

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOANN MARCHELLE BROOKS,)
)
 Petitioner,)
)
 vs.) Case No. 09-0464
)
 CSX TRANSPORTATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on August 20, 2009, by video teleconference, with hearing sites located in Tallahassee, Florida, and Jacksonville, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Emmanuel Roy, Esquire
26 Court Street, Suite 1503
Brooklyn, New York 11242

For Respondent: Scott S. Cairns, Esquire
Nancy A. Beyer Benton, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice by discriminating against Petitioner based on her race and/or age when it denied her a promotion.

PRELIMINARY STATEMENT

On July 3, 2008, Petitioner JoAnn Marchelle Brooks (Petitioner) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The complaint alleged that Respondent CSX Transportation, Inc. (CSXT) discriminated against Petitioner based on her race and age by failing to promote her to the position of Manager of Manpower Administration in the Human Resources Department.

On December 19, 2008, FCHR issued a Determination: No Cause. According to FCHR's determination, there was no reasonable cause to believe that an unlawful employment practice had occurred.

On January 22, 2009, Petitioner filed a Petition for Relief with FCHR. In the petition, Petitioner alleged that CSXT failed to promote her to several positions between February 2006 and July 2007. FCHR referred this matter to the Division of Administrative Hearings on January 27, 2009.

The undersigned issued a Notice of Hearing dated February 9, 2009. The notice scheduled the hearing for April 16 and 17, 2009.

On February 20, 2009, CSXT filed a Motion to Dismiss Certain Claims as Untimely or Outside the Scope of the Charge or the Investigation of the Charge. Petitioner did not file a

response to the motion. On March 6, 2009, the undersigned issued an Order Dismissing Certain Claims.

On April 3, 2009, Petitioner filed a Request for Continuance. CSXT filed a response in opposition to the request that same day. An order dated April 6, 2009, denied a continuance of the hearing.

Between April 3, 2009, and April 7, 2009, CSXT filed seven motions to quash subpoena of its employees. An order dated April 8, 2009, granted the motions.

On April 8, 2009, CSXT filed a Motion to Compel Deposition of Petitioner. Due to the shortness of time before the final hearing, the undersigned issued an Order Granting Motion to Compel on April 8, 2009.

On April 9, 2009, Petitioner retained counsel. Said counsel immediately filed a Motion for Extension of Time. After a telephone conference on April 13, 2009, the undersigned issued an Order Granting Continuance and Re-scheduling Hearing for May 13, 2009.

On May 5, 2009, CSXT filed a Motion to Continue the May 13, 2009, hearing. An Order Granting Continuance and Re-scheduling Hearing was issued on May 7, 2009. The Order re-scheduled the hearing for August 20, 2009.

On May 18, 2009, CSXT filed a Motion to Quash Subpoena Ad Testificandum. An order dated June 2, 2009, granted the motion.

On August 14, 2009, CSXT filed a Motion to Dismiss Petition for Relief, or Alternatively, Motion to Preclude Petitioner from Calling Witnesses or Offering Evidence at the August 20, 2009, Final Hearing. The motion was denied in part and granted in part on the record when the hearing commenced.

During the hearing, Petitioner testified on her own behalf. Petitioner offered three exhibits, P1-P3 (also identified as R14, R13, and R9, respectively) that were accepted as evidence.

CSXT presented the testimony of four witnesses. CSXT offered Respondent's Exhibit Nos. R1, R5, R10, R11, R12, R17, R19, R20, R21, R22, R24, R26, R27, R28, R30, R36, and R41, that were accepted as evidence.

The court reporter filed the Transcript on September 10, 2009.

On September 16, 2009, Petitioner requested an extension of time to file a proposed recommended order due to the hospitalization of her attorney. On September 17, 2009, CSXT filed a response, indicating that it did not object to an extension for a specific period of time. On September 18, 2009, the undersigned issued an Order Granting Extension of Time.

On October 21, 2009, CSXT timely filed its Proposed Recommended Order. Petitioner filed its Proposed Recommended Order on October 23, 2009. Unless otherwise indicated, all

references to the Florida Statutes are to the 2007 codifications.

FINDINGS OF FACT

1. Petitioner is an African-American female who has worked for CSXT for over 30 years. She began her employment with CSXT on May 19, 1977, as a secretary in CSXT's Baltimore Division. In 1992, Petitioner transferred to CSXT's Jacksonville Division.

2. During her employment with CSXT, Petitioner held various positions. In 2004, Petitioner transferred to the position of Manpower Support Clerk, a union position, and worked in the Personnel Attendance Central Services ("PACS") Group^{1/} under the directorship of Edward H. Pettit. Petitioner held this position during the time period at issue in this proceeding.

3. In July of 2007, Petitioner applied for the position of Manager Manpower Administration, a management position. The job posting for this position provided that the selected candidate would be responsible for managing all PACS processes, as well as the day-to-day activities of the PACS staff. The job posting also provided that the selected candidate must have, inter alia, "functional/technical" competencies, including extensive knowledge of CSXT's mainframe systems such as TSO and Focus, as well as various PC programs.

4. Petitioner, as well as fellow applicants Stephanie Howard, Anthony Avena, and Glenn Shelton, met the minimum qualifications for the position and were each interviewed on July 10, 2007. The interview panel consisted of the following CSXT employees: (1) Jenna Svela, the Recruiter for the Manager Manpower Administration position; (2) Gary Gambill, Director Human Resources Information Systems-Workforce Analytics; (3) Mr. Pettit, Director Manpower Administration and Information Management; and (4) Lucy Bafford, Human Resources Representative.

5. At the time Ms. Howard applied for the position of Manager Manpower Administration, she held the position of a Senior Manpower Support Representative. As a Senior Manpower Support Representative, Ms. Howard supervised two Manpower Support Clerks and was responsible for generating regularly weekly and monthly reports using Focus, Microsoft Excel, and Access programs. In addition to her Bachelor of Science in management, Ms. Howard had also obtained an Associate's degree in computer programming and applications in 1998. Ms. Howard is Asian-American and younger than Petitioner.

6. The interview panel asked each of the applicants the same seven questions. Six out of the seven questions were standard interview questions that were pulled from a bank of interview questions maintained by CSXT. The remaining interview

question, namely, question three, was added by Mr. Pettit, the hiring manager, to assess each candidate's technical abilities within the PACS system. As noted above, the job posting for the Manager Manpower Position provided that the selected candidate must have "functional/technical" competencies.

7. For each interview that was conducted, the individual members of the interview panel completed an interview evaluation form in which he or she assigned a score of 1 through 4 to the answers provided by the candidate to each of the questions. The scoring was assigned as follows: (1) a score of one indicated that the candidate "does not meet requirements"; (2) a score of two indicated that the candidate "almost meets requirements"; (3) a score of three indicated that the candidate "meets requirements"; and (4) a score of four indicated that the candidate "exceeds requirements." In addition to assigning a score, the individual members also provided an explanation on the interview evaluation form as to why a particular score was assigned.

8. The interview panel found that Petitioner met the requirements for question one, almost met the requirements for questions two, six, and seven, and did not meet the requirements for questions four and five. In comparison, the interview panel determined that Ms. Howard exceeded the requirements for questions one, two, four, and five and met the requirements for

questions six and seven. Thus, Ms. Howard received a higher score than Petitioner on each of these questions.

9. As noted above, question three was added to assess each candidate's technical abilities within the PACS system. For this portion of the interview, each candidate was asked to log into the PACS system and accomplish the following functions: (1) add a new location in PACS; (2) change a bad ID number; (3) disqualify an employee's bid; (4) change an employee's seniority date; and (5) manipulate a prepared Excel spreadsheet to produce a pivot table and bar graph, as well as format the prepared Excel spreadsheet for printing.

10. PACS clerks have access to these functions and, in fact, perform these tasks from time to time. There is no persuasive evidence that Mr. Pettit designed question three to give Ms. Howard or any other candidate a competitive advantage over Petitioner who was not familiar with the functions.

11. The interview panel found that Petitioner did not meet the requirements of question three. Notably, Petitioner was only able to complete one out of the five functions. In comparison, the interview panel determined that Ms. Howard met the requirements for question three. Unlike Petitioner, Ms. Howard completed each of the five functions.

12. Overall, the panel found that Ms. Howard would be a good fit for the position of Manager Manpower Administration.

The decision was based on her qualifications, supervisory experience, technical and communication skills, and leadership abilities.

13. On the other hand, the panel found Petitioner to be ill prepared for the interview. Specifically, the panel concluded that Petitioner failed to effectively communicate how her skills, abilities, and experience prepared her to assume the Manager Manpower Administration position. In fact, several members of the panel noted that Petitioner's responses were difficult to follow and that Petitioner failed to provide appropriate examples in support of her responses. In addition, the panel found Petitioner's technical skills to be insufficient.

14. Based on the foregoing, Respondent offered and Ms. Howard accepted the position of Manager Manpower Administration. The greater weight of the evidence indicates that neither Petitioner's race nor her age played any role in the decision-making process.

15. During the hearing, Petitioner acknowledged that she did not have any facts that would indicate that the panel's decision not to promote her was based on her age or race. Moreover, she verified that Ms. Svela, Mr. Gambill, and Ms. Bafford had never done or said anything to her that would indicate that they were biased against her based on her race or

age. Petitioner also confirmed that Mr. Pettit had never made any statement suggesting that he was biased against her based on her race.

16. Mr. Pettit never told Petitioner that she did not need a union-protected position due to her age and tenure with the company. Instead, Mr. Pettit merely informed Petitioner that, given her 30 years of service with CSXT, she did not need to obtain a protected position to avoid being displaced.

17. There is no persuasive evidence that Mr. Pettit had influence with the individuals involved in the hiring process. He did not try to drive the panel's selection towards Ms. Howard or away from Petitioner.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding. See §§ 120.569, 120.57(1), and 760.11, Fla. Stat. (2009).

19. The Florida Civil Rights Act ("FCRA"), Sections 760.01 through 760.11, Florida Statutes, makes it unlawful for an employer to discriminate against an employee because of race or age. See § 760.10(1), Fla. Stat. The FCRA was patterned after Title VII and the Age Discrimination in Employment Act ("ADEA") and federal case law interpreting Title VII and the ADEA is applicable to claims arising under the FCRA. See Wilbur v.

Corr. Servs. Corp., 393 F.3d 1192, 1195 n. 1 (11th Cir. 2004) (Title VII); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996) (Title VII and the ADEA).

20. A charging party can establish a prima facie case of discrimination under Title VII and the ADEA by one of three methods: (a) by presenting direct evidence of discrimination; (b) by presenting statistical proof of a pattern of discrimination; or (c) by presenting circumstantial evidence to prove discriminatory intent, using the McDonnell Douglas framework. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997).

21. Petitioner has not presented statistical evidence of discrimination. In addition, Petitioner has not presented any statement that would rise to the level of direct evidence.

22. Direct evidence of discrimination is evidence that, if believed, would prove the existence of a fact [in issue] "without inference or presumption." See Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989); Burrell v. Board of Trustees of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir. 1997). In other words, the evidence "must indicate that the complained-of employment decision was motivated by the decision-maker's ageism or [racism]." See Damon v. Fleming Supermarkets, Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999).

23. The Eleventh Circuit has repeatedly held that "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age [or race]" constitute direct evidence of discrimination. See Carter, 870 F.2d at 582; Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990); Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999).

24. In this case, no member of the interview panel made any statement to Petitioner indicating that they were biased against her because of her race. Mr. Pettit did not make a statement about Petitioner's age or long-term employment tenure in relation to the position at issue in this case. "[R]emarks by non-decisionmakers or remarks unrelated to the decision-making process itself are not direct evidence of discrimination." See Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998).

25. Petitioner has not presented any statistical evidence or direct evidence of discrimination. Therefore, Petitioner must rely on the McDonnell Douglas framework to establish a prima facie case of race and age discrimination.

26. To establish a claim of race or age discrimination involving a failure to promote claim, Petitioner must show that: (a) she is a member of a protected group; (b) that she was qualified for and applied for the promotion; (c) that she was

rejected; and (d) that other equally or less qualified employees who were not members of the protected classes were promoted.

See Barron v. Federal Reserve Bank of Atlanta, 129 Fed. Appx. 512, 516 (11th Cir. 2005) (race); Crawford v. Johnson, 133 Fed. Appx. 674, 675 (11th Cir. 2005) (age).

27. Petitioner has failed to establish the last prong of the prima facie case for discriminatory failure to promote because Ms. Howard was more qualified for the position of Management Manpower Administration. Petitioner did not perform as well as Ms. Howard during the panel interview. Specifically, Petitioner received lower ratings than Ms. Howard on her responses to each of the questions posed by the panel. Of particular note, while Ms. Howard was able to complete each of the technical functions required by question three, Petitioner only completed one function.

28. Moreover, Ms. Howard was more qualified than Petitioner for the Manager Manpower Administration position in other respects. Unlike Petitioner, Ms. Howard held the position of Senior Manpower Support Representative and had experience supervising two Manpower Support Clerks. In addition, Ms. Howard's technical background was superior to Petitioner's. Ms. Howard obtained an Associate's degree in computer programming and applications in 1998. Moreover, as a Senior Manpower Support Representative, Ms. Howard was already

responsible for generating regularly weekly and monthly reports using Focus, Microsoft Excel, and Access programs. Thus, at the time Ms. Howard applied for the Manager Manpower Administration position, she was already familiar with these programs.

29. By showing that Ms. Howard was more qualified for the position of Manager Manpower Administration than Petitioner, CSXT has established a legitimate, non-discriminatory reason for not promoting Petitioner. Petitioner has not offered any evidence demonstrating that the proffered legitimate, non-discriminatory reason is a pretext for discrimination.

30. The analysis of pretext is focused on the employer's and not the employee's beliefs. See Holifield, 115 F.3d at 1565. While the panel's conclusion that Ms. Howard outperformed Petitioner during their respective interviews is subjective, the "employment decisions may legitimately be based on subjective criteria as long as the criteria are capable of objective evaluation and are stated with a sufficient degree of particularity." See EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1280 n. 17 (11th Cir. 2000).

31. In the instant case, CSXT conducted a structured panel interview in which each candidate was asked identical questions. The individual panel members then assigned a score to the answers given by each candidate and provided an explanation for each score on an interview evaluation form. Each of the panel

members' scores was taken into consideration when the decision was made to hire Ms. Howard. Through these interview evaluation forms, the panel members provided clear and specific explanations as to how they arrived at their subjective conclusions. See Lee v. Miami-Dade Police Dep't, No. 04-22261-CIV, 2005 WL 2456011, at *8 (S.D. Fla. Aug. 12, 2005) (concluding that an employer is "entitled to select eligible candidates for promotions by relying on the candidates' interview scores and the ranking system chosen by [the employer])."

RECOMMENDATION

Based on the foregoing 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 13th day of November, 2009, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of November, 2009.

ENDNOTE

^{1/} The PACS system is a management system that "keeps track of seniority rosters, positions, bids and bumps to positions, assignments, work histories, and attendance" for union employees. (Hearing Transcript, p. 172 l. 11-17).

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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.