STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GERRY D. MCQUAGGE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-1197
	)	
BAY DISTRICT SCHOOLS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 11, 2010, by video teleconference with locations in Tallahassee, Florida, and Panama City, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jerry Long, Ed.D.
Qualified Representative
803 Skyland Avenue
Panama City, Florida 32401

For Respondent: Robert Christopher Jackson, Esquire
Harrison, Sale, McCloy, Duncan
& Jackson, Chtd.
304 Magnolia Avenue
Panama City, Florida 32402-1579

STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondent committed an unlawful employment action by discriminating

against Petitioner based on his age and gender in violation of Section 760.10, Florida Statutes; and (b) whether Respondent retaliated against Petitioner for filing a grievance.

PRELIMINARY STATEMENT

On or about August 27, 2009, Petitioner Gerry D. McQuagge (Petitioner), filed an Employment Complaint of Discrimination against Respondent Bay District Schools (Respondent) with the Florida Commission on Human Relations (FCHR). The complaint alleged that Respondent discriminated against Petitioner when it failed to transfer him to an elementary school teaching position because he was a 51-year-old male. The complaint also alleged that Respondent retaliated against Petitioner for filing a grievance regarding his involuntary transfer.

On February 5, 2010, FCHR issued a Determination: No Cause. Petitioner then filed a Petition for Relief with FCHR on March 10, 2010. FCHR referred the petition to the Division of Administrative Hearings on March 11, 2010.

A Notice of Hearing by Video Teleconference dated March 24, 2010, scheduled the hearing for June 4, 2010. By letter dated April 11, 2010, Petitioner requested a continuance. After a telephone conference on April 14, 2010, the undersigned issued an Order Granting Continuance and Rescheduling Hearing by Video Teleconference. The order scheduled the hearing for June 11, 2010.

On May 26, 2010, Respondent filed a Motion to Relinquish Jurisdiction. The undersigned heard oral argument on the motion before the hearing commenced. The motion was denied on the record.

During the hearing, Petitioner testified on his own behalf and presented the testimony of two witnesses. Petitioner offered six exhibits that were accepted as evidence.

Respondent presented the testimony of three witnesses. Respondent offered five exhibits that were accepted as evidence.

There was no court reporter at the hearing. Therefore, there is no hearing transcript.

Respondent filed its Proposed Recommended Order on June 22, 2010. As of the date that this Recommended Order was issued, Respondent had not filed proposed findings of fact and conclusions of law.

Hereinafter, all references shall be to Florida Statutes (2009), unless otherwise indicated.

FINDINGS OF FACT

1. Respondent is a public taxing district responsible for educating Bay County's children from pre-kindergarten through high school. Respondent employs roughly 6000 instructional, support, and administrative personnel.

2. Respondent's instructional employees are covered by Respondent's anti-discrimination policy and a collective

bargaining agreement (CBA) between Respondent and the local bargaining unit, the Association of Bay County Educators (ABCE). The CBA governs many aspects of the employment relationship between the District and its teachers, including procedures for involuntary transfers and lay offs due to funding issues.

3. Respondent's schools are divided as follows: (a) high school includes ninth grade through twelfth grade; (b) middle school includes sixth grade through eighth grade; and (c) elementary school includes kindergarten ages through fifth grade.

4. Petitioner is a 51-year-old male. He began working for Respondent as a teacher in 1990.

5. For the 2008/2009 school year, Petitioner worked as a teacher at Respondent's Haney Technical High School and Center (Haney). At that time, Haney operated two concurrent programs: a technical education program and a high school program. Petitioner taught physical education and science in the high school program.

6. During the 2008/2009 school year, Respondent decided to eliminate the Haney high school program due to budget cuts and lower student census. Respondent also made the decision to combine the Haney technical education program with an adult education program from another closed school.

7. The Haney high school program was not Respondent's only major adjustment for economic reasons. Respondent also closed five other schools and cut over 100 positions. This process resulted in 154 displaced teachers.

8. All of Haney's high school teaching positions, including Petitioner's, were to be eliminated. Sandra Davis, principal at Haney, asked for voluntary transfers. No one in the high school program volunteered to transfer.

9. Ms. Davis requested that certain high school teachers remain at Haney to teach in the restructured program at Haney. Ms. Davis made the decision to keep the teachers at Haney based on consideration of the projected need in the restructured Haney program for the upcoming year and after considering the teachers' certifications and experience.

10. Teachers with continuing contracts or professional service contracts, who were not to remain at Haney, were placed in the displaced teachers' pool. The pool included Petitioner and all teachers who worked in schools or programs that Respondent intended to eliminate.

11. There was a meeting on April 20, 2009, between Superintendent William Husfelt, the District's Personnel Department, and the displaced teachers in the District. At the meeting Respondent explained the procedures for transferring/reassigning displaced teachers.

12. The displaced teachers were provided with a list of all of Respondent's vacant positions. Respondent then asked each displaced teacher to list their top three positions. Every teacher was granted an interview for their top three positions.

13. Petitioner selected positions at Hiland Park Elementary School, Lynn Haven Elementary School, and Mowat Middle School. According to Petitioner, he listed the middle school because it was close to his home. He was granted and attended interviews for all three positions.

14. Petitioner recently obtained his certification in elementary education. However, he had no recent substantive experience teaching elementary students.

15. The principals who interviewed the displaced teachers selected the people to fill vacant positions at their respective schools on a competitive basis. During one such interview, it became apparent that Petitioner was not as familiar with the method of teaching reading as more experienced teachers and/or even other recently certified elementary education professionals.

16. The vast majority of Petitioner's experience was teaching high school students. He was used to working with students more similar in age and behavior to middle school students.

17. The principals who interviewed Petitioner did not select him to fill any of his top three positions. At the end of this interview/selection process, there were 34 teachers who were not selected for any position, including Petitioner.

18. During the hearing, Petitioner confirmed that he did not believe any discrimination or retaliation took place prior to and through the time of the interviews. Petitioner understood it was a competitive selection process with over 100 applicants.

19. On or about April 28, 2009, Respondent conducted a second meeting with the remaining displaced teachers. At the meeting, displaced teachers were again asked to list their top three choices for placement from the remaining vacant positions. Petitioner listed Hiland Park Elementary, Tommy Smith Elementary, and Lucille Moore Elementary.

20. Superintendent considered the displaced teachers' lists, their certifications and experience, the vacant positions, and other factors. At no time did Respondent promise to place a displaced teacher in a position of the teachers' choice.

21. Superintendent Husfelt placed Petitioner at Everitt Middle School, teaching science. Petitioner was qualified to fill the position, but it was not one of his choices on his

second top-three list. Female applicants were appointed to fill all of the positions at the elementary schools.

22. On or about May 11, 2009, Petitioner and Ms. Davis met to discuss Petitioner's informal grievance relative to his involuntary transfer. Ms. Davis denied the informal grievance.

23. On May 26, 2009, Petitioner filed a formal Grievance with Ms. Davis regarding his involuntary transfer/reassignment. She denied the grievance.

24. On June 10, 2009, Petitioner and Superintendent Husfelt's designee, Pat Martin, had a Step II grievance meeting. Respondent subsequently denied Petitioner's grievance.

25. Sometime in June 2009, Petitioner applied for five vacant positions at Hiland Elementary School. There were fifth grade vacancies, two fourth-grade vacancies, and one third-grade vacancies. Petitioner received an interview for these positions. However, all five positions were filled with female teachers.

26. The involuntary transfer did not cause Petitioner to suffer any loss of pay, benefits, or seniority. The new position was approximately five miles away from his former position.

27. During the hearing, Petitioner testified that he researched the Internet to determine the percentage of male teachers in Respondent's elementary schools, kindergarten

through grade five. According to Petitioner, four percent of the teachers are male. Respondent presented evidence that approximately 11.58 percent of its elementary school teachers, kindergarten through sixth grade, are male. These raw statistics, standing alone, are not competent evidence that Respondent is intentionally excluding male teachers in its elementary schools.

28. Petitioner admitted during the hearing that he had no evidence regarding the age of Respondent's elementary school teachers, male or female. Therefore, there is no evidence of age discrimination.

29. Petitioner stated at hearing that the transfer to the middle school caused him to suffer an adverse action because industrial air pollution in the area caused him to take more sick leave than when he taught at Haney, about five miles away. This argument has not been considered here because Petitioner raised it for the first time during the hearing and because Petitioner had no competent medical evidence to support his claim.

CONCLUSIONS OF LAW

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

31. It is unlawful for an employer to discriminate against an individual based on the individual's age or gender. See § 760.10(1)(a), Fla. Stat.

32. The Florida Civil Rights Act (FCRA), Sections 760.01 - 760.11, Florida Statutes, as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C Section 2000e et seq. Federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Brand v. Florida Power Corp., 633 So. 2d 504,509 (Fla. 1st DCA 1994); and Valenzuela v. Globeground North America, LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009).

33. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated and/or retaliated against him. See Valenzuela, 18 So. 3d at 22.

34. Petitioner can establish a case of discrimination alleging disparate treatment through direct, statistical, or circumstantial evidence. See Valenzuela, 18 So. 3d at 22.

35. Petitioner presented no evidence of any kind relative to age discrimination. Apparently, Petitioner has abandoned his argument that Respondent discriminated against him based on his age.

36. As to Petitioner's claim of gender discrimination, he did not present any direct evidence showing discrimination. However, the record does include two statistics regarding the

gender of elementary school teachers. Petitioner asserts that approximately four percent of elementary school teachers are male in grades kindergarten through fifth grade. Respondent states that approximately 11 percent of elementary school teachers are male in grades kindergarten through sixth grade.

37. Respondent admits that over 90 percent of all elementary school teachers are female. There is no evidence as to the number of men who have applied for and been denied a job teaching kindergarten through fifth grade. The raw statistical facts established here, without more, do not show that Respondent is deliberately excluding males, including Petitioner, from teaching elementary school, kindergarten through fifth grade.

38. In the absence of direct or statistical evidence of intentional discrimination, an employee in a discrimination case has the initial burden of proving a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). If the employee proves a prima facie case, the burden shifts to the employer to proffer a legitimate non-discriminatory reason for the action it took. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The employer's burden is one of production, not persuasion, as it always remains the employee's burden to persuade the fact-finder

that the proffered reason is a pretext and that the employer is guilty of intentional discrimination. See Burdine, 450 U.S. at 252-256.

39. In order to prove a prima facie case of gender discrimination, Petitioner must show the following: (a) he is a member of a protected group; (b) he was qualified for the position he sought; (c) he was subjected to an adverse employment action; and (d) Respondent treated similarly situated employees of a different gender more favorably. See Turlington v. Atlanta Gas Light Company, 135 F.3d 1428, 1432 (11th Cir. 1998); Lee v. Russell County Board of Education, 684 F.2d 769 (11th Cir. 1984); and Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983).

40. Similarly, in order to prove a prima facie case of retaliation, Petitioner must establish that: (a) he engaged in a statutorily protected activity; (b) he suffered an adverse employment action; and (c) the adverse action was causally related to the protected expression. See Byrne v. Alabama Alcoholic Beverage Control Bd., 635 F. Supp. 2d 1281, 1297 (M.D. Ala. 2009).

41. Thus, an adverse employment action is a necessary element of proof for Petitioner to maintain his discrimination and retaliation claims. Petitioner has not met his burden on either claim.

42. In Davis v. Town of Lake Park, 245 F.3d 1232 (11th Cir. 2002), the Court set forth the adverse employment standard as follows:

> Whatever the benchmark, it is clear that to support a claim under Title VII's anti-discrimination clause the employer's action must impact the "terms, conditions, or privileges" of the plaintiff's job in a real and demonstrable way. Although the statute does not require proof of direct economic consequences in all cases, the asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff's employment. We therefore hold that, to prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a ***serious and material*** change in the terms, conditions, or privileges of employment. Moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances. [Emphasis included; Citation omitted].

43. Not every decision of an employer is considered an adverse employment action. In this case, Petitioner has not shown that there has been a serious and material change in the terms, conditions, or privileges of his employment. The only change here was a five-mile change in location and a shift from teaching high school students to middle school students.

44. To the extent that Petitioner proved a prima facie case of gender discrimination and/or retaliation, Respondent had the following legitimate non-discriminatory reasons for placing

Petitioner in a middle school position: (a) Petitioner's lack of elementary school experience; and (b) Petitioner's experience was more closely suited to teaching middle school students. Petitioner provided no evidence to suggest that these reasons were pretextual.

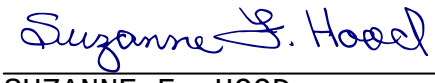
RECOMMENDATION

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 30th day of June, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.