STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALBERT J. BEDDY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-4769
	)	
FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was held in this matter before Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings on February 5, 2008, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Albert H. Beddy, pro se
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For Respondent: Stan M. Warden, Esquire
Emily J. Norton, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner was the subject of an unlawful employment practice as defined in Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

On June 2, 2007, Petitioner, Albert J. Beddy, filed a Charge of Employment Discrimination with the Florida Commission on Human Relations (FCHR) claiming age and race discrimination by Respondent, Florida Fish and Wildlife Conservation Commission. FCHR investigated the charge and, on September 13, 2007, issued a determination of no cause. On October 13, 2007, Petitioner filed a Petition for Relief with FCHR alleging age, race and sex discrimination against Respondent. The Petition was forwarded to the Division of Administrative Hearings.

On January 30, 2008, Respondent filed a Motion to Strike the allegations related to gender discrimination because such alleged discrimination was not asserted in Petitioner's original Charge of Employment Discrimination and not investigated by FCHR. The motion was granted and the allegations regarding discrimination based on gender were dismissed. Petitioner was permitted to proceed on his allegations of age and race discrimination.

At the final hearing, Petitioner testified in his own behalf and called one witness to testify. Respondent presented the testimony of two witnesses and offered two exhibits into evidence. Additionally, the parties also stipulated to the admission of seven joint exhibits into evidence.

After the hearing, Petitioner submitted a Proposed Recommended Order on February 29, 2008. Respondent submitted a Proposed Recommended Order on March 3, 2008.

FINDINGS OF FACT

1. In July of 2006, Respondent advertised an opening for an Accountant II, position #70557, in its revenue and contracts division. The primary responsibility in the position was accounting for and paying or reimbursing expenses in state programs that were funded through federal money by drawing down the accounts in which the federal funds were maintained. Therefore, among other things, the position required accounting experience and a working knowledge of FLAIR. FLAIR is the computerized accounting and records system used by all state agencies in the State of Florida. The vacant position required significant knowledge and experience in both the accounting codes utilized in FLAIR and the computer screens associated with those codes.

2. Additionally, there was a critical need to immediately fill the position with an experienced person because of the involvement with federal funds and due to the fact that another employee, Deborah Schimmel, was performing the work required in her position, as well as, the work required in the vacant position.

3. In 2006, Petitioner, who is Caucasian and 67 years old, applied for the Accountant II position with Respondent. As part of the application process, Petitioner answered a series of qualifying questions relevant to the vacant position. The questions were used by Respondent to help with preliminary screening of the applicants. Some of the questions involved the applicants' experience with FLAIR, grants and revenue.

4. Petitioner answered the qualifying questions and indicated he had one year of experience with FLAIR, a college degree in accounting and experience with grants.

5. There were four other applicants for the position. Petitioner did not know the race of any of the other applicants for the position and did not offer any evidence regarding the race of these individuals.

6. Salwa Soliman, the Commission's Revenue and Contracts Manager, was advised that the Accountant II position was vacant and had been advertised. She was also aware that the position needed to be filled as soon as possible with a person who could perform the accounting and billing duties of that position with little or no training. Ms. Soliman reviewed the applications for the vacant position.

7. Based on a review of his application and qualifying questions, Petitioner was granted an interview because he was a veteran, held a bachelor's degree in accounting, had revenue experience and had experience with FLAIR.

8. On October 13, 2006, Petitioner was interviewed for the position by Ms. Soliman and Ms. Schimmel.

9. During Petitioner's interview, it was clear that Petitioner's experience with revenue related to tax returns and not grants. Likewise, Petitioner's experience with grants was only in writing or applying for grants. He had not billed or disbursed federal money from such grants. More importantly, Petitioner's experience with FLAIR was "view only" experience. "View only" experience or authorization meant that Petitioner was only able to view or look at certain screens but not input data or change the screens in FLAIR. Thus, Petitioner did not have experience with data input to FLAIR and/or the pull-down menus associated with such input.

10. In short, Petitioner's experience and skills did not relate to the work required in the position at issue. Neither tax experience nor grant writing experience was the type of revenue experience required for the vacant position. Additionally, Petitioner did not have sufficient experience or working knowledge of FLAIR to enable him to fill the position with little or no training.

11. Petitioner was not hired for the position. In all likelihood, Petitioner could have been trained for the position. However, due to the nature of the position, Respondent reasonably wanted to hire a person who could immediately fill it. Indeed, none of the applicants for the position were hired because no person had the necessary working knowledge of FLAIR and grant

billing to fill the Accountant II position immediately with little or no training required. There was no evidence that Respondent's reasons for not hiring Petitioner were unreasonable or a pretext for discriminating against Petitioner.

12. When a batch of applicants does not meet Respondent's needs for a vacant position, Respondent's policy was to review any applications for other employment opportunities with Respondent submitted within six months of the closing date of the job announcement for the current vacancy.

13. Because of the critical need to fill the Accounting II position, Ms. Soliman asked that other previously submitted applications be forwarded to her by Respondent's personnel department.

14. In order to transfer an application from one job posting to another job posting, People's First, the State's contractor for some personnel matters, must transfer the previously filed application in its database to the file for the current vacancy. Other than requesting the transfer of the application, Respondent is not involved in the actions necessary to transfer an application to another file for a vacant position.

15. In this case, Respondent's personnel department requested People's First to transfer applications from an earlier-filled Accountant II position with Respondent. One of the transferred applications was from Debra Shriver who was 23 years old and Caucasian. For unknown reasons, in the computer process of transferring the application, the date on Ms. Shriver's application was changed. The evidence was clear that

Respondent did not ask for or cause the date on Ms. Shriver's application to change. In fact, the change in the application's date was immaterial to Respondent's criteria or requirements in filling the position at issue here and does not demonstrate any fraud, falsification or misrepresentation on the part of Respondent in filling the position.

16. Based on her application, Ms. Soliman interviewed Ms. Shriver for the vacant position. The evidence was clear that Ms. Shriver had the experience and knowledge being sought and required for the position at issue. She was currently working in the grant billing division in another state agency and had significant experience and working knowledge of FLAIR as it relates to grants and billing. Ms. Soliman had worked with the successful candidate before but they were not personal friends. Ms. Soliman knew that Ms. Shriver was a competent employee. Based on these facts, Ms. Shriver was hired for the vacant position and did not require significant training once she began working in that position.

17. There was no evidence that Ms. Shriver's selection was based on her race or her age. She was selected based on her qualifications to immediately perform in the position for which she was hired. Likewise, there was no evidence that Petitioner was not hired based on his race, which was the same as Ms. Shriver's, or his age. Petitioner was not hired because he did not have the experience necessary to enable him to immediately begin performing the duties of the position for which he applied. Finally, there was no evidence that Petitioner's

requirements for selecting a person to fill the vacant position or for selecting Ms. Shriver were unreasonable or a pretext for discrimination against Petitioner. Therefore, the Petition for Relief should be dismissed.

CONCLUSION OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007).

19. It is an unlawful employment practice for an employer to discharge or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age, race or gender. § 760.10(1)(a), Fla. Stat.

20. In cases of discrimination, Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. Fla. Dep't of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

21. The provisions of Chapter 760, Florida Statutes, are analogous to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Cases interpreting Title VII are, therefore, applicable to Chapter 760, Florida Statutes. See School Bd. v. Hargis, 400 So. 2d 103, 108 and n.2 (Fla. 1st DCA 1981); Harper v. Blockbuster Entertainment Corp., 139 F.3d 1285, 1387 (11th Cir. 1998) ("No Florida court has interpreted the Florida Statue to impose substantive liability where Title VII does not.") cert. denied, 525 U.S. 1000, 119 S. Ct. 509, 142 L.

Ed.2d 422 (1998); Bryant 586 So. 2d at 1209; see also Scelta v. Delicatessen Support Servs., 146 F. Supp. 2d 1255, 1261 and n.5 (M.D. Fla. 2001). McDonnell Douglas-Burdine-Hicks (burden-shifting framework for indirect proof cases). See Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 143 (2000); Chapman v. Al Transp., 229 F.3d 1012, 1024-25 (11th Cir. 2000) (en banc).

22. In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the United States Supreme Court set for the requirements for proving a prima facie case of discrimination, which can vary depending on the type of discrimination case. McDonnell Douglas Corp. v. Green, 411 U.S. at 802 n. 13; Schwartz v. State of Florida, 494 F. Supp. 574, 583 (N.D. Fla. 1980). McDonnell Douglas Corp. v. Green provides:

> That a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the (Civil Rights) Act (of 1964." Teamsters v. United States, 431 U.S. 324, 358 (1977).

Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1977).

23. If the plaintiff proves a prima facie case of discrimination, the burden shifts to the employer "to articulate some legitimate nondiscriminatory reason" for the adverse employment action. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

24. In St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 2747 (1993), the Court held that once the employer

succeeds in carrying his burden of producing a nondiscriminatory reason for the challenged action, the employee must show that the employer's reason is pretextual. The final and ultimate burden of persuading the trier of fact, by a preponderance of the evidence, remains at all times with the employee. St. Mary's Honor Center v. Hicks, 113 S. Ct. at 2747.

25. The employee's ultimate burden of persuasion may be satisfied by direct evidence showing that a discriminatory reason, more likely than not, motivated the decision involved, or by indirect evidence showing that the proffered reasons of the employer are not worthy of belief. Department of Corrections v. Chandler, 528 So. 2d 1183, 1186 (Fla. 1st DCA 1991). In Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), the U.S. Supreme Court resolved a conflict among the circuits about the standard for establishing pretext fueled by the Court's earlier decision in St. Mary's Honor Center v. Hicks, 509 U.S. 133 (1993), and made it clear that "pre-text plus" was not the standard to be used. Reeves established the pretextual standard as a permissive, case-by-case approach in "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false and . . . permit the trier of fact to conclude that the employer unlawfully discriminated." Id.at 148. Justice O'Connor's opinion for a unanimous court carefully explained why evidence of pretext with the prima facie case may be sufficient to find discrimination:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory

> purpose. . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely explanation, especially since the employer is in the best position to put forth the actual reasons for the decision . . .

Reeves, 530 U.S. at 147. See also, Dep't of Corrections v. Chandler, 582 So. 2d 1186 (Fla. Dist. Ct. App. 1st Dist. 1991) and Chapman, 229 F.3d at 1024.

26. On the other hand, "[a] plaintiff is not allowed to recast an employer's proffered nondiscriminatory reason or substitute [his] business judgment for that of the employer." Chapman, 229 F.3d at 1030. Rather, "an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Id.

27. To establish a prima facie case of discrimination based on disparate treatment, a complainant must show the following: (a) Complainant belongs to a protected class; (b) Complainant was not hired; (c) Complainant was qualified for the position; and (d) the employer treated similarly situated applicants outside the protected class more favorably. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); Jones v. Gerwens, 874 F.2d 1534, 1539-42 (11th Cir. 1989).

28. In this case, Petitioner demonstrated that he was a member of a protected class both as to age and race. He also demonstrated he was not hired for the vacant position. However, he did not demonstrate that he was a similarly situated applicant.

29. It is established law under Title VII that "to make a comparison of the plaintiff's treatment to that of non-minority

employees, the plaintiff must show that he and the employees are similarly situated in all relevant respects." Holifield, 115 F.3d at 1562.

30. In this case, Petitioner has not identified any non-minority or younger applicant who is similarly situated in relationship to the applicant's knowledge of or experience with FLAIR, grants and/or grant billing. Petitioner's and Ms. Shriver's qualifications were significantly different in each person's knowledge and experience with FLAIR and in the area of grant billing. They were both of the same race. Given these differences and Respondent's need to fill the vacant position with a person who could immediately perform the duties of the position, Petitioner has failed to prove a prima facie case of either race or age discrimination.

31. Even assuming, arguendo, Petitioner established a prima facie case of discrimination, Respondent has articulated a legitimate, non-pretextual reason for not hiring Petitioner. Respondent reasonably believed it needed someone to fill the vacancy who could immediately fulfill the duties of the position. Additionally, Ms. Shriver was substantially more experienced with FLAIR and grant billing. Both reasons for hiring Ms. Shriver were legitimate and not pretextual rationales for Respondent's employment decision. Forrester v. Rawland-Bog Corp., 453 F.3d 416, 418 (7th Cir. 2006) ("the question is never whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason was his reason: not a good

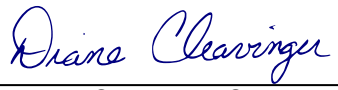
reason, but the true reason"); Jones, 874 F.2d 1534, 1540 (11th Cir. 1989) ("[t]he law is clear that, even, if a Title VII claimant did not commit the violation with which he is charged, an employer successfully rebuts any prima facie case of disparate treatment by showing that it honestly believed the employee committed the violation); Damon v. Fleming Supermarkets, Inc., 196 F.3d 1354, 1363 n.3 (11th Cir. 1999) ("[a]n employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct") (citation and quotation omitted), cert. denied, 529 U.S. 1109, 120 S. Ct. 1962, 146 L. Ed. 2d 793 (2000); Herron v. Daimler Chrysler Corp., 388 F.3d 293, 299 (7th Cir. 2004) (the pretext inquiry focuses on whether employer's explanation was a "a lie rather than an oddity or an error"). Petitioner provided no evidence that Respondent's articulated reasons for the selection of the successful candidate were unreasonable or were a pretext for discrimination. The application process used by Respondent followed Agency policy in reviewing the applications of unsuccessful applicants for a previously advertised accounting position. Therefore, absent such evidence, the Petition for Relief should be dismissed.

RECOMMENDATION

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

RECOMMENDED that a final Order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 8th day of April, 2008, in Tallahassee, Leon County, Florida.



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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.