

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL J. PAPPAS,)
)
 Petitioner,)
)
 vs.) Case No. 08-1928
)
 BAY COUNTY SCHOOL BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing before Diane Cleavinger, Administrative Law Judge with the Division of Administrative Hearings, on October 2, 2008, in Panama City, Florida.

APPEARANCES

For Petitioner: Michael J. Pappas, pro se
6208 North Lagoon Drive
Panama City Beach, Florida 32408

For Respondent: Robert C. Jackson, Esquire
Harrison, Sale, McCloy, Duncan
& Jackson, Chtd.
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioner was the subject of unlawful employment practice based on sex.

PRELIMINARY STATEMENT

On August 29, 2007, Petitioner, Michael J. Pappas (Petitioner), filed a Charge of Discrimination against Respondent, Bay County school Board (Board or Respondent). The Charge alleged that Petitioner was subjected to an unlawful employment practice based on his sex when Respondent failed to hire him for a teaching position in June 2007.

The allegations of sexual discrimination were investigated by the Florida Commission on Human Relations (FCHR). On March 20, 2008, FCHR issued a "Notice of Determination: No Cause," which advised Petitioner that he had 35 days from the date of the Notice to request an administrative hearing. On April 9, 2008, Petitioner filed a Petition for Relief. The Petition reiterated the allegations in his Charge.

At the final hearing, Petitioner presented the testimony of seven witnesses. Respondent presented the testimony of two witnesses. Additionally, the parties offered 17 exhibits into evidence.

After the hearing, Respondent filed a Proposed Recommended Order on November 21, 2008. Petitioner did not submit a Proposed Recommended Order.

FINDINGS OF FACT

1. Since November 2006, Petitioner, Michael J. Pappas, was a male employee of Respondent, Bay County School Board.

Initially, he was employed as a part-time substitute teacher at Patronis Elementary School (Patronis). Patronis has an "A" ranking under Florida's school accountability program and was ranked as a Top 100 School in 2005. Eventually, Petitioner became a full-time para-professional (aide) assigned to work exclusively with an autistic child enrolled at the school. Ellie Spivey (female), the principal at Patronis, recommended Petitioner for the full-time position. Petitioner was hired under an annual contract.

2. In addition to his employment with Respondent, Petitioner served as Captain of a Dolphin tour boat he operated out of Panama City.

3. In his para-professional position, Petitioner worked with Art Beakley (male) and Mary Martin (female). Both were third grade teachers at Patronis. Mr. Beakley was Petitioner's direct supervisor and, like Petitioner, had been recommended for his teaching position by Ellie Spivey.

4. Petitioner's performance as a para-professional was mixed. At best, both teachers indicated Petitioner's performance was adequate, when he was present at the school. Often Petitioner was absent from school or left school early to go on dolphin tours. Petitioner often did not notify either teacher that he would be absent. Petitioner told Mr. Beakley that he could make more money as a boat captain on the dolphin

tours. On the days Petitioner was absent, the autistic student's mother would act as his caretaker during the day.

5. Eventually, both teachers complained to the principal about Petitioner's absences from school. The principal did not discipline Petitioner because the absences were taken on allowable personal leave days. However, Petitioner's clear preference for working the dolphin tours as opposed to working at the school did not reflect well on his dedication or enthusiasm for a career at the school.

6. Brooke Loyed, an Assistant Principal at Patronis, evaluated Petitioner's employment based on her observations of Petitioner. She was unaware of Mr. Beakley's and Ms. Martin's complaints regarding Petitioner's absences. On April 3, 2007, Petitioner received a good evaluation with no problems noted.

7. However, funding for Petitioner's para-professional position was not available for the next school term. In mid-to-late April 2007, Petitioner was advised his contract would not be renewed.

8. That same month, after learning of the non-renewal, Petitioner asked Mr. Beakley and Ms. Martin for a letter of recommendation. Mr. Beakley reluctantly agreed to give Petitioner a letter of recommendation and drafted a letter highlighting Petitioner's good-qualities. The letter did not mention Petitioner's absences and lack of enthusiasm.

9. Initially, Ms. Martin refused to sign the letter by making excuses about why she had not signed the letter drafted by Mr. Beakley. However, she finally signed the letter so that Petitioner would stop asking her to do so. Ms. Martin now regrets that she signed the letter.

10. In May 2007, Ms. Spivey was developing classes and personnel pairings for the next school term. She asked Kara Powell, a teacher at Patronis, if she was willing to work with a full-time para-professional in her classroom. Ms. Spivey did not indicate to Ms. Powell who the para-professional would be. Ms. Powell was not aware that Petitioner's contract would not be renewed for the next term. Ms. Powell told Ms. Spivey that she would not be interested in working with a para-professional in her classroom if that person was Petitioner.

11. Ms. Powell told Ms. Spivey that Petitioner made her uncomfortable because he would sit very close to her in the lunchroom and that he sometimes made comments she did not care for. She also told Ms. Spivey that Petitioner had once invited her and some other female teachers to go on a dolphin tour in their bathing suits without their husbands. Ms. Powell felt the invitation was inappropriate and made for sexual purposes. The evidence did not demonstrate that Petitioner invited the teachers to go on a dolphin tour for inappropriate reasons.

12. From Petitioner's point of view, the invitation was made to a group of teachers sitting as a group in the cafeteria during a light-hearted conversation at the table. He invited his co-workers because he thought they might enjoy going on a dolphin tour. He limited the invitation to his co-workers because his boat was not big enough to take spouses or boyfriends.

13. On the other hand, other teachers confirmed Ms. Powell's story, and also indicated that Mr. Powell made them feel uncomfortable. Since the school year was through and Petitioner's contract was not going to be renewed, Ms. Spivey did not investigate further and did not take any formal action against Petitioner regarding the reports of these teachers.

14. Eventually, due to the lack of funds, Petitioner's contract expired and was not renewed. There was no evidence that demonstrated the non-renewal of Petitioner's contract was based on Petitioner's gender.

15. In the summer of 2007, Patronis had several open teaching positions. Respondent advertised the positions for 5 days. Eventually, the District Office developed an applicant list for Patronis and forwarded it to the school. There were over 90 applicants on the list, of which almost 95 percent were female. A minimum of five applicants was required to be

interviewed by the school with the same questions and scoring form used for each candidate.

16. In June and July 2007, interviews for the open teaching positions were held at Patronis. Ms. Spivey and Ms. Loyed selected Petitioner for an interview. Other candidates were Sarah Patterson, Jessica Kelley, Debra Holbrook, Kim Rogers, Sasha Aufschieder and Jana Jackins.

17. Petitioner did not have a good interview and did not promote himself or his qualifications during the interview. He was not particularly enthusiastic or upbeat about teaching. Other than his application, Petitioner did not bring any letters of recommendation or updated resume to the interview. He did not provide the Bleakley letter discussed earlier. He did not discuss current teaching methods or techniques even though the interview questions provided him an opportunity to do so. Importantly, Petitioner did not appear to be current with those methods. From his application, it was clear that he had received his teaching degree over 20 years ago and had had no full-time classroom teaching experience since that time. Petitioner refused to be considered for a special education teaching position. The refusal did not reflect well on his dedication or enthusiasm for teaching. Petitioner also had no "English as a second language (ESOL)" experience or certification. ESOL certification is a desirable skill for

teachers today. Because of the poor interview and given the recent allegations that he made other teachers uncomfortable, Petitioner was not offered any of the open positions at Patronis. The evidence did not demonstrate that the reasons for not hiring Petitioner were invalid or a pretext to mask discriminatory action.

18. The successful applicants for the open positions at Patronis were Sarah Patterson, Jessica Kelley, Debra Holbrook, Kim Rogers, Sasha Aufschieder and Jana Jackins. All of the candidates hired for the open positions were female. However, that fact alone is not demonstrative of discrimination given the fact that the applicant pool was almost 95 percent female. The evidence demonstrated that all of these candidates were more qualified for the open teaching positions than Petitioner. All of the applicants had better interviews. All showed more enthusiasm and dedication to teaching. All demonstrated that they had knowledge of the latest teaching methods and techniques. Finally, all scored higher in the interview.

19. Kim Rogers had three years of teaching experience at a Title I school. Her Title I experience was a good indication that she had experience in teaching at-risk children. Sarah Patterson had a year of classroom experience and ESOL certification. She also was known to be a very hard worker at school. Jessica Kelley and Debra Holbrook were new teachers who

had recently completed their teaching internship at Patronis. Both were current in the latest teaching methods and techniques and had demonstrated such during the interview. Both were highly thought of by their teaching peers. Sasha Aufschieder was ESOL-certified. She also was highly recommended by her peers. Likewise, Jana Jackins was highly recommended by her teaching peers.

20. When Petitioner discovered that he would not be offered a position, he complained to Dr. Richardson at the District Office. At the time, he did not indicate that he thought he had been discriminated against based on his sex. Instead, he indicated that he thought he had been promised a position. Dr. Richardson determined that the District hiring policies had been followed. She offered to help Petitioner and contacted the principals at Cedar Grove Elementary School, a Title I school, and Surfside Middle School.

21. On July 19, 2007, Petitioner interviewed at Cedar Grove Elementary for a position involving remediation of students who failed the FCAT. The school and the position required an enthusiastic and motivated person who could work with high-risk, failing students.

22. The interview was conducted by the principal, Billy May (male). Petitioner performed adequately in his interview with Mr. May. Petitioner was not selected for the position.

The successful candidate, Heather Six (female), was more qualified for the position. She scored higher and had ESOL certification. Indeed, there was no evidence that demonstrated Petitioner was discriminated against based on his sex when he was not hired for the Cedar Grove position.

23. Similarly, Petitioner was not hired for the position at Surfside Middle School. The interview was conducted by the principal, Sue Harrell (female). Petitioner again did adequately in the interview. The successful candidate for the position was Kenneth Stem (male). As with Cedar Grove, there was no evidence of discrimination or pretext in the hiring of Mr. Stem over Petitioner and the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

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

25. Under the provisions of Section 760.10(1), Florida Statutes, it is 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.

* * *

(7) . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

26. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand vs. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs vs. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

27. The Supreme Court of the United States established in McDonnell-Douglass Corp. vs. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII, which are persuasive in cases such as the one at bar. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

28. Pursuant to this analysis, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for the action taken against Petitioner.

Once this non-discriminatory reason is offered by Respondent, the burden then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, “[t]he fact finder must believe the plaintiff’s explanation of intentional discrimination.” Hicks, 509 U.S. at 519.

29. In Hicks, the Court stressed that even if the fact-finder does not believe the proffered reason given by the employer, the burden remains with Petitioner to demonstrate a discriminatory motive for the adverse employment action. Id.

30. In order to establish a prima facie case of discrimination, Petitioner must demonstrate that:

- a. Petitioner is a member of a protected class;
- b. Petitioner is qualified for the position;
- c. Petitioner was subject to an adverse employment decision; and,
- d. Petitioner was treated less favorably than similarly situated persons outside the protected class.

Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983); Smith v. Georgia, 684 F.2d 729 (11th Cir. 1982); and Lee v. Russell County School Board, 684 F.2d 769 (11th Cir. 1984).

31. In this case, the evidence failed to demonstrate that Petitioner was discriminated against on the basis of his sex when he was not hired by Respondent for an open teaching position. Indeed, the evidence demonstrated that Petitioner was treated the same as other candidates since all candidates went through the same interview process. Additionally, the evidence was clear that Petitioner was either less qualified than the successful candidates or was of the same gender as the successful candidate. In short, the successful candidates were not similarly situated to Petitioner.

32. At Patronis, Petitioner did not perform well in his interview. He did not demonstrate that he was familiar with the latest teaching techniques or methods. He did not have full-time classroom experience and he was not ESOL certified. The successful candidates had these characteristics.

33. At Cedar Grove, Petitioner's interview was adequate. However, he was not as qualified as the successful candidate who was ESOL certified. At Surfside, Petitioner was the same gender as the successful candidate.

34. Moreover, even assuming Petitioner made out a prima facie case, Respondent articulated a legitimate, non-retaliatory reason for not hiring Petitioner. See Mitchell v. USBI, Co., 186 F.3d 1352, 1354 (11th Cir. 1999) ("This Court repeatedly has stated that it will not second-guess a company's legitimate

assessment of whether an employee is qualified for a particular position."); Elrod v. Sears, Roebuck and Co., 939 F.2d 1466, 1470 (11th Cir. 1991) (courts are not super-personnel departments that reexamine an entity's business decisions; the only question is whether the employer gave an honest explanation of its behavior). Respondent provided legitimate reasons for selecting the successful candidates for the teaching positions that were open. There was no evidence to suggest that those reasons were invalid or a pretext to hide discrimination. Therefore, the Petition for Relief should be dismissed.

RECOMMENDATION

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

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 8th day of January, 2009, in Tallahassee, Leon County, Florida.



DIANE CLEAVINGER
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.