

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

GERRY D. MCQUAGGE,

2010 SEP 22 A 11:42 EEOC Case No. 15D200900806

Petitioner,

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

FCHR Case No. 2009-02333

v.

DOAH Case No. 10-1197

BAY DISTRICT SCHOOLS,

FCHR Order No. 10-071

Respondent.

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**FINAL ORDER DISMISSING PETITION FOR  
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Gerry D. McQuagge filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2007), alleging that Respondent Bay District Schools committed an unlawful employment practice on the bases of Petitioner's sex (male) and age (DOB: 4-8-58) by not transferring Petitioner to a school of his choice. Petitioner also alleged that he was retaliated against for having filed a grievance.

The allegations set forth in the complaint were investigated, and, on February 5, 2010, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held by video teleconference at sites in Panama City and Tallahassee, Florida, on June 11, 2010, before Administrative Law Judge Suzanne F. Hood.

Judge Hood issued a Recommended Order of dismissal, dated June 30, 2010.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact

A transcript of the proceeding before the Administrative Law Judge was not filed with the Commission. In the absence of a transcript of the proceeding before the Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See National Industries, Inc. v. Commission on Human

Relations, et al., 527 So. 2d 894, at 897, 898 (Fla. 5th DCA 1988). Accord, Hall v. Villages of West Oaks HOA, FCHR Order No. 08-007 (January 14, 2008), Beach-Gutierrez v. Bay Medical Center, FCHR Order No. 05-011 (January 19, 2005), and Waaser v. Streit's Motorsports, FCHR Order No. 04-157 (November 30, 2004).

We adopt the Administrative Law Judge's findings of fact.

#### Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We note that the Administrative Law Judge concluded that Petitioner failed to establish a prima facie case of sex discrimination because it was not established that an adverse employment action had occurred (Recommended Order, ¶ 41). We conclude that based on the facts found by the Administrative Law Judge a prima facie case of sex discrimination was established.

It has been stated that for a Petitioner to establish a prima facie case of discrimination in a failure-to-hire case it "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." Russ v. City of Cottondale, Florida, FCHR Order No. 09-006 (January 27, 2009), adopting conclusions of law set out in the Recommended Order of DOAH case No. 08-3114 at page 11.

Applying this to the facts found in this case: Petitioner is male (Recommended Order, ¶ 4); Petitioner was qualified to teach in an elementary school by virtue of having recently obtained certification in elementary education (Recommended Order, ¶ 14); In June 2009, Petitioner applied for five open elementary school teaching positions at Hiland Elementary school and was not offered any of the positions (Recommended Order, ¶ 25); and each of the five positions was filled by a female teacher (Recommended Order, ¶ 25). Consequently, based on the facts found in the Recommended Order, it would appear to us that Petitioner established a prima facie case of sex discrimination.

Nevertheless, even if a prima facie case of sex discrimination had been established, the ultimate outcome of the case would not change given the Administrative Law Judge's conclusion that Respondent established legitimate nondiscriminatory reasons for not hiring Petitioner for the elementary school positions, and there was no showing that those reasons were a pretext for unlawful discrimination (Recommended Order, ¶ 44).

With these comments, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

Neither of the parties filed exceptions to the Administrative Law Judge's Recommended Order.

Dismissal

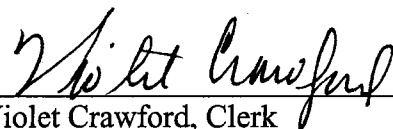
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 21st day of September, 2010.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;  
Commissioner Joanna Cunningham; and  
Commissioner Patty Ball Thomas

Filed this 21st day of September, 2010,  
in Tallahassee, Florida.

  
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Violet Crawford, Clerk  
Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, FL 32301  
(850) 488-7082

NOTICE TO COMPLAINANT / PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), you have the right to request EEOC to review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131.

Copies furnished to:


Gerry D. McQuagge  
c/o Jerry Long, Ed.D.  
Qualified Representative  
803 Skyland Avenue  
Panama City, FL 32401

Bay District Schools  
c/o Robert Christopher Jackson, Esq.  
Harrison, Sale, McCloy, Duncan  
& Jackson, Chtd.  
304 Magnolia Avenue  
Panama City, FL 32401

Suzanne F. Hood, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 21st day of September, 2010.

By:   
Clerk of the Commission  
Florida Commission on Human Relations