

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

GWENDOLYN SALTER,

EEOC Case No. NONE

Petitioner,

FCHR Case No. 2005-02106

v.

DOAH Case No. 06-0339

INTERNATIONAL PAPER,

FCHR Order No. 07-006

Respondent.

**FINAL ORDER DISMISSING PETITION FOR  
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Gwendolyn Salter filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2003), alleging that Respondent International Paper committed unlawful employment practices on the bases of Petitioner's race (African-American) and sex (female) when it demoted Petitioner and denied Petitioner a pay raise.

The allegations set forth in the complaint were investigated, and, on December 13, 2005, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held on April 5 and May 17, 2006, in Tallahassee, Florida, before Administrative Law Judge P. Michael Ruff.

Judge Ruff issued a Recommended Order of dismissal, dated November 3, 2006.

Pursuant to notice, public deliberations were held on January 25, 2007, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact.

### Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

With regard to establishing a prima facie case of discrimination in a "demotion" case, it has been stated, "...the Petitioner may show that (1) he is a member of a protected class; (2) he is qualified; (3) he was demoted; and (4) he was replaced by a person outside the protected class." Hamm v. Starke Nursing Home, d/b/a Whispering Pines Care Center, et al., 18 F.A.L.R. 1775, at 1776 (FCHR 1995).

This is a slightly different test than that used by the Administrative Law Judge (see Recommended Order, ¶ 46), and the Administrative Law Judge concluded that Petitioner failed to establish a prima facie case of discrimination (see Recommended Order, ¶ 47 and ¶ 48).

Specifically, the Administrative Law Judge concluded that the person who replaced Petitioner was not similarly-situated to Petitioner (Recommended Order, ¶ 47), and that Petitioner was not qualified for the position of Lead Grader (Recommended Order, ¶ 48).

In our view, using the test set out above, Petitioner established a prima facie case of discrimination with regard to her demotion. She is a member, in this instance, of two protected classes (race / African-American and sex / female). Recommended Order, ¶ 47. She was demoted. Recommended Order, ¶24 and ¶ 47. She was replaced by a person outside her protected classes, a white male, Paul LePage. See Recommended Order, ¶ 47. Further, in our view, Petitioner was at least minimally qualified for the Lead Grader position in question by virtue of having been placed in the Lead Grader position by Respondent. To demonstrate that a person is "qualified" for a position in question, the Commission has required a showing only that the person is "minimally" qualified for the position, and has concluded that such a showing can be made by virtue of the fact that Respondent put the person in the position in the first place. See, e.g. Ricks v. City of Gainesville, FCHR Order No. 05-018 (February 22, 2005), Brown v. Volusia County School Board, FCHR Order No. 04-160 (December 23, 2004), and Kesselman v. Department of Transportation, 20 F.A.L.R. 166, at 169 (FCHR 1996).

We conclude that Petitioner established a prima facie case of race and sex discrimination as to her demotion.

In modifying these conclusions of law of the Administrative Law Judge, we conclude: (1) that the conclusions of law being modified are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions of law stating what must be demonstrated to establish a prima facie case of unlawful discrimination under the Florida Civil Rights Act of 1992; (2) that the reason the modifications are being made by the Commission is that the conclusions of law as stated run contrary to previous Commission decisions on the issue; and (3) that in making these modifications the conclusions of law being substituted are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(1), Florida Statutes (2005).

We note that this correction to the conclusions of law does not affect the outcome of the case, however, because, the Administrative Law Judge concluded that even if a prima facie case had been established Respondent articulated legitimate, nondiscriminatory reasons for terminating Petitioner, namely her failure to review the appropriate board count and her improper administration of tests to graders individually instead of as a group (see Recommended Order, ¶ 24 and ¶ 50), and that there was no showing that these reasons were a pretext for discrimination (see Recommended Order, ¶ 50).

With the indicated correction, we adopt the Administrative Law Judge's conclusions of law.

#### Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner's Exceptions to Recommended Order," apparently received by the Commission on November 20, 2006. (Note that the date of the Recommended Order is November 3, 2006, and that 15 days therefrom would be November 18, 2006. Since November 18, 2006, is a Saturday, the next business day would be Monday, November 20, 2006, the date the exceptions were received. Petitioner's exceptions are, therefore, timely filed. See Fla. Admin. Code R. 28-106.103.)

Paragraphs 1 through 6 of the exceptions document essentially take issue with the Administrative Law Judge's finding that Petitioner violated Respondent's policy as to how tests were administered to graders. Paragraphs 7 through 10 of the exceptions document take issue with the Administrative Law Judge's finding that Petitioner failed to meet the proper board count. Paragraphs 11 through 13 of the exceptions document take issue with the Administrative Law Judge's finding that Petitioner did not understand the grading program, arguing that Paul LePage, a white male, performed the counts the same way as Petitioner.

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999). Accord, Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005).

These exceptions are rejected.

Paragraphs 14 through 18 of the exceptions document appear to take issue with the Administrative Law Judge's finding that Petitioner and Paul LePage are not similarly-situated.

In our view, whether Petitioner and Paul LePage are deemed "similarly-situated" is relevant only to the issue of whether a prima facie case of discrimination has been established. The Administrative Law Judge concluded that a prima facie case had not been established. We concluded, above, that a prima facie case of discrimination was established as to Petitioner's demotion. Nevertheless, we noted, above, that the Administrative Law Judge went on to conclude that even if a prima facie case had been established, Respondent articulated legitimate nondiscriminatory reasons for demoting Petitioner, and there was no showing that these reasons were a pretext for unlawful race and/or sex discrimination.

Based on the foregoing, this exception is rejected, since its acceptance or rejection does not affect the outcome of the case.

Finally, Petitioner excepts to the Administrative Law Judge's conclusion that a prima facie case has not been established.

For reasons discussed in the Conclusions of Law section of this Order, above, we accept this exception to the extent it refers to Petitioner's demotion, concluding that a prima facie case of race and sex discrimination has been established regarding Petitioner's demotion, but noting that, for reasons discussed above, this will not affect the outcome of the case.

#### Dismissal

The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 29<sup>th</sup> day of January, 2007.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Rita Craig, Panel Chairperson;  
Commissioner Shahrukh S. Dhanji; and  
Commissioner Anice R. Prosser

Filed this 29<sup>th</sup> day of January, 2007,  
in Tallahassee, Florida.



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P. Michael Ruff, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above  
listed addressees this 29<sup>th</sup> day of January, 2007.

By:   
Clerk of the Commission  
Florida Commission on Human Relations