

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LAURA A. WESTBROOKS, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-1968  
 )  
 CITY OF NORTH MIAMI, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 18, 2009, by video teleconference with connecting sites in Miami and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Laura A. Westbrooks, pro se  
890 Northeast 138th Street  
North Miami, Florida 33161

For Respondent: V. Lynn Whitfield, Esquire  
City of North Miami  
776 Northeast 125th Street  
North Miami, Florida 33161

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed an unlawful employment act by discriminating against Petitioner

on the basis of race in violation of the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

Laura A. Westbrooks filed an employment discrimination complaint against the City of North Miami (City) on the basis of race with the Miami-Dade County Equal Opportunity Board. The discrimination complaint was referred to and dual filed with the federal Equal Employment Opportunity Commission (EEOC) and the Florida Commission on Human Relations (FCHR) and was investigated by the EEOC. The EEOC determined that it was "unable to conclude that the information obtained during its investigation established violations of the statutes" and, as a result, issued a Right to Sue. Being prohibited from reinvestigating the discrimination complaint and unable to grant substantial weight to the EEOC's decision due to the EEOC being unable to conclude that a violation occurred, the FCHR determined that it too would issue a Right to Sue. Ms. Westbrooks decided to file a Petition for Relief for an unlawful employment practice, which was timely filed. On April 15, 2009, FCHR referred this matter to the Division of Administrative Hearings.

At hearing, Ms. Westbrooks testified on her own behalf and entered 12 exhibits (Petitioner's Exhibits numbered 1, 2, 3, 5-12, 14 (pages 1 and 4), and 15) into evidence.<sup>1</sup> The City

presented the testimony of two witnesses and entered ten exhibits (Respondent's Exhibit numbered 1 through 10) into evidence.

A transcript of the hearing was not ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the conclusion of the hearing. The parties timely filed their post hearing submissions, which were considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Ms. Westbrooks is an African-American female.

2. In 2000, Ms. Westbrooks began her employment with the City in a billing position in Customer Service as an Account Clerk. She performed very well in that position and received an above satisfactory rating.

3. In 2002, a Junior Accountant position became available, and Ms. Westbrooks applied for the position. The position description for a Junior Accountant indicates that the position's duties included "Professional accounting work covering all fixed assets accounting and reporting." Further, the position description indicates that the minimum qualifications consisted of the following:

Associate's degree in Accounting or related field, with some work experience in an accounting environment

OR

An equivalent combination of training and experience which provides the required knowledge, skills and abilities.

4. Carlos Perez, the City's Finance Director and a Certified Public Accountant (CPA), performed the hiring for the Junior Accountant position. He hired Ms. Westbrook for the Junior Accountant position.

5. Mr. Perez considered Ms. Westbrook's performance in the Junior Accountant position as excellent. She consistently received performance ratings of above satisfactory and merit increases.

6. In 2006, an Accountant position became available. The City advertised the position. The announcement for the position indicated that the position's duties included "complex technical work performing professional accounting work covering all phases of account maintenance, classification, analysis, and expenditure control of all phases of City wide fiscal transactions." Further, the announcement indicated that the minimum requirements for the position were:

Bachelors degree in Accounting, Finance or a closely related field with major coursework in accounting . . . plus one to two years experience in accounting.

OR

An equivalent combination of training and experience which provides the required knowledge, skills, and abilities.

Moreover, the announcement provided that **"Only those applicants who most closely meet the specific requirements for the position will be contacted for an interview."**

7. Ms. Westbrook applied for the Accountant position.

8. No dispute exists that Ms. Westbrook does not possess a bachelor's degree in accounting. She has an Associates in Arts (AA) degree in Business Administration, which she obtained in 1993.

9. At all times material hereto, the City had a tuition reimbursement program, wherein an employee of the City could obtain a degree and receive tuition reimbursement for obtaining the degree. Ms. Westbrook was aware of the reimbursement program but chose not to avail herself of it in order to obtain a bachelor's degree in accounting. However, she did avail herself of the program to obtain certifications associated with her position as a Junior Accountant.

10. No dispute exists that Ms. Westbrook met the minimum requirements for the Accountant position, satisfying the alternative requirement of equivalent combination of training and experience.

11. Ms. Westbrook was provided an interview.

12. An interview panel conducted the interviews and rated the applicants, who were interviewed, on a scale of 0 through 5. The interview panel consisted of the City's Chief Accountant, Budget Administrator, and Pension Administrator. Only the applicants who had an overall rating of 3.0 or higher on the interview were submitted by the City's Personnel Administration Director, Rebecca Jones, to Mr. Perez. Ms. Jones is an African American and is female.

13. Mr. Perez makes the final decision as to who is hired for accounting positions. He was the final decision-maker for this Accounting position. Mr. Perez is not African American.

14. Only three persons received an overall interview rating of 3.0 or higher. Ms. Westbrooks was one of the three persons, and she received the highest interview score. On December 6, 2006, Ms. Jones submitted to Mr. Perez the names of the three persons, with their interview scores:

Laura Westbrooks	4.0
Ronald Castrillo	3.4
Bayard Louis	3.3

15. Mr. Perez had never hired an accountant who did not have a four-year college degree, i.e., a bachelor's degree, regardless of race. His position was that the person hired for the Accountant position, and all of his accountants, needed a four-year college degree because that person, as all of his accountants, would be fourth in line to head the Finance

Department, as Acting Finance Director, behind himself, the Assistant Finance Director, and the Chief Accountant—at least once a year he (Mr. Perez), the Assistant Finance Director, and the Chief Accountant all attend a conference together; and that a person with a four-year college degree has the technical ability needed to perform in the position, whereas, a person without a four-year degree would not have the technical ability needed. Further, as to the accounting focus of a junior accountant position versus an accountant position, a junior accountant's focus is fixed assets, whereas, accountants are involved with all aspects of accounting, which includes and goes beyond fixed assets.

16. Mr. Perez had made Ms. Westbrook aware of his position, regarding accountants, during her tenure in the Junior Accountant position.

17. Ms. Jones did not consider Mr. Perez's position and action, regarding the hiring of accountants, as being discriminatory.

18. Mr. Perez's final requirement of a four-year college degree in order to be hired by him as an accountant became the City's requirement.

18. Mr. Perez offered the Accountant position to Mr. Castrillo who had an AA degree in Business Administration, a Bachelor's degree in Accounting and who was scheduled to

graduate the following semester with a Master's degree in Accounting. However, Mr. Castrillo did not accept the position due to the failure to agree on a salary.

19. The Accountant position was re-advertised.

20. Ms. Westbrooks remained eligible for the Accountant position and was, therefore, in the pool of applicants to be considered; but was not re-interviewed because the interview questions did not change

21. On March 8, 2007, Ms. Jones submitted to Mr. Perez the names of the applicants who had an overall rating of 3.0 or higher on the interview, together with their interview scores:

Tricia Beerom	4.0
Sampson Okeke	3.4
Mirtha Servat	3.3

22. Mr. Perez hired Ms. Beerom for the Accountant position. Ms. Beerom had a Bachelor of Science degree in Accounting and Management and was an African-American female.

23. Ms. Westbrooks believed that she was not afforded an opportunity to advance because of Mr. Perez's position regarding accountants possessing a four-year degree and that, therefore, she was discriminated against. However, even though the City had a policy against discrimination and a procedure to file discrimination complaints, she chose not to proceed through the City's discrimination process because she had no faith in the City.



24. Ms. Westbrooks believed that she was not going to be treated fairly by the City in any attempt by her to achieve upward mobility, which caused her to continuously experience stress, which negatively impacted her health. She eventually resigned from the City. Ms. Westbrooks' resignation was effective May 4, 2007.

25. At the time of her resignation, Ms. Westbrooks' salary was \$40,000. After her resignation, she received her contributions to the City's retirement system in the amount of approximately \$13,000.

26. In September 2008, over a year after her resignation from the City, Ms. Westbrooks obtained employment with the University of Miami, School of Medicine, as a Grant and Contracts Specialist, with a salary of \$41,500.

27. Ms. Westbrooks did not identify any employees who were in classified positions as herself, who were or were not African American and who had upward mobility in positions, and who did not have four-year college degrees. Classified positions are protected by the City's Civil Service rules and must be advertised.

28. Ms. Westbrooks did identify City employees who were in unclassified positions, not a classified position like herself, i.e., directors and city manager, who did not have four-year college degrees, and who were and were not African American.

Unclassified positions are not protected by the City's Civil Service rules and need not be advertised. The city manager hires all department directors.

29. No dispute exists that, at all times material hereto, a former Director of Purchasing was a white female and a long term employee, who had an AA, not a four-year degree, and who was promoted through the ranks; a Director of Public Works was a white male and a long-term employee, who had an AA, not a four-year degree, and who was promoted through the ranks.

30. No dispute exists that the City's City Manager is an African-American male who does not have a four-year college degree.

31. No dispute exists that, at all times material hereto, all of the City's Department Directors, who are African American, have four-year college degrees.

32. The EEOC instituted an "E-RACE Initiative (Eradicating Racism and Colorism from Employment)" and developed a "set of detailed E-RACE goals and objectives to be achieved within a five-year timeframe from FY [fiscal year] 2008 to FY [fiscal year] 2013." Included in the E-RACE Initiative, were "Best Practices for Employers and Human Resources/EEO Professionals," which included best practices for recruitment, hiring and promotion. The E-RACE Initiative was implemented by the EEOC subsequent to the action complained of by Ms. Westbrook and was

not demonstrated to be federal law, rule, or regulation; and was, therefore, not shown to have the force or impact of law. The E-RACE Initiative is not applicable to the instant case.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Sections 760.11 and 120.569, Florida Statutes (2009), and Subsection 120.57(1), Florida Statutes (2009).

34. The standard of proof is preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2009).

35. These proceedings are de novo. § 120.57(1)(k), Fla. Stat. (2009).

36. Section 760.10, Florida Statutes, provides in pertinent part:

(1) It is an 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.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any

individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

37. The issue of whether the City discriminated against Ms. Westbrooks in violation of the Florida Civil Rights Act of 1992, as amended, is the only issue before the undersigned. The issue as to whether the City failed to hire her for the Accountant position for non-discriminatory reasons in that the City failed to follow its own rules and policies in the hiring process is not before the undersigned unless such failure was done discriminatorily. The evidence fails to demonstrate that the City failed to follow its rules and policies for discriminatory purposes in not hiring Ms. Westbrooks for the Accountant position.

38. In the instant case, Ms. Westbrooks must rely upon circumstantial evidence to prove discriminatory intent by the City. For such cases, a three-step burden and order of presentation of proof have been established for unlawful employment practices. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 688 (1973); Aramburu v. The Boeing Company, 112 F.3d 1398, 1403 (10th Cir. 1997); Combs v. Plantation Patterns, 106 F.3d 1519, 1527-1528 (11th Cir. 1997).

39. The initial burden is upon Ms. Westbrooks to establish a prima facie case of discrimination. McDonnell Douglas, at 802; Aramburu, at 1403; Combs, at 1527-1528. Ms. Westbrooks establishes a prima facie case of discrimination by showing four factors: (1) that she belongs to a protected group; (2) that she was subjected to an adverse employment action; (3) that her employer treated similarly situated employees outside the protected group differently or more favorably; and (4) that she was qualified to do the job. McDonnell Douglas, supra; Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); Aramburu, supra; Combs, supra. See Kendrick v. Penske Transportation Services, 220 F.3d 1220 (10th Cir. 2000) (similarly situated employees need not be outside the protected group).

40. Once Ms. Westbrooks establishes a prima facie case, a presumption of unlawful discrimination is created. McDonnell Douglas, at 802; Aramburu, at 1403; Combs, at 1528. The burden shifts then to the City to show a legitimate, nondiscriminatory reason for its action. McDonnell Douglas, at 802; Aramburu, at 1403; Combs, at 1528.

41. If the City carries its burden, Ms. Westbrooks must then prove, by a preponderance of the evidence, that the reason offered by the City is not its true reason, but only a pretext

for discrimination. McDonnell Douglas, at 804; Aramburu, at 1403; Combs, at 1528.

42. However, at all times, the ultimate burden of persuasion that the City intentionally discriminated against her remains with Ms. Westbrooks. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

43. Applying the prima facie standards, the evidence demonstrates that Ms. Westbrooks satisfied the first two factors and the fourth factor. Ms. Westbrooks demonstrated that she belongs to a protected class (race, color, sex, religion, national origin, age, and marital status); that she was subjected to an adverse employment action (not being hired for the Accountant position); and that she was qualified for the Accountant position.

44. However, Ms. Westbrooks failed to demonstrate that the City treated similarly situated employees, whether inside or outside the protected group, differently or more favorably. Anderson v. WBMG-42, 253 F.3d 561, 565 (11th Cir. 2001); McGuinness v. Lincoln Hall, 263 F.3d 49, 53, 54 (2d Cir. 2001); Kendrick, supra; Holifield, supra at 1562; Shumway v. United Parcel Service, Inc., 118 F.3d 60, 64 (2d Cir. 1997). She must show that she and the other employees that she identified (the comparator employees) are "similarly situated in all relevant

respects." Holifield, supra at 1562. Ms. Westbrook must show that she "shared sufficient employment characteristics with [the] comparator[s] so that they could be considered similarly situated. . . . [they] 'must be similarly situated in all material respects'—not in all respects." McGuinness v. Lincoln Hall, 263 F.3d 49, 53 (2d Cir. 2001); Shumway v. United Parcel Service, Inc., 118 F.3d 60, 64 (2d Cir. 1997). "In other words . . . those employees must have a situation sufficiently similar . . . to support at least a minimal inference that the difference of treatment may be attributable to discrimination." McGuinness, supra at 54.

45. The evidence fails to demonstrate that the City's employees outside of the protected group—the former Director of Purchasing and the Director of Public Works—and the City's employees inside the protected group—Department Directors and the City Manager—were similarly situated in all material respects to Ms. Westbrook in order to establish, at least, a minimal inference that the difference of treatment may be attributable to discrimination. Consequently, Ms. Westbrook and the identified employees were not comparator employees.

46. Furthermore, the evidence demonstrates that all accountants hired by Mr. Perez, both African American and white, had four-year accounting degrees (four-year college degrees).

47. Hence, Ms. Westbrooks failed to establish a prima facie case of discrimination.

48. Assuming Ms. Westbrook had established a prima facie case, the City demonstrated a legitimate, nondiscriminatory reason for its employment action of not hiring her for the Accountant position. The City demonstrated that, even though Ms. Westbrooks was qualified for the position by meeting the minimum qualifications for the position and obtaining the highest overall interview rating at the first advertisement of the position, the more qualified person for the City was a person who possessed a four-year college degree.

49. Hence, Ms. Westbrooks failed to demonstrate that the City's reason for not hiring her for the Accountant position was not the true reason, but a pretext for discrimination.

50. Further, Ms. Westbrooks presents an argument, in essence, that she was the victim of unequal employment opportunity in that white employees of the City, who did not have a four-year degree, were afforded an opportunity for upward mobility, whereas African-American employees of the City, who did not have a four-year degree, were not afforded an opportunity for upward mobility; and that such disparate treatment is pervasive and systemic throughout the City and is discriminatory. She cites, as support for this argument, Griggs



v. Duke Power Company, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).

51. In Griggs, supra, the power company began to require a high school diploma and the passage of two tests for initial employment and transfer to certain positions for all employee, "whites and Negroes alike." Griggs at 428. The requirement had the effect of excluding "Negroes" from certain positions. The evidence before the Court showed that "neither [test] was directed or intended to measure the ability to learn to perform a particular job or category of jobs"; that "neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used"; and that "employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used." Griggs at 428, 431-432. The Court stated that "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins." Griggs at 436. The Court held that, unless the testing or measuring procedures are demonstrably a reasonable measure of job performance, they are forbidden. Id.

52. In the instant case, Ms. Westbrook challenges the Mr. Perez's determining factor of a four-year college degree in

order to be hired as an accountant by him. No other factor, regarding the requirements of job performance, is being challenged by her. Unlike Griggs, supra, the instant case is devoid of any evidence that demonstrates whether an accountant, without a four-year college degree, has or is performing satisfactorily in an accountant position because no person without a four-year college degree has been hired by Mr. Perez. However, Ms. Westbrook, as having the ultimate burden of persuasion, has failed to demonstrate that Mr. Perez's action falls within the prohibition of Griggs, supra. Mr. Perez presented a legitimate business reason for hiring a person with a four-year college degree in accounting for the accounting position; the final determinative factor bears a demonstrable reasonable relationship to the performance of the person in the accounting position. The evidence fails to demonstrate that the determinative four-year college degree in accounting fails to bear a reasonable relationship to successful performance of the job of accounting. Hence, Ms. Westbrook has failed to demonstrate that the City discriminated against her.

#### 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 finding that the City of North Miami did not commit a discriminating employment practice against Laura A. Westbrooks in violation of the Florida Civil Rights Act of 1992, as amended, by failing to hire her for an accounting position.

DONE AND ENTERED this 1st day of September, 2009, in Tallahassee, Leon County, Florida.

*Errol H. Powell*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of September, 2009.

ENDNOTE

<sup>1/</sup> Petitioner's Exhibits numbered 4 and 14 were rejected. Petitioner's Exhibit number 11 was admitted only as to Mark Collins.

COPIES FURNISHED:

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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.