

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAROL TUCKER,)
)
 Petitioner,)
)
 vs.) Case No. 07-2655
)
 CHIPOLA COLLEGE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 30, 2007, in Shalimar, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Carol L. Tucker, pro se
Post Office Box 378
Mary Esther, Florida 32569-0378

For Respondent: Michael Mattimore, Esquire
Mark L. Bonfanti, Esquire
Allen, Norton & Blue, P.A.
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner has been subjected to an unlawful employment practice.

PRELIMINARY STATEMENT

On October 24, 2006, Petitioner, Carol Tucker (Ms. Tucker), filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission), alleging that Respondent, Chipola College (Chipola), discriminated against her when Chipola failed to hire her after learning of her "medical history/disabilities." On April 20, 2007, the Commission issued a Determination: No Cause, finding that no reasonable cause existed to believe that an unlawful employment practice had occurred. Ms. Tucker filed a Petition for Relief (Petition) with the Commission, and the Petition was received by the Division of Administrative Hearings on June 13, 2007, with a request from the Commission to assign an Administrative Law Judge to conduct the necessary proceedings.

At the final hearing, Ms. Tucker testified in her own behalf and Petitioner's Exhibit 1 was introduced in evidence. Chipola called Karan Davis and Wendy Pippen as its witnesses. Respondent's Exhibit 1 was proffered but not received in evidence. Respondent's Exhibits 2 and 3 were admitted in evidence.

The one-volume Transcript of the final hearing was filed on October 5, 2007. At the final hearing, the parties were instructed to file their proposed recommended orders within ten days of the filing of the Transcript. Ms. Tucker filed her

proposed recommended order and closing statement on September 10, 2007. Chipola filed its proposed recommended order and brief on October 15, 2007. The parties' proposed recommended orders have been given consideration in the rendering of this Recommended Order.

FINDINGS OF FACT

1. Chipola is a college located in Marianna, Florida, and offers two-year and four-year degrees.

2. In August 2005, Ms. Tucker contacted personnel at Chipola inquiring about a faculty position. She sent an e-mail to Karan Davis (Ms. Davis), Chipola's associate vice president of Human Resources and included a brief résumé. No positions were available at that time.

2. On or about May 18, 2006, Ms. Tucker submitted an application for employment at Chipola as an adjunct instructor. An adjunct instructor position is a temporary position on an as-needed basis to instruct a specific course. Health benefits are not provided for adjunct instructors.

3. The employment application which Ms. Tucker submitted requested that applicants complete a section on educational employment and a section on non-educational employment. In each section, the application provided space for the listing of three present or former employers. The application stated, "If you wish to further describe your work experience, please attach a

resume to this application." Ms. Tucker did not attach a résumé to the application.

4. In the section for educational employment, Ms. Tucker listed employment as a substitute teacher for two school districts and one private school. In the section for non-educational employment, Ms. Tucker listed employment in 2006 at Florida State University, employment from 1979 to 1988 with the United States Postal Service, and a position as a legal secretary from 1975 to 1977.

5. The application asked, "Have you ever been discharged or forced to resign from a previous position?" to which Ms. Tucker replied, "No." The application contains an applicant certification, which states:

I am aware that any omissions, falsifications, misstatement or misrepresentations may disqualify me for employment consideration, and if I am hired, may be grounds for termination at a later date.

Ms. Tucker signed the applicant's certification.

6. Wendy Pippen (Ms. Pippen) is employed by Chipola as the human resources coordinator. She is responsible for coordination of the daily activities and tasks in the Human Resources Department, including review of employment applications and résumés. She did not receive a résumé from Ms. Tucker at any point during the hiring process.

7. Ms. Tucker was interviewed for the position as adjunct instructor. During a conversation with Ms. Phippen following Ms. Tucker's interview, Ms. Tucker mentioned that she had worked at the University of South Florida. Ms. Phippen did not recall seeing the University of South Florida listed as an employer on Ms. Tucker's application. She checked Ms. Tucker's application and confirmed that the University of South Florida was not listed on the application. Ms. Phippen immediately advised her supervisor, Ms. Davis, of the omission.

8. Ms. Tucker told Ms. Phippen that she had omitted her employment with the University of South Florida because an employment agency had advised her to do so due to the potential for a negative reference. Ms. Tucker vehemently testified at the final hearing that the reason she did not list employment with the University of South Florida was that she was terminated for medical reasons, and it was "no one's business." However, she also testified that the University of South Florida gave "bad references." She had told others that she was concerned that the University of South Florida would give her a bad reference. It was her opinion that the University of South Florida was not ethical in giving references on former employees. Having judged the demeanor of the witnesses, Ms. Phippen's testimony is credited that Ms. Tucker told her the reason that she did not put the University of South Florida on

her application was that she felt the University of South Florida would not give her a good reference.

9. Upon being informed by Ms. Phippen that Ms. Tucker had worked at the University of South Florida, Ms. Davis contacted the University of South Florida to check Ms. Tucker's past employment. Ms. Davis was advised that Ms. Tucker had been employed by the University of South Florida and that she had been terminated for medical reasons. Ms. Davis did not inquire why Ms. Tucker was terminated. That information was volunteered by personnel at the University of South Florida. Ms. Davis did not ask for an explanation of the medical reasons, and no explanation was volunteered. Ms. Davis did not inquire whether Ms. Tucker had a disability, and no one from the University of South Florida told Ms. Davis that Ms. Tucker had a disability.

10. The decision was made not to hire Ms. Tucker as an adjunct instructor because she had failed to include the University of South Florida on her application and had stated in her application that she had not been discharged or forced to resign from a previous position. Ms. Davis perceived that the omission of the University of South Florida from the application and the failure to indicate that she had been discharged from previous employment amounted to falsification of the application, which was a reason for disqualification from employment as clearly stated in the application form.

11. Ms. Tucker contends that Ms. Davis was aware that she had been employed by the University of South Florida because she had included the employment on the résumé that she sent to Ms. Davis in 2005. Ms. Davis did not recall seeing the résumé and given that there was a lapse of seven months from the time that Ms. Tucker sent her résumé in 2005 until she submitted an application in May 2006 without a résumé, it is reasonable that Ms. Davis would not recall seeing the résumé or was not aware that Ms. Tucker had listed the University of South Florida on a résumé.

12. After Ms. Tucker was advised that she would not be hired as an adjunct instructor, she wrote Dr. Spires at Chipola, stating that she had not put the University of South Florida on her employment application because she had been advised by an employment agency to omit the University of South Florida because it had a long history of illegal employment practices.

13. Ms. Tucker does not contend that she has a particular disability which served as the basis for Chipola's failing to hire her, and she did not inform staff at Chipola that she has a disability or identify any medical condition she has. Her claim is that she was not hired because of a history of medical problems. The evidence overwhelmingly established that Ms. Tucker was not hired because she had made misrepresentations on her application and not because of any history of medical

problems. It is clear that Ms. Tucker did not include the University of South Florida on her application and did not inform Chipola that she had been discharged because she was afraid that the University of South Florida would give her a bad reference.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2007).

15. Subsection 760.10, Florida Statutes (2006),¹ provides:

(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 of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

16. The Florida Civil Rights Act of 1992, Section 760.01, Florida Statutes, et seq., is construed in accordance with the Americans with Disabilities Act (ADA), 42 U.S.C. Section 12101, et seq., when the charge of discrimination is based on handicap. Razner v. Wellington Regional Medical Center, Inc., 837 So. 2d 437, 440 (Fla. 4th DCA 2002); McCaw Cellular Communications of Florida, Inc. v. Kwaitek, 763 So. 2d 1063 (Fla. 4th DCA 1999);

Greene v. Seminole Electric Co-op, Inc., 701 So. 2d 646 (Fla. 5th DCA 1997).

17. To be eligible for relief based on a claim of handicap discrimination, a petitioner must satisfy the same evidentiary burdens demanded by similar statutes addressing claims of employment discrimination. See Earl v. Mervyns, Inc., 207 F.3d 1361, 1365 (11th Cir. 2000); Hilburn v. Murata Elecs. North America, Inc., 181 F.3d 1220, 1226 (11th Cir. 1999). The burden-shifting analysis of Title VII employment discrimination claims is applicable to claims based on handicap discrimination. Earl, 207 F.3d at 1365. The petitioner has the burden to establish a prima facie case of discrimination. Once a prima facie case of discrimination is established, the burden shifts to the employer to articulate a nondiscriminatory reason for the adverse employment action. If the employer articulates a nondiscriminatory reason for its action, the burden shifts back to the petitioner to establish that the reasons articulated by the employer were pretextual. The petitioner bears the ultimate burden of establishing that the employer discriminated against her. See Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1193 (11th Cir. 2004).

18. In order for Ms. Tucker to establish a prima facie case of handicap discrimination, she must "show: (1) she is disabled; (2) she is a qualified individual; (3) she was

subjected to unlawful discrimination because of her disability.”
Id.

19. In order to satisfy the first element of a prima facie case of discrimination, a petitioner must establish that he/she is disabled. A person is disabled when he/she has a physical or mental impairment that substantially limits one or more of his/her major life activities or has a record of such impairment or is being regarded as having such an impairment. 42 U.S.C. § 12102(2). See also Harris v. H&W Contracting Co., 102 F.3d 516, 518-20 (11th Cir. 1996). “Major life activities” include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i).

20. Ms. Tucker has failed to establish that she has a disability. She has not identified, much less established, a physical or mental impairment that substantially limits one or more of her major life activities. Since she has not identified or established any disability, she has not established a record of such impairment. The evidence did not establish that staff at Chipola perceived Ms. Tucker to have a disability. Ms. Davis’ discovery that Ms. Tucker was terminated for medical reasons from her employment at the University of South Florida does not equate to Ms. Davis’ perceiving Ms. Tucker as having a disability.

21. Based on the evidence presented, Ms. Tucker did establish that she was educationally qualified to be an adjunct instructor.

22. Ms. Tucker did not establish that she was not hired because of a disability. Chipola presented convincing evidence that the reason for not hiring Ms. Tucker was her misrepresentations on her employment application. Ms. Tucker clearly indicated that she had not been discharged from previous employment when she had been. She was advised by the application itself that misrepresentation of information would result in disqualification from employment.

23. Ms. Tucker has failed to establish that Chipola discriminated against her based on a handicap or disability.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entering finding that Chipola College did not discriminate against Ms. Tucker and dismissing the Petition for Relief.

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

Susan B. Harrell

SUSAN B. HARRELL
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 November, 2007.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida
Statutes are to the 2006 edition.

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.