

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANET CARTWRIGHT,)
)
 Petitioner,)
)
 vs.) Case No. 06-2131
)
 FLORIDA DEPARTMENT OF REVENUE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On December 4, 2006, a hearing was held in Tallahassee, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Janet Cartwright, pro se
7328 Cottonwood Road
Dothan, Alabama 36301-6502

For Respondent: Cindy Horne, Esquire
Department of Revenue
Post Office Box 6668
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STATEMENT OF THE ISSUE

Whether the Respondent discriminated against Petitioner in her employment based on her gender or race in violation of Section 760.10, Florida Statutes?

PRELIMINARY STATEMENT

On August 30, 2005, Petitioner filed a complaint with the Florida Commission on Human Relations for race and gender

discrimination.^{1/} The Commission investigated her complaint and issued a "Determination of No Cause" on April 24, 2006.

Petitioner filed a petition contesting the determination on May 30, 2006, and the Petition was forwarded to the Division of Administrative Hearings on June 14, 2006.

The case was originally scheduled for hearing August 17, 2006. At the request of Petitioner, the case was continued three times, to September 26, 2006; October 24, 2006; and finally December 4, 2006. On November 17, 2006, Respondent filed a Motion to Enter Depositions as Trial Testimony. No objection was filed and at the hearing, the Motion was granted and depositions of Evonne Schultz and Glynn Walters were accepted as Respondent's Exhibits numbered 1 and 2, respectively. Petitioner testified on her own behalf and Petitioner's Exhibits numbered 1-4, 7-10, 12, 14-15, and 17-18 were admitted. Respondent presented no live witnesses, but Respondent's Exhibits numbered 1-7 were admitted into evidence.

The proceedings were recorded but no transcript was ordered. The parties were given until December 14, 2006, to file proposed recommended orders. Both submissions were timely filed and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Janet Cartwright is a white female who formerly worked at the Department of Revenue (DOR or the Department) as a tax auditor.

2. Ms. Cartwright began employment with the Department of Revenue May 1, 2000, as a tax auditor at the Atlanta Service Center. During her employment with DOR, she had four supervisors: Emmanuel Minta, Ron Lee-Owen, Glynn Walters and Evonne Jones Schultz.

3. The function of a tax auditor is to audit all pertinent books and records of taxpayers assigned to them. Auditors are required to maintain a working knowledge of the taxes within their area of responsibility; to travel to the site of the taxpayer's books to perform their audit duties; to review all records during an audit for potential non-compliance with Florida tax statutes; to gather pertinent tax records to support their findings; and to prepare supporting work papers.

4. Ms. Cartwright went on medical leave in September 2003 and did not return to work. On January 2, 2004, she notified her supervisor that she would be applying for early retirement based on a disability, and requested that her medical leave without pay status be extended until her retirement date was established.

5. On or about March 29, 2004, her request for disability retirement benefits was denied. On April 19, 2004, a recommendation was made to terminate her employment based on Petitioner's inability to perform her duties. On July 13, 2004, Petitioner was advised by certified letter that the Department was proposing to terminate her from the position as Tax Auditor II, effective August 31, 2004. Ms. Cartwright acknowledged

receiving the July 13, 2004, letter. The July 13, 2004, letter stated:

You began employment with the Department of Revenue effective May 1, 2000, as a Tax Auditor I, and on July 12, 2000, you were promoted to a TA II position. You are currently a TA II, which is a field audit position that requires the auditor to independently travel to the taxpayer's location to audit the company's information for Florida taxes.

You have been on Leave Without Pay (LWOP) status since September 18, 2003. Further, in a letter dated September 29, 2003, from your physician, Dr. Daniel Goodman, M.D., he indicates that due to your medical condition of narcolepsy, cataplexy and sleep apnea, you are chronically exhausted and always at a risk of falling asleep at any time and have difficulty operating a car at all times. Additionally, Dr. Goodman recommended that you look into getting long-term disability.

On January 2, 2004, you provided a letter to your supervisor, Eve Jones, Process Group Manager, requesting that your LWOP status be extended until your retirement benefits are established. However, on March 29, 2004, you were denied disability benefits.

6. The July 13, 2004 letter identified the disciplinary standard upon which the Department relied and the documents considered by the Department in making its decision. It concluded:

Your continuing inability to perform your duties has caused not only a concern for your well being, but has also imposed a hardship on the other staff that have had to handle your job duties and responsibilities in addition to their regular duties.

Your Program Director and I agree that because of your continuing inability to perform the duties of your position, with no indication of when you might be able to begin performing your normal work duties, dismissal for inability to perform assigned job duties [is] the only appropriate action in your case.

7. No evidence was presented that Ms. Cartwright's termination was based upon her race or gender.

8. The letter contained a notification of Petitioner's right to appeal the action to the Public Employees Relations Commission or to file a grievance pursuant to Section 447.401, Florida Statutes. Ms. Cartwright did not pursue either remedy. Instead she continued to pursue approval of her request for disability retirement, which was successful. On August 30, 2004, the day before her termination would be effective, she faxed to the Department a letter which stated:

Last week I received the "Order of Remand," the final document necessary to process my disability retirement effective September 1, 2004.

Therefore, after what was an extraordinary amount of time to apply for, and be approved for, disability retirement, I will be terminating employment as a Tax Auditor II effective August 31, 2004.

I thank the Department for allowing me to remain on a leave of absence without pay during this process.

9. On August 30, 2005, she filed a complaint against the Department with the Florida Commission on Human Relations alleging racial and gender discrimination.

10. Ms. Cartwright claimed that she was denied training essential to her position; that she was denied a flex schedule; that she was asked to perform clerical and janitorial duties not required of her male counterparts; and that she was not allowed to drive her own car to field audit locations.

11. The more credible evidence indicates that Ms. Cartwright received formal training in Tallahassee a few months after she was hired, received computer based training and on-the-job training. No credible evidence was received that other similarly situated employees received training denied to Ms. Cartwright. Her claim that she was denied training involved events occurring before she began medical leave without pay, well over a year before she filed her complaint with the Commission.

12. Ms. Cartwright claimed that she was denied a flex time schedule. To the contrary, while there was a delay in approval of flex time during part of her tenure, Ms. Cartwright was approved for flex time schedules on May 2, 2000 (the day after beginning work with the Department) and on August 13, 2002. Ms. Cartwright admitted that the issue regarding flex time was resolved over three years before she filed her complaint with the Florida Commission on Human Relations.

13. Ms. Cartwright, along with other members of the staff, was asked to perform clerical duties when the office was short-handed. Ms. Cartwright did not identify any person on the staff who was not asked to perform such functions. Likewise, members

of the staff were asked to take shifts on a volunteer basis with respect to "coffee duty." Ms. Cartwright claimed that she was asked to clean out the refrigerator, but did not testify when this request was made. As she did not return to work after September 18, 2003, it would have been well over a year before she filed her complaint with the Florida Commission on Human Relations August 30, 2005.

14. Finally, Ms. Cartwright claimed that she was not allowed to drive her own car to field audits. The more credible evidence indicates that Ms. Cartwright was never prohibited from driving her own car, but that office policy provided that when more than one auditor went to an audit location, only the senior auditor would be paid for mileage when using a personally owned vehicle. Ms. Cartwright did not identify any other employee who was not a senior auditor who was paid mileage when accompanying a senior auditor in the field. Moreover, the trips for which mileage was not approved occurred during the period covering September through December 2002. These trips occurred well over two years before Ms. Cartwright filed her complaint with the Commission on Human Relations.

15. The issues raised in her complaint, i.e., lack of training, denial of flex schedule, performance of clerical or janitorial duties and not being compensated for driving her own car, are separate incidents and do not constitute a continuing violation tied to her proposed termination. All of the incidents

identified in her complaint, including the proposed termination, occurred more than 365 days before Petitioner filed her complaint with the Commission on Human Relations.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

17. Petitioner has the burden of proving by a preponderance of the evidence that the Respondent committed an unlawful employment practice. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

18. Petitioner's complaint is based on perceived violations of Section 760.10(1)(a), Florida Statutes, which makes it an unlawful employment practice for an employer to "discharge or fail 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 the individual's race, color, religion, sex, national origin, age, handicap, or marital status.

19. Section 760.11(1), Florida Statutes, provides the procedural requirements for filing a complaint alleging violations of Chapter 760. It states in pertinent part:

(1) Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, naming the employer . . . and

describing the violation. . . . The complaint shall contain a short and plain statement of the facts describing the violation and the relief sought.

20. The Florida Civil Rights Act (FCRA) is patterned after Title VII, and federal case law dealing with Title VII is applicable. Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

21. The Supreme Court has held that the limitations period for a Title VII complaint begins to run when the actual decision of the allegedly unlawful employment practice was made, and not when the effects of the decision began. Delaware State College v. Ricks, 449 U.S. 250, 259 (1980). See also Chardon v. Fernandez, 454 U.S. 6, 8 (1981)(the applicable limitations period begins to run when notice of termination was given, not on the date the employment actually terminated); Collins v. Miami-Dade County, 361 F. Supp. 2d 1362, 1378-79 (S.D. Fla. 2005).

22. In this case, the alleged denial of training, failure to approve flex time, performance of clerical duties and disallowance of mileage for use of Petitioner's car on audits all occurred well before the deadline for filing a complaint of discrimination pursuant to Section 760.11. Petitioner's claim could only be considered timely with respect to these actions if she were able to claim that they were part of a continuing series of discriminatory acts continuing into the statutory filing period.

To revive the otherwise time-barred claim under the doctrine, however, it must be part of a pattern of continuing practice out of which the timely-filed incident arose.

Johnson v. Woodruff, 28 F. Supp. 2d 1248, 1251 (M.D. Fla. 1998), quoting Roberts v. Gadsden Memorial Hospital, 835 F.2d 793, 799 (11th Cir. 1988). For acts to be included under the continuing violation doctrine, there must be a substantial nexus between the acts, considering whether they are related in subject matter, frequency, and permanence. Id.

23. Here, Petitioner seeks to tie the actions taken while she was still physically present and working at the Atlanta Service Center with her termination, which occurred several months after she chose to go on and remain on leave without pay. However, even the termination did not occur within 365 days of her filing her complaint. While it is not clear precisely when she received the July 13, 2004 letter, Petitioner acknowledged at hearing that she did in fact receive it. It was clear from the evidence presented that she was aware of the Department's decision before its effective date of August 31, 2004. Thus, none of the alleged actions by the Department continued into the time frame permitted for filing a timely complaint.

24. Moreover, none of the prior actions have any nexus to the Department's proposed termination of her employment. The Department decided to terminate her employment because she was not present in the workplace, and based on her medical documentation, she was unable to perform the job for which she

was employed. The proposed termination was not related to her claims regarding training, flex time, mileage or performance of clerical/janitorial duties. Under these circumstances, Petitioner's complaint is not timely and is therefore barred.

25. Even assuming Petitioner's claim was not barred as untimely, she has not established a basis for her claim. To establish a prima facie case of racial or gender discrimination based on disparate treatment, Petitioner must show that 1) she belongs to a racial minority or is female; 2) she was subjected to adverse employment actions; c) she was qualified for her position; and 4) the Respondent treated similarly situated employees outside the protected class more favorably. McDonnell Douglass Corp. v. Green, 411 U.S. 792, 802-804 (1973); Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). Petitioner has not presented a prima facie case with respect to any of her claims. Petitioner is female and the Department stipulates that she is qualified for her position. With the exception of the proposed termination for inability to perform her duties, Petitioner has not demonstrated that she suffered any adverse employment actions. Further, she has not demonstrated that other, similarly situated employees outside the protected class were treated more favorably. The more credible evidence indicates that Petitioner was treated in a manner consistent with other employees in the Atlanta Service Center.

26. Even with respect to her proposed termination,

ultimately Petitioner did not suffer an adverse employment action. Inasmuch as she was allowed to retire with disability, the proposed termination of her employment never became effective. In any event, no credible evidence was presented to demonstrate that with respect to the proposed termination, Respondent treated similarly situated employees differently. Petitioner simply has failed to present any credible evidence that the Department discriminated against her in any way.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing the Petition for Relief.

DONE AND ENTERED this 2nd day of January, 2007, in Tallahassee, Leon County, Florida.

S

LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of January, 2007.

ENDNOTE

^{1/} There was some discussion in the Proposed Recommended Orders of a claim for discrimination based on marital status. The complaint filed with the Commission on Human Relations did not include a claim based on marital status and no credible evidence was presented to support such a claim.

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.