

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EULINDA RUSS,)
)
 Petitioner,)
)
 vs.) Case No. 08-3114
)
 CITY OF COTTONDALE, FLORIDA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings in Marianna, Florida, on September 5, 2008. The appearances were as follows:

APPEARANCES

For Petitioner: Eulinda M. Russ, pro se
Post Office Box 767
Cottondale, Florida 32431

For Respondent: Timothy W. Warner, Esquire
Warner & Wintrode, P.A.
Post Office Box 1820
Panama City, Florida 32402

STATEMENT OF THE ISSUES:

The issues to be resolved in this proceeding concern whether the Division of Administrative Hearings and the Florida Commission on Human Relations (Commission) have subject matter

jurisdiction of this dispute and, aside from the jurisdictional questions, whether the City of Cottondale has engaged in a discriminatory employment action against the Petitioner based upon her race (African-American).

PRELIMINARY STATEMENT

This case arose based upon a charge of discrimination filed with the Commission by the Petitioner, Eulinda Russ, on or about December 13, 2007. Ms. Russ alleged that she was a victim of discrimination in a hiring practice by the City of Cottondale based upon her race, African-American. The Commission issued a Determination of No Cause on May 21, 2008, based upon its investigative memorandum which contained the conclusion that the Petitioner had failed to establish a prima facie case of racial discrimination by the City of Cottondale (City). The Petitioner filed a Petition for Relief on June 24, 2008.

The cause came on for hearing on September 5, 2008, before the undersigned. At the hearing the City argued its Motion to Dismiss based upon lack of jurisdiction, alleging that the City did not have the requisite 15 employees so as to be deemed an "employer" for purposes of Sections 760.02(7) and 760.10, Florida Statutes (2007). The Motion was taken under advisement and evidence was presented on the issues on the merits.

The Petitioner called as witnesses Elmore Bryant, Annie Blaine, and presented her own testimony as well. The Petitioner

introduced as exhibits her employment application of February 8, 2007, as well as a performance appraisal review of Ms. Russ. The City presented the testimony of Judy Powell, James Elmore, and Denise White. In addition to testimony, it introduced 14 exhibits which were admitted into evidence. Upon rebuttal the Petitioner introduced the testimony of Willie C. Cook.

Upon conclusion of the hearing, a transcript of the proceedings was ordered, and proposed recommended orders were agreed to be filed within 10 days after the filing of the transcript. Thus Proposed Recommended Orders were timely filed and have been considered in the rendition of this Recommended Order. Unless otherwise indicated all statutory references are to the 2007 edition of the relevant statutes.

FINDINGS OF FACT

1. The Petitioner was an unsuccessful applicant for a job vacancy for a position of secretary with the City. The Respondent is the City of Cottondale, Florida, an incorporated municipality under relevant Florida Law.

2. As established by the testimony of Judy Powell, the City Clerk for the City, the City, at all times pertinent hereto, had fewer than 15 employees. City counsel members other than James Elmore, were paid less than \$600.00 per year and did not receive forms 1099 for their compensation from the City. They do not meet the relevant criteria to be considered

employees. The City's Exhibit One, in evidence, shows that the City had fewer than 15 employees. The Petitioner offered no evidence to contradict the evidence from the City, the Respondent, that it had fewer than 15 employees at all relevant times.

3. On January 30, 2007, the City placed an advertisement in the Graceville News, a newspaper, advertising a job vacancy for the position of secretary. The job description for the position included duties involving collecting utility bills, water deposits, issuing receipts for monies, helping to maintain and record cash journals of all business transactions, preparing billing for utilities, posting ledgers, assisting with daily collections, setting-up accounts, performing customer transfers, maintaining records of water deposits paid and refunded, and preparing of payroll and all related tax reports. Pursuant to that job description, general qualifications which applicants must have included bookkeeping skills and experience.

4. In selecting applicants who would actually be interviewed, Ms. Powell and Willie Cook, who were doing the interviews, looked for individuals who had specific job skills related to the above-referenced duties contained in the job description for that position. Nineteen individuals submitted applications for the position, including the Petitioner.

5. Four individuals were selected to be interviewed out of the 19 individuals who had applied for the position. Those were Melissa Davis, Linda Krauser, Gail Woodham, and Denise White.

6. There was no requirement in City policy that all applicants for a job position be interviewed. There is no evidence to show that race was a factor in determining which applicants were selected to be interviewed for the secretarial position and which were not selected. Rather, the interview selection process involved selecting persons whose application documents appeared to show evidence of some specific job skills which related to accounting, accounts receivable, accounts payable, and the other duties detailed in the job description for the position in question.

7. A white female, Melissa Davis, was selected to be interviewed because her application and cover letter indicated that she was familiar with accounts receivable, accounts payable, payroll, job costing, personnel, handling line telephones, customer service, preparing quarterly reports, and billing purchase orders and had experience in working with 401(k) issues and health and dental insurance. In addition, she had experience as a bank teller handling cash transactions.

8. Another white female, Linda Krauser, was selected to be interviewed as well because her application indicated that she had previously supervised a staff of 40 people and had

experience in customer service, maintaining staff records, and experience in accounting and billing.

9. Another white female, Gail Woodham, was selected for interview because her job application and attached documents showed 20 years of experience in payroll, excel, powerpoint, computer skills, veritable spread sheets, and spread sheet tracking.

10. An Hispanic female, Denise White, was also selected to be interviewed because her job application indicated that she had experience as a head bank teller with 17 years in a fast-paced environment and as a supervisor of tellers. She had worked in a doctor's office and had experience with record keeping. She had secretarial and billing experience working with patients for an optometry group, prepared correspondence for doctors and assisted with patient check-out. In her employment with Indian River National Bank, she had gained experience in customer service in handling accounts, and was a supervisor. Prior to that job, while working for another bank, she was a lead teller, supervisor, and handled cash flow. She had also received a prior certification regarding medical billing.

11. The other 15 individuals who applied for the position, including Ms. Russ, were not interviewed. This decision was based upon Ms. Powell and Mr. Cook's review of the applications,

and related to the relevant skills, experience, or education shown, or not shown, on those applications. There was no evidence that there was any racially discriminatory animus involved in the selection of individuals for interviews or the rejection of the other individuals who were not interviewed.

12. The job application and resume submitted by the Petitioner indicated that her expertise and experience was primarily in caring for the elderly. There was no indication that she had any experience in bookkeeping, handling invoices, or billing. The decision not to interview the Petitioner was not based upon racial motivation, but rather, as with the case with the other applicants who were not interviewed, was based upon a review of application documents. A decision was made to select the four whose past experience, education, and job skills noted in those documents showed them most likely to be candidates with the appropriate skills and experience for the job in question.

13. During the interviews of the four selected applicants, questions were asked them regarding accounting and bookkeeping issues. Ms. Powell, the City Clerk, finished the interview process and made the selection of the individual to be offered the position of secretary. Ultimately, Ms. White, a Hispanic female, was selected for the secretarial position and accepted the salary range offered, in the amount of \$8.00 to \$8.25 per

hour. The applicants who were not interviewed did not have skills appropriate to the job and did not have skills substantially similar to those of the four individuals who were selected for interviews. They were particularly dissimilar in skills, experience, and education to the person ultimately hired, Ms. White.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

Subject Matter Jurisdiction

15. Section 760.02(7), Florida Statutes, provides in pertinent part as follows:

'Employer' means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

16. In the case of Housing Authority of the City of Sanford v. Billingslea, 464 So. 2d 1221 at 1224 (Fla. 5th DCA 1985), the Fifth District Court of Appeal stated that:

. . . the 1977 act specifically includes as covered employers any 'governmental entity or agency' which employs '15 or more employees for each working day in each of the 20 or more calendar weeks in the current or preceding calendar year' . . . the 1977 act grants to the Commission on Human Relations at least concurrent jurisdiction

with the Circuit Court in regard to county and municipal employers.

See also Mousa v. Lauda Air Luftfahrt, A.G., 258 F. Supp. 2d 1329 (U.S.D.C. So. Dist. Fla. 2003).

17. The preponderant evidence shows that the City of Cottondale did not employ 15 or more employees at all times material to this Petition and case. Thus, the Respondent does not meet the threshold for being deemed an employer under the provisions of Chapter 760, Florida Statutes. The City's Exhibit One, its forms 941, establish that it had fewer than 15 employees at times pertinent to this case. This was confirmed by the testimony of Ms. Judy Powell, the City Clerk, who also established that the City had fewer than 15 employees. No evidence was offered to contradict that showing regarding the number of city employees.

18. Accordingly, the Petitioner has not demonstrated that there is subject matter jurisdiction over the claim involved in this case, involving the charge of discrimination based upon race, because the City of Cottondale has fewer than 15 employees.

Discrimination Claim

19. Assuming arguendo that there was subject matter jurisdiction in this case, the race discrimination claim will be addressed. Based upon the provisions of Chapter 760, Florida

Statutes, specifically Section 760.10, Florida Statutes, and Title VII, 42 USC Section 2000E-2(a), it is unlawful to discriminate against an individual with respect to that person's compensation, terms, conditions or privileges of employment or to otherwise adversely affect that person's status as an employee because of that person's race. The Petitioner must prove an intentional discriminatory motive by presenting either direct or circumstantial evidence of discriminatory animus. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-507, 113 S. Ct. 2742, 2746-47, 125 L. Ed. 2d 407 (1993).

20. "Direct evidence . . . is evidence that, 'if believed, proves [the] existence of [a] fact in issue without inference or presumption.'" Schoenfeld v. Babbit, 168 F.3d 1257, 1266 (11th Cir. 1999); see also Merritt v. Dillard Paper Company, 120 F.3d 1181, 1189 (11th Cir. 1997) (stating that evidence that only suggests discrimination or is subject to more than one interpretation is not direct evidence). Direct evidence consists of "'only the most blatant remarks, whose intent could be nothing other than to discriminate.'" See Schoenfeld, supra.

21. In the absence of direct evidence a petitioner may present circumstantial evidence and invoke the burden-shifting framework established in McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under the McDonnell-Douglas framework, the plaintiff or petitioner

bears the initial burden of establishing a prima facie case of intentional discrimination, which requires: (1) that she be a member of a protected class; (2) that she be qualified for the position which she held or sought; (3) that she was discharged or subject to an adverse employment action (failure to hire); and (4) that the employer treated similarly-situated employees and persons outside the protected class more favorably. See St. Mary's, supra at 506. See also Burke-Fowler v. Orange County, 447 F.3d 1319, 1323 (11th Cir. 2006).

22. If a prima facie case is established, a presumption of discrimination is raised and the burden of production of evidence shifts to the defendant (Respondent) to articulate a legitimate, non-discriminatory reason for its actions. St. Mary's, supra at 506-507. The defense must show, through the introduction of evidence, reasons for its action, which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the reason for the employment action at issue. The burden on the defense is to proffer a non-discriminatory reason for its action and is a burden of production. It is satisfied by producing such a reason regardless of the persuasive effect of that proffered reason.

23. If a respondent or defendant shows evidence of a legitimate, non-discriminatory reason, the presumption disappears and the petitioner or plaintiff must then show that

the reasons were not the true reasons for the employment decision, but rather were a pretext for what really amounted to discrimination. See Chapman v. AI Transport, 229 F.3d 1012, 1024 (11th Cir. 2000). The ultimate burden of persuasion, however, remains with the Petitioner to show that intentional discrimination occurred. The petitioner must establish a prima facie case and rebut any legitimate, non-discriminatory explanation or reasons offered by the employer. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). St. Mary's, supra at 507.

24. Employees are similarly situated, in the context of an allegedly discriminatory hiring decision, when they are of the same or a different class and are possessed of the same or very similar job qualifications. In order to show a prima facie case the Petitioner must show that the employees who were interviewed were similarly situated to her, but were of a different class from her protected class, and were treated more favorably in the hiring process. Three of the interviewed employees were white, one was Hispanic. So they were not in the protected class of the Petitioner, who is African-American. The evidence, however, shows clearly and persuasively that all four were not similarly situated to the Petitioner nor to the other 14 job applicants who were not interviewed. This is because they had different, more relevant and appropriate qualifications, in terms of the

required education and work experience for the job at issue. Thus they were not similarly-situated employees, even if they were treated more favorably than the Petitioner. Therefore, that element of a prima facie case has not been established. See Burke-Fowler, 447 F.3d at 1323. Moreover, the Petitioner has failed to established that she was qualified for the secretarial position for which she applied.

25. The position of secretary for the City had a job description involving collecting utility bills, water deposits, issuing receipt for monies, helping to maintain cash journals of all business transactions, preparing billing for utilities, posting ledgers, assisting with daily collections, setting up accounts, performing customer transfers, maintaining records of water deposits paid and refunded, and preparing payroll and all related tax reports. Under "general qualifications" the qualifications needed for applicants included bookkeeping skills and experience.

26. Ms. Powell and Mr. Cook, in selecting applicants to be interviewed, were looking for individuals who had these specific job skills, or many of them, including accounting, accounts receivables, accounts payable, and customer service. Four individuals were ultimately selected as having sufficient qualifications to be interviewed. The individuals selected are those named in the above Findings of Fact. There was no

requirement in City policy that all applicants be interviewed. There is no persuasive evidence that race was ever a factor in determining which applicants were selected for interview. Three of the selectees for interviews were white females. All had significant qualifications in terms of those criteria contained in the job description.

27. Denise White is a Hispanic female. She was selected to be interviewed because her job application reflected the extensive, relevant experience depicted in the above Findings of Fact. She had served as lead teller and supervisor and handled cash flow for one of the banks for which she had previously been employed. In fact, her qualifications were the best of the 19 applicants, in terms of varied experience and training and including supervisory experience. She was the best of the four interviewed applicants and was ultimately hired for the position.

28. The Petitioner's application and resume on the other hand, reflected her expertise was essentially in caring for elderly persons. There was no indication that she had any experience in bookkeeping, handling invoices, or billing or any of the other criteria or duties delineated in the job description and which were possessed to varying degrees by the four persons who were interviewed for the job.

29. During the interviews, the four selected applicants were asked questions regarding their accounting and bookkeeping skills, training, and experience. Ms. Powell, the City Clerk, finished the interview process and made the selection of the individual to be offered the position of secretary. Ms. White ultimately was selected. The Petitioner was not similarly-situated with the four individuals who were selected to be interviewed for the position nor as to the one person ultimately hired for the position. Although they were not of the same protected class as the Petitioner, they were not similarly-situated with her because all of them had significantly more relevant qualifications for the position in question than did the Petitioner. She had no similar accounting, billing, or bookkeeping background as those who were selected to be interviewed. Therefore, in terms of her lack of qualifications, and in terms of failing to show that those who were treated more favorably, were similarly-situated, she failed to establish a prima facie case of racial discrimination in hiring.

30. Even had she established a prima facie case, the City established a legitimate, non-discriminatory basis for the decision not to interview Ms. Russ and to hire Ms. White. The legitimate non-discriminatory basis is that the four individuals interviewed and the one actually hired, Ms. White, had substantially more relevant accounting, bookkeeping, cash

handling, customer service, and the other elements of necessary experience, referenced above, than did the Petitioner.

31. The Petitioner has not established any basis to determine that the reasons and actions of the City in making the hire, and in interviewing the four persons, were pretextual for what really amounted to racial discrimination. The Petitioner has simply failed to rebut the legitimate, non-discriminatory business purpose, based upon relative qualifications of the applicants, set forth by the City in the evidence, upon which its decision regarding interviewing and hiring was based. Therefore, since she has not established a pretextual element to the City's reasons for the interviews and the hiring, and because, for the reasons referenced above, she has not established a prima facie case, the Petitioner has failed to adduce preponderant, persuasive evidence to establish her claim of racial discrimination as to the hiring decision at issue.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses and pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that the Motion to Dismiss for Lack of Subject Matter Jurisdiction is granted. It is further recommended, aside from the finding of lack of subject matter jurisdiction,

that, alternatively, a final order be entered determining that the Petitioner has not established her claim of racial discrimination in the hiring decision at issue, and that the Petition be dismissed in its entirety for this reason as well.

DONE AND ENTERED this 5th day of December, 2008, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
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this 5th day of December, 2008.

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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.