

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STEVEN L. BOLES,)
)
 Petitioner,)
)
 vs.) Case No. 07-3263
)
 SANTA ROSA COUNTY SHERIFF'S)
 OFFICE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on September 27, 2007, in Milton, Florida.

APPEARANCES

For Petitioner: Steven L. Boles, pro se
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For Respondent: Robert W. Evans, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent committed an act or acts of age discrimination against Petitioner by not selecting him for promotion to sergeant with the Santa Rosa County Sheriff's Office.

PRELIMINARY STATEMENT

Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations ("FCHR") on September 13, 2006. FCHR issued a Notice of Determination: No Cause on June 15, 2007. Petitioner filed a Petition for Relief with FCHR on July 13, 2007. That Petition was referred to the Division of Administrative Hearings (Division) on July 18, 2007. An Initial Order was issued by the Division on that date followed by a Notice of Hearing and Order of Pre-hearing Instructions on August 20, 2007, setting the matter for hearing on September 27, 2007. The hearing was conducted that day before the undersigned in Milton, Florida.

At the hearing, Petitioner testified on his own behalf and offered Exhibits numbered 1 through 29 into evidence, all of which were admitted except Exhibits numbered 10, 15, 24, 26, and 29. Respondent presented the testimony of Major Randy Steve Collier and Detective Earl Gene Griffin, III, and offered Exhibits numbered 1 through 5 into evidence.

A Transcript was filed on October 15, 2007. After the hearing, Petitioner and Respondent filed their Proposed Recommended Orders on October 25, 2007.

References to statutes are to Florida Statutes (2006) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Steven L. Boles, was employed at the Santa Rosa County Sheriff's Office in April 2001 as a deputy sheriff.

2. Petitioner's date of birth is June 15, 1958, making him approximately 47-48 years old at all times related to the promotion issues, which are the subject of this proceeding.

3. Petitioner completed 34 college classes while a deputy sheriff and attained a Bachelor's Degree from Troy State University. He was continuing his education towards a Master's Degree during the promotion period at issue.

4. Petitioner had over 20 years' experience in the United States Air Force, during which his duties included managing a 24-person flight, supervising, planning, administering, and executed law enforcement and security training for a 270-person unit.

5. The Florida Department of Law Enforcement recognized Petitioner's qualifications as being equivalent to those required by the State of Florida for certified law enforcement officers.

6. During Petitioner's time as a deputy sheriff, he worked one position besides his road patrol duties. In 2003, he transferred to a property detective position where he served for almost a year. When he did not receive training that he deemed

necessary to better perform his job, he transferred back to his road patrol position.

7. Petitioner was certified as an all-terrain vehicle ("ATV") instructor in April 2006.

8. Petitioner did not serve in a supervisory capacity while employed by Respondent.

9. Under Sheriff Wendell Hall's administration, the promotional process for sergeant and lieutenant was established in General Order D-017. Applicants were ranked on an eligibility list based upon their scoring for specific criteria: advanced training courses, formal education, seniority, supervisory experience, written examinations, and an oral review board. Sheriff Hall promoted from the top of the list in order of ranking.

10. The Fraternal Order of Police ("FOP") is the bargaining agent for deputy sheriffs. During collective bargaining negotiations in 2005, the FOP asked Sheriff Hall to change the promotional process to provide greater flexibility in promotions. The FOP believes that the top-ranked applicant is not necessarily the best candidate for an available position.

11. The sheriff and the FOP executed a collective bargaining agreement ("CBA") in 2005 to implement changes in the promotional process that would afford more flexibility.

Pursuant to Article 9 of the CBA, the parties agreed that General Order D-017 would be utilized in promotions.

12. To effect the changes requested by the FOP, General Order D-017 was revised in December 2005. The new policy continued to provide that applicants would be ranked based upon scoring for specific criteria, but added field training officer experience ("FTO") as a new category to be scored. Additionally, the policy provided that the division captains and department major would review the promotion roster and provide a written recommendation to the sheriff for promotion of candidates. The sheriff would be provided with the top five names for one vacancy and one additional name for each additional vacancy.

13. The new policy for promotion was provided to the FOP for review prior to its enactment. Pursuant to the CBA, the FOP could request impact bargaining within ten days of receipt of the policy. Because the FOP did not object to the policy, it became effective on December 26, 2005.

14. The revised policy, General Order D-017, was provided to all members of Respondent, including Petitioner. Petitioner was aware that the process had been changed to permit the division captains and the department major to make written recommendations for promotion.

15. Petitioner received a memorandum from Sheriff Hall on February 17, 2006, informing him of his eligibility to sit for the written promotion examination on March 22, 2006. Petitioner learned in that memorandum that credit for training courses and formal education would not be given for anything that had not occurred and was not present in the training office on or before March 10, 2006.

16. When vacancies for sergeant and lieutenant became available in 2006, the promotional process followed the revised policy. Points were allocated to the applicants under the revised criteria, and the top 20 candidates were ranked.

17. Major Steve Collier and Captains Jack Onkka and Jim Spencer met on May 26, 2006, pursuant to the newly-adopted policy, to review the applicants and make promotion recommendations to the sheriff. Because there were six vacancies for sergeant, the top 10 names on the roster were reviewed.

18. Petitioner was ranked number five on the roster.

19. Major Collier and Captains Onkka and Spencer concluded that the primary consideration for the recommendations for sergeant and lieutenant would be the motivation and initiative displayed by the applicants while employed at the Sheriff's Office. Believing that these qualities demonstrate the foundation of leadership, Collier, Onkka, and Spencer discussed

each of the applicants to determine who best exemplified these characteristics.

20. Collier, Onkka, and Spencer recommended six applicants who were ranked in the top 10 of the promotional roster: George Hawkins, Joseph Dunne, William Dunsford, Wayne Enterkin, Jerry Salter, and Todd Reaves. Prior to the review by Collier, Onkka, and Spencer, three of these deputies were ranked higher in the roster than Petitioner and three of them were ranked lower.

21. The reviewers selected these six deputies for promotion to sergeant because each had undertaken an assignment outside his normal duties or otherwise had distinguished himself in a manner that set him apart from the other candidates.

22. George Hawkins, ranked number one on the roster, was recommended as a result of his field officer training experience. Further, he performed as an acting supervisor when the shift sergeant was absent, which the reviewers deemed significant. Field officer training was particularly valued by the reviewers because it required the deputy to serve as a front line supervisor for trainees as well as an instructor and mentor.

23. Joseph Dunne also had performed field officer training and consistently volunteered for special operations projects that were after hours.

24. William Dunsford, although not a FTO, was a member of the hostage negotiation team and, pursuant to this assignment, was on-call 24 hours a day, seven days a week. Similar to Dunne, Dunsford volunteered for special operations after hours. He particularly impressed Major Collier with noteworthy arrests and for his high level of professionalism and motivation.

25. Wayne Enterkin was recommended as a result of his field officer training experience and his initiation of the drug court officers program, which involved juvenile offenders. He particularly distinguished himself in the drug court program.

26. Jerry Salter was recommended as a result of field officer training experience and his assignment to the special weapons and tactics ("SWAT") team. As in the case of hostage negotiators, SWAT team members must undergo additional tactical training and are on-call 24 hours a day, seven days a week. They must also maintain a high level of physical fitness to participate in this unit.

27. Todd Reeves was recommended because of his field officer training experience and his participation on the hostage negotiation team. Reeves also made noteworthy arrests in the northern part of the county, which was not a particularly busy area. Reeves had also received a lifesaver award for his extraordinary actions in providing care to a canine officer who was shot by a suspect.

28. Petitioner was not recommended because the reviewers were not aware of any activities and assignments that set him apart from the other candidates. They were unaware of the fact that Petitioner had become certified as an ATV instructor, since that occurred on April 21, 2006, after the March 10, 2006, information deadline.

29. The reviewing panel would not have given as much credit for Petitioner being an ATV instructor, even if his certification had occurred before March 10, 2006, since this activity did not require as much of a time commitment as a field training officer, hostage negotiation team member, or SWAT team member.

30. The panel also passed over William Bass (ranked number two on the roster) and Christian Turcic (ranked number seven). Deputy Bass was deemed not particularly motivated and refused a transfer to a busier district when it was offered.

31. Deputy Turcic was passed so he could complete his new assignment as a trainer of a new dog. Once he completed his assignment, he received a promotion to sergeant in September 2006.

32. The age of the candidates for promotion was not a topic discussed by the reviewing panel.

33. Sheriff Hall promoted Deputies Dunne, Dunsford, Enterkin, Hawkins, Reeves, and Salter in June 2006. He based

his decision to promote these deputies upon the recommendations of his staff without regard to their age.

34. When Petitioner became aware of the identities of the promoted deputies, he tendered a brief letter of resignation, dated June 15, 2006, in which he stated that his total loss of faith in the administration caused the need for him to leave immediately.

35. Petitioner followed the brief letter with an email to Sheriff Hall on June 16, 2006, in which he elaborated on his qualifications and justifications of why he should have received a promotion to sergeant. Petitioner informed Sheriff Hall that he believed a "good-ol-boy system" was in place in the Santa Rosa County Sheriff's Office.

36. In his letter and email resigning from Respondent, Petitioner made no mention of his age as a factor in his failure to be promoted to sergeant.

37. Petitioner never inquired as to why he was not promoted. He met with Sheriff Hall, who informed him that he could be considered for promotion at a later date and encouraged him to contact Major Collier.

38. Petitioner never spoke with Major Collier regarding his failure to be promoted to sergeant.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.01 et seq., Fla. Stat.

40. The Florida Civil Rights Act of 1992 (the "Act") is codified in Sections 760.01 through 760.11 and 509.092, Florida Statutes. "Because th[e] [A]ct is patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, 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).

41. Petitioner is an "aggrieved person," and Respondent an "employer" within the meaning of Subsections 760.02(10) and (7), Florida Statutes, respectively. Section 760.10, Florida Statutes, makes it unlawful for Respondent to discharge or otherwise discriminate against Petitioner based on an employee's disability.

42. Among other things, the Act makes certain acts "unlawful employment practices" and gives FCHR the authority, following an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay," if it finds

that such an "unlawful employment practice" has occurred.

§§ 760.10 and 760.11(6), Fla. Stat.

43. The "unlawful employment practices" prohibited by the Act include those described in Subsection 760.10(1)(a), Florida Statutes, which provides as follows:

It is an unlawful employment practice for an employer:

(1)(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.

44. In the instant case, Petitioner has alleged that the Santa Rosa County Sheriff's Office committed such an "unlawful employment practice" when it acted with discriminatory intent based on his age by not promoting him to the rank of sergeant when, based upon the examination and scoring system, he was ranked fifth. Six deputies out of the 20 ranked, were promoted to sergeant, three of whom were ranked higher than Petitioner, and three of whom were ranked lower.

45. At the administrative hearing held in this case, Petitioner had the burden of proving that he was the victim of a discriminatorily motivated action. See Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996)

("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."); Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974) ("[T]he burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'"); and Mack v. County of Cook, 827 F. Supp. 1381, 1385 (N.D. Ill. 1993) ("To prevail on a racially-based discriminatory discharge claim under Title VII, Mack must prove that she was a victim of intentional discrimination.").

46. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001).

47. "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor. . . . If an alleged statement at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Likewise, a statement "that is subject to more than one interpretation . . . does not constitute direct evidence." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997).

48. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997).

49. No direct evidence of discrimination exists in this case. A finding, if any, must be based on circumstantial evidence.

50. The burden of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Federal discrimination law may be used for guidance in evaluating the merits of claims arising under Chapter 760, Florida Statutes. Tourville v. Securex, Inc., 769 So. 2d 491 (Fla. 4th DCA 2000); Greene v. Seminole Electric Co-op., Inc., 701 So. 2d 646 (Fla. 5th DCA 1997); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

51. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the "shifting burden framework established by the [United States] Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d

207 (1981)" is applied. "Under this framework, the [complainant] has the initial burden of establishing a prima facie case of discrimination. If [the complainant] meets that burden, then an inference arises that the challenged action was motivated by a discriminatory intent. The burden then shifts to the employer to 'articulate' a legitimate, non-discriminatory reason for its action. If the employer successfully articulates such a reason, then the burden shifts back to the [complainant] to show that the proffered reason is really pretext for unlawful discrimination." Schoenfeld v. Babbitt, 168 F.3d at 1267 (citations omitted).

52. In the instant case, Petitioner produced no direct evidence to support his claim that he had been the victim of intentional discrimination on the part of the Sheriff's Office. Petitioner, therefore, relied on circumstantial evidence to prove his claim.

53. To make out a prima facie case of age discrimination [based on circumstantial evidence] in a case of failure to promote, a complainant must show: 1) that he belongs to the protected class; 2) that he was qualified and applied for the promotion; 3) that despite his qualifications he was rejected; and 4) that the employer either ultimately filled the position with someone sufficiently younger to permit an inference of age discrimination or sought to promote less qualified employees who

are not members of the protected class. Once the complainant has established a prima facie case of discrimination, the burden then shifts to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. If the employer meets this burden of persuasion, the complainant must then establish that the employer's proffered reasons for the employee's rejection were pretextual. Taylor v. Runyon, 175 F.3d 861, 866 (11th Cir. 1999).

54. Petitioner has failed to establish a prima facie case of age discrimination. While Petitioner established that he is greater than 40 years of age, that he was qualified for and applied for the promotion, and that he was rejected despite his qualifications; he failed to demonstrate that other, less qualified members of his protected class were promoted. Petitioner did not establish the age of the other deputies who were promoted. Therefore, the record lacks evidence that other equally or less qualified employees under the age of 40 were promoted rather than Petitioner.

55. Even if Petitioner had established a prima facie case of discrimination, Petitioner did not prove age discrimination. The evidence supports Respondent's position that more qualified candidates, based upon their special duties and voluntary assignments, were promoted over him. Clearly, Respondent presented legitimate, non-discriminatory reasons for its

promotion of the other deputies over Petitioner. Petitioner failed to show that the stated reasons were pretextual and that the real reason for the denial of his promotion was his age.

56. In his letter and email resigning from Respondent, Petitioner states that his reasons for leaving is that he has lost faith in the Sheriff's Office and that he felt himself to be the victim of a "good-ol-boy" network. In spite of this, Petitioner resigned of his own volition, even after being told by Sheriff Hall that he would be eligible to apply for promotion again when positions became available. Sheriff Hall gave Petitioner no reason to believe that he would not be promoted in the future. The evidence showed that another, lower-ranked deputy was promoted only a few months after the round of promotions that gave rise to this proceeding. Had Petitioner taken the advice of Sheriff Hall, he might have achieved his promotion by the time this matter went to hearing. Petitioner's resignation from the Santa Rosa County Sheriff's Office ensured that his promotion would not occur.

57. Based upon the evidence and testimony offered at hearing, the Santa Rosa County Sheriff's Office cannot be found to have committed the "unlawful employment practice" alleged in the employment discrimination charge, which is the subject of this proceeding. Therefore, the employment discrimination charge should be dismissed.

RECOMMENDATION

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

RECOMMENDED that FCHR issue a final order finding Respondent not guilty of the "unlawful employment practice" alleged by Petitioner and dismissing Petitioner's employment discrimination charge.

DONE AND ENTERED this 5th day of December, 2007, in Tallahassee, Leon County, Florida.

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ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
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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.