. Mr. Martinez also offered to allow Ms. Cabrera to work overtime, for additional pay, to catch up with her work, but Ms. Cabrera did not take advantage of this opportunity.

23. On January 14, 2004, Ms. Ervesun was advised that Ms. Cabrera had not provided corrected advertisements for an up-

coming bid solicitation in time for the publication deadline, resulting in the bid solicitation having to be revised to include a new deadline.

24. On January 16, 2004, Ms. Ervesun issued a Final Warning to Ms. Cabrera, with the agreement of Mr. Martinez and Mr. Morales, the Housing Authority's Executive Director. In the Final Warning, Ms. Ervesun pointed out a number of deficiencies in Ms. Cabrera's job performance and stated that Ms. Cabrera would be given 10 days to bring her "job tasks and responsibilities up to departmental standards" or face disciplinary action that could include termination.⁶

25. Ms. Cabrera was actually given over 30 days to correct her performance deficiencies, but she failed to complete assigned tasks timely and continued to make mistakes in filing and in preparing reports. Ms. Cabrera was advised in a memorandum from Mr. Martinez dated February 20, 2004, that the Housing Authority's Executive Director had terminated her employment based on her "repeated failure to follow instructions" and on the following:

On several occasions the Capital Fund Program Coordinator met with you to discuss the many pending issues (e.g., files not updated, failure to verify certified payroll, failure to complete assignments on time) that currently exist in the Capital Fund Department and to date most of those issues are still pending. You failed to act upon the orders and the written warning

given to you in the presence of your Union Representative on January 16, 2004 in order to resolve all the pending issues. Furthermore, other tasks that were assigned to you have yet to be completed (i.e., list identifying files in storage). Your failure to follow instructions is a violation of the Authority's Personnel Rules and Regulations, Rule XXV, A. Category I, 6 - "failure to follow instructions."^[7]

26. Ms. Cabrera was advised of her right to appeal the decision by filing a grievance, which she did through her union representative. Ms. Cabrera attached a "Grievance Report" to the Employee Grievance form, in which she objected to her termination and stated various grounds for her contention that her termination was not warranted; none of the grounds mentioned by Ms. Cabrera referred to age discrimination. After a hearing before the Housing Authority's Board of Commissioners, the decision to terminate Ms. Cabrera was upheld.

27. Ms. Cabrera was replaced as assistant to the CFP Coordinator by a young woman who was under 30 years of age. The replacement was hired on Ms. Ervesun's recommendation after following the routine procedure for filling job-vacancies at the Housing Authority.

Summary

28. Ms. Cabrera offered no persuasive direct evidence to establish that her termination was the result of discrimination because of her age. The only direct evidence that Ms. Cabrera

offered was her own self-serving testimony, which is not credited, that Ms. Ervesun had told her that she was too old for the assistant's job and that Ms. Ervesun had told her she intended to replace Ms. Cabrera with a younger person.

Ms. Cabrera conceded that no one overheard Ms. Ervesun make these remarks; she did not file a formal complaint with the Human Relations Department that Ms. Ervesun was discriminating against her on the basis of her age; she did not complain verbally to Mr. Martinez or Mr. Esposito that Ms. Ervesun's treatment of her was based on her age; and she did not include an allegation of age discrimination in the grievance that the union filed on her behalf to challenge her termination.

29. The evidence presented by Ms. Cabrera was sufficient to establish that she was over 40 years of age at the relevant times, that she was terminated from her employment, that she was initially considered qualified for the position as assistant to the CFP Coordinator, and that she was replaced by a younger person. The evidence presented by the Housing Authority established that Ms. Cabrera was terminated because she did not perform her job responsibilities satisfactorily, after a number of warnings and counseling sessions, and Ms. Cabrera did not submit any evidence to establish that this proffered reason for her termination was a fabrication or was otherwise unworthy of belief.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

31. Section 760.10, Florida Statutes, part of the Florida Civil Rights Act of 1992, as amended, provides in pertinent part:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

* * *

(7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

32. Florida courts routinely rely on decisions of the federal courts construing Title VII of the Civil Rights Act of 1964, codified at Title 42, Section 2000e et seq., United States

Code, ("Title VII"), when construing the Florida Civil Rights Act of 1992, "because the Florida act was patterned after Title VII." Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998), citing, inter alia, Ranger Insurance Co. v. Bal Harbor Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989), and Florida State University v. Sondel, 685 So. 2d 923, 925, n. 1 (Fla. 1st DCA 1996).

33. Ms. Cabrera has the burden of proving by a preponderance of the evidence that she was the victim of employment discrimination, and she can establish discrimination either through direct evidence of discrimination or through circumstantial evidence, which is evaluated within the framework of the burden-shifting analysis first articulated in McDonald Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Logan v. Denny's Inc., 259 F.3d 558, 566-67, 567, n. 2 (11th Cir. 2006).

34. "Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact in issue without inference or presumption. Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [age] constitute direct evidence of discrimination." Bass v. Board of County Comm'rs, Orange County, Florida, 256 F.3d 1095, 1105 (11th Cir. 2001).

35. Based on the findings of fact herein, Ms. Cabrera has presented no persuasive direct evidence that she was discriminated against because of her age, and she must, therefore, rely on the presumption set forth in McDonald Douglas to establish a prima facie case of age discrimination by showing that (1) she was at least 40 years old; (2) she suffered an adverse employment action; (3) she was qualified to do the job; and (4) she was replaced by someone substantially younger. See Haas v. Kelly Servs. Inc., 409 F.3d 1030, 1035 (8th Cir. 2005); Chapman v. AI Transp., 229 F.3d 1012, 1024 (11th Cir. 2000). If Ms. Cabrera satisfies her burden of proving a prima facie case of age discrimination, the burden of producing evidence then shifts to the Housing Authority to produce evidence articulating "a legitimate, non-discriminatory reason" for terminating Ms. Cabrera. Id. If the Housing Authority meets this burden, Ms. Cabrera must prove that the non-discriminatory reason offered by the Housing Authority to justify her termination is pretext. Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410 (3d Cir. 1999).

36. Ms. Cabrera can establish pretext by presenting evidence that casts doubt on the reason for termination offered by the Housing Authority and supports the conclusion that the reason offered was a fabrication or by presenting evidence sufficient to support an inference that Ms. Cabrera's

termination was more likely than not motivated by discrimination. See Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994). The evidence offered to establish that the reason offered by the Housing Authority for Ms. Cabrera's termination was pretext "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory reasons." Id.

37. Based on the findings of fact herein, Ms. Cabrera has met her burden of establishing a prima facie case of age discrimination: During her employment with the Housing Authority she was over 40 years of age; she was terminated from her position as assistant to Ms. Ervesun; Ms. Ervesun initially considered her qualified to do the job; and she was replaced by a person under 30 years of age. However, based on the findings of fact herein, the Housing Authority met its burden of establishing a legitimate, non-discriminatory reason for Ms. Cabrera's termination: Ms. Cabrera's job performance was unsatisfactory, and her job performance did not improve after she was given counseling, assistance, and additional time to complete her assigned tasks. Finally, based on the findings of fact herein, the evidence offered by Ms. Cabrera was not

sufficient to establish that the reasons given by the Housing Authority for her termination were pretext. Ms. Cabrera, therefore, did not prove by a preponderance of the evidence that the Housing Authority discriminated against her on the basis of her age when it terminated her employment in February 2004.⁸

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed by Lucy Cabrera.

DONE AND ENTERED this 8th day of January, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of January, 2007.

ENDNOTES

- ¹/ All references to the Florida Statutes shall be to the 2004 edition unless otherwise indicated.
- ²/ Respondent's Exhibit E.
- ³/ Respondent's Exhibit F.
- ⁴/ Transcript at page 134.
- ⁵/ Respondent's Exhibit I.
- ⁶/ Respondent's Exhibit O.
- ⁷/ Respondent's Exhibit Q.
- ⁸/ Ms. Cabrera attempted to broaden the issues presented in her Employment Complaint of Discrimination and Petition for Relief to include a charge that she had been subjected to a hostile work environment and that her termination was in retaliation for joining the employee's union. The evidence presented by Ms. Cabrera is sufficient to establish that Ms. Ervesun's behavior toward her became increasingly abusive and demeaning prior to her termination. Nonetheless, even if Ms. Cabrera had requested prior to hearing that the charges against the Housing Authority be expanded to include a charge that Ms. Ervesun subjected her to a hostile work environment, Ms. Cabrera did not present any evidence to connect Ms. Ervesun's behavior with discrimination based on her age. Kamal Al-Zubaidy v. TEK Indus., 406 F.3d 1030, 1038 (8th Cir. 2005)(To establish hostile work environment claim, it must be shown, among other things, that "the harassment was based on a protected characteristic under Title VII"). In addition, even if Ms. Cabrera had timely presented a claim that her termination was in retaliation for her joining the union, union membership is not an activity protected under Sections 760.01 through .11, Florida Statutes, and cannot support an action for retaliatory discharge under Section 760.10(7), Florida Statutes.

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.