STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHIRLEY FLEMING-BRICKOUS,)
)
Petitioner,)
)
vs.) Case No. 09-7036
)
BREVARD COUNTY SHERIFF'S)
OFFICE,)
)
Respondent.)
_______________________________)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on May 13, 2010. The ALJ conducted the hearing by video teleconference in Tallahassee and Melbourne, Florida.

APPEARANCES

For Petitioner: Shirley Fleming-Brickous, pro se
1803 Plata Court
Rockledge, Florida 32955

For Respondent: Robert W. Evans, Esquire
Allen, Norton & Blue, P.A.
906 North Monroe Street, Suite 100
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

The stipulated issue[1] is whether Respondent discriminated against Petitioner on the basis of her race by denying Petitioner equal pay in violation of the Florida Civil Rights Act, Chapter 760, Florida Statutes (2007).[2]

PRELIMINARY STATEMENT

On May 22, 2009, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (the Commission). On November 18, 2009, the Commission issued a Determination: No Cause. On December 21, 2009, Petitioner filed a Petition for Relief, and the Commission referred the matter to DOAH to conduct the final hearing.

At the hearing, Petitioner testified in her own behalf and submitted six exhibits for admission into evidence. Respondent presented the testimony of four witnesses and submitted 17 exhibits for admission into evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the Transcript of the hearing filed with DOAH on May 25, 2010. Respondent timely filed its Proposed Recommended Order (PRO) on June 4, 2010. Petitioner did not file a PRO.

FINDINGS OF FACT

1. Petitioner is an "aggrieved person" within the meaning of Subsections 760.02(6) and (10). Petitioner is an African-American female and filed a complaint of race discrimination, with the Commission.

2. Respondent is an "employer" within the meaning of Subsection 760.02(7). Respondent is the Office of the Sheriff for Brevard County, Florida.

3. The evidence, in its entirety, does not establish a prima facie showing of discrimination. Nor does the evidence prove that Petitioner received unequal pay.

4. Respondent first employed Petitioner sometime in October 2002. Petitioner voluntarily resigned her position of employment with Respondent on May 30, 2008, for a higher-paying position with another employer.[3]

5. On July 29, 2006, Respondent transferred Petitioner from the position of payroll specialist, in the accounting department, to a position of personnel officer in the personnel department. The transfer was a promotion, and Petitioner received a 10 percent increase in pay. Ms. Bridget Bauer replaced Petitioner in the accounting department.

6. The supervisor in the personnel office was Ms. Imogene Mullins. Ms. Mullins supported the transfer of Petitioner and considered Petitioner to be a valuable asset due to Petitioner's varied experience, including experience in human resources.

7. On April 3, 2008, Ms. Bauer transferred from the accounting department to another position within Respondent's organization. Ms. Denise Postlethweight, the supervisor of the accounting department, asked Petitioner to temporarily assist the accounting department until the department could replace Ms. Bauer, to train the replacement for Ms. Bauer, and to assist

in interviewing applicants to replace Ms. Bauer. Petitioner agreed to perform these temporary duties.

8. Respondent, Ms. Postlethweight, and Ms. Mullins did not promise Petitioner she would receive additional compensation for performing these temporary duties in the accounting department until the accounting department replaced Ms. Bauer. Respondent's administrative policy does not authorize compensation for temporary duties.

9. Ms. Mullins attempted to obtain authorization for increased compensation for the temporary duties performed by Petitioner without success. No pay increase was approved because Petitioner was performing equivalent supervisory duties in the accounting and personnel departments on a temporary basis.

10. One alleged comparator relied on by Petitioner is not a comparator. Ms. Lisa Gillis performed equivalent supervisory duties as the special projects coordinator and sheriff's assistant. However, Ms. Gillis performed equivalent supervisory duties on a permanent basis rather than a temporary basis. Respondent's administrative policy authorizes additional compensation for dual duties performed on a permanent basis.

11. Petitioner spent much of her time during the hearing attempting to show that Ms. Mullins promised additional compensation to Petitioner as an inducement for Petitioner's

agreement to perform dual duties on a temporary basis. As previously found, the fact-finder does not find that evidence to be persuasive, and, if it were, the evidence does not rise to the level of a preponderance of the evidence.

12. Moreover, evidence of an offer and acceptance of additional compensation between Ms. Mullins and Petitioner as an inducement for the performance of dual duties is relevant to an action for breach of contract rather than discrimination. Jurisdiction for an action for breach of contract is in circuit court rather than DOAH.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties and the subject matter in this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009). DOAH provided the parties with adequate notice of the final hearing.

14. Petitioner bears the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that Respondent discriminated against her by denying her equal pay on the basis of her race. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973).

15. Federal discrimination law may be used for guidance in evaluating the merits of claims arising under Chapter 760. Tourville v. Securex, Inc., 769 So. 2d 491 (Fla. 4th DCA 2000); Greene v. Seminole Elec. Co-op. Inc., 701 So. 2d 646 (Fla. 5th

DCA 1997); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994). Petitioner can meet her burden of proof with either direct or circumstantial evidence. Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1358 (11th Cir. 1999), cert. denied, 529 U.S. 1109 (2000). Direct evidence must evince discrimination or retaliation without the need for inference or presumption. Standard v. A.B.E.L. Services., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998). In other words, direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate," Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

16. There is no direct evidence of discrimination or retaliation in this case. In the absence of direct evidence, Petitioner must meet her burden of proof by circumstantial evidence.

17. Circumstantial evidence of discrimination or retaliation is subject to the burden-shifting framework of proof established in McDonnell Douglas, 411 U.S. 792, and Reed, 95 F.3d at 1178. Petitioner must first establish a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802; Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1345 (11th Cir. 2000). Her failure to do so ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1013 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Sys., 509 So.

2d 958 (Fla. 2d DCA 1987)). If Petitioner establishes a prima facie case, the burden shifts to Respondent to articulate a legitimate, non-discriminatory, non-retaliatory reason for the challenged action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257, 101 S. Ct. 1089, 1096 (1981); Munoz, 223 F.3d at 1345; Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998), cert. denied, 119 S. Ct. 405 (1998). Petitioner must then prove by a preponderance of evidence that the reasons offered by Respondent for its actions are mere pretexts. Id.

18. In order to establish a prima facie case of race discrimination, a preponderance of the evidence must show that Petitioner is a member of a protected class, that she suffered an adverse employment action, that she received disparate treatment compared to similarly-situated individuals in a non-protected class, and that there is sufficient evidence of bias to infer a causal connection between her race and the disparate treatment. Rosenbaum v. Southern Manatee Fire and Rescue Dist., 980 F. Supp. 1469 (M.D. Fla. 1997); Andrade v. Morse Operations, Inc., 946 F. Supp. 979, 984 (M.D. Fla. 1996). A preponderance of the evidence does not show that Petitioner received disparate treatment compared to similarly situated individuals or that the alleged disparate treatment is causally connected to Petitioner's race. Failure to establish the last prong of the

conjunctive test is fatal to a claim of discrimination. Mayfield v. Patterson Pump Co., 101 F.3d 1371 (11th Cir. 1996); Earley, supra. See also Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

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 Respondent not guilty of the allegations against Respondent and dismissing the Charge of Discrimination and Petition for Relief.

DONE AND ENTERED this 15th day of June, 2010, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of June, 2010.

ENDNOTES

[1/] The Charge of Discrimination and Petition for Relief raise numerous allegations against Respondent. At the final hearing, however, Petitioner stipulated on the record that the issue for determination in the hearing is limited to discrimination based on race and that Petitioner is withdrawing any allegation of retaliation. Transcript at 12-13. The Petition for Relief did not include an allegation of age discrimination that was included in the Charge of Discrimination, and the record is devoid of any evidence of age discrimination.

[2/] References to chapters, sections, and subsections are to Florida Statutes (2007), unless stated otherwise.

[3/] The fact-finder finds evidence offered by Petitioner that the resignation was a constructive termination of employment to be neither credible nor persuasive. In any event, the evidence did not rise to the level of a preponderance of the evidence. A preponderance of the evidence shows that the resignation was voluntary and not wanted by Respondent.

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.