

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARTHUR T. BROWN,)
)
 Petitioner,)
)
 vs.) Case No. 10-10016
)
 FLAGLER COUNTY SCHOOL BOARD,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

An administrative hearing was conducted in this case on April 12, 2011, by video teleconference in Jacksonville and Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Arthur T. Brown, pro se
29-A Louvet Lane
Palm Coast, Florida 32137

For Respondent: Kristy J. Gavin, Esquire
Flagler County School District
1769 East Moody Boulevard, Building 2
Bunnell, Florida 32110

STATEMENT OF THE ISSUE

Whether the Flagler County School Board discriminated against Petitioner by failing to hire Petitioner based on his disability.

PRELIMINARY STATEMENT

On March 11, 2010, Petitioner filed a complaint (Complaint) with the Florida Commission on Human Relations (the Commission or FCHR) alleging employment discrimination by the Flagler County School Board (School Board or Respondent). The Complaint was assigned FCHR No. 201001184.

The Commission investigated the Complaint and on September 30, 2010, issued a Determination which found "No Cause." On that same day, the Commission issued a Notice of Determination of No Cause (Notice) on the Complaint stating that the Commission "has determined that there is no reasonable cause to believe that an unlawful employment practice occurred." The Notice advised Petitioner of his right to file a Petition for Relief for an administrative hearing on his Complaint within 35 days. Petitioner timely filed a Petition for Relief.

On November 2, 2010, the Commission filed a Transmittal of Petition with the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge to conduct an administrative hearing.

Following a telephonic hearing on Petitioner's counsel's Motion to Withdraw as Counsel for Petitioner (Motion to Withdraw) held on December 8, 2010, the Motion to Withdraw was granted and this case was subsequently scheduled for a final hearing. At the final hearing, Petitioner testified, through a

sign language interpreter, on his own behalf and offered one exhibit which was received into evidence as Petitioner's Exhibit P-1, without objection. Respondent presented the telephone testimony of Paula Parrella, secretary to Respondent's Director of Human Resources, and offered one exhibit which was received into evidence without objection as Respondent's Exhibit R-1.

The evidentiary portion of the hearing concluded on April 12, 2011. The proceedings were not recorded and there is no transcript of the proceedings. The parties were given until May 2, 2011, to file proposed recommended orders. Respondent filed its Proposed Recommended Order on April 29, 2011, which has been considered in preparing this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Respondent is the local government agency responsible for oversight of the public schools of Flagler County, Florida.

2. Petitioner applied for two positions with the School Board. In December 2009, Petitioner applied for a job opening as a bus aide for handicapped students (Transportation Handicapped Aide position). On January 29, 2010, he applied for a lawn maintenance position at Flagler Palm Coast High School (Maintenance/Turf Care Worker position).

3. On February 1, 2010, Petitioner received a letter from the School Board thanking him for his interest in the

Transportation Handicapped Aide position, but informing him that the School Board had selected another applicant.

4. On or about May 31, 2010, Petitioner received another rejection letter from the School Board, informing him that he had not been hired for the Maintenance/Turf Care position.

5. Petitioner alleges that Respondent did not hire him for either position because he is "qualified deaf."

6. Prior to actually applying for the two positions, as part of the application process, Petitioner completed an on-line employment application with the School Board. Petitioner listed eight previous positions on his on-line application, including: dishwasher, assembler, part-time stacker, dock worker, warehouse/driver, part-time delivery driver, warehouse associate, and warehouse forklift operator.

7. The previous positions listed on Petitioner's on-line application did not involve working with children or lawn care.

8. At the final hearing, Petitioner testified that he had been around deaf and blind students while attending the Florida School for Deaf and Blind. He also testified that he thought he could learn the lawn care maintenance position while on the job. Petitioner conceded, however, that his prior employment positions and experience did not involve working with children or lawn care maintenance.

9. Qualifications the School Board required for the Transportation Handicapped Aide position included prior experience or training in the care of children, as well as knowledge of and ability to use crisis intervention and prevention techniques, CPR, and first aid.

10. The Maintenance/Turf Care Worker position was not a beginning position where qualifications could be met by on-the-job training. Rather, the position required a state-certified pest control operator's license for lawn and ornamental plants or the equivalent, and a working knowledge of the rules and regulations on safe handling and application of pesticides, herbicides, and fertilizers. The position also required knowledge of athletic field dimensions and striping, and the ability to maintain a commercial irrigation system.

11. Review of Petitioner's on-line application, in light of the qualifications for the two positions sought, reveals that Petitioner was not qualified for either position.

12. In contrast, the successful applicants who were hired for the two positions possessed the required qualifications and experience.

13. Ms. Parrella testified that, as secretary to the School Board's Director of Human Relations, it was her responsibility to monitor the applications for employment submitted for the two positions for which Petitioner applied.

According to Ms. Parrella, Petitioner was not hired because he did not possess the required qualifications for the positions.

14. Ms. Parrella further testified that the School Board would not discriminate against a person who was deaf if he had the qualifications for the position. She further explained that Petitioner's handicap or disability played no role in the decision not to hire him for the two positions. Ms. Parrella's testimony is credited.

15. Petitioner testified that, at the time he filed the Complaint, he suspected that he had not been hired by the School Board because of his disability because he could not think of any other reason he was not hired. He admitted, however, that he had no personal knowledge as to the reasons why he was not hired.

16. Petitioner also admitted during the final hearing that he did not list or possess all of the certifications or qualifications required for either of the two positions.

17. In sum, Petitioner did not show that the School Board discriminated against him by failing to hire him because of his disability.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this

proceeding. See §§ 120.569, 120.57(1), and 760.11(4) (b), Fla. Stat. (2010)^{1/}; see also Fla. Admin. Code R. 60Y-4.016.

19. The Florida Civil Rights Act of 1992 (the Act) is codified in sections 760.01 through 760.11, Florida Statutes. "The Act," as amended, was patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Federal case law interpreting Title VII and the ADEA is applicable to cases arising under the Florida Act. Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996) (citing Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991)).

20. Section 760.10 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.

21. The three-part "burden of proof" pattern developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applies. Under that test, first, Petitioner has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if Petitioner sufficiently establishes a prima facie case, the burden shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if Respondent satisfies this burden, Petitioner has the opportunity to prove by a preponderance of the evidence that the legitimate reasons asserted by Respondent are in fact mere pretext. 411 U.S. at 802-04.

22. To establish a prima facie case of discrimination, Petitioner must prove by a preponderance of the evidence: (1) that he is a handicapped person within the meaning of subsection 760.10(1)(a); (2) that he is a qualified individual; and (3) that Respondent discriminated against him on the basis of his disability. See Earl v. Mervyns, 207 F.3d 1361, 1365 (11th Cir. 2000); Byrd v. BT Foods, Inc., 948 So. 2d 921, 925 (Fla. 4th DCA 2007).

23. While Petitioner established the first element, Petitioner failed to establish a prima facie case of discrimination.

24. As to the first element, the undisputed evidence demonstrated that Petitioner is handicapped by virtue of the

fact that he is deaf. The term "handicap" in the Florida Civil Rights Act is treated as equivalent to the term "disability" in the Americans with Disabilities Act. Byrd, 948 So. 2d at 926.

25. "The ADA defines a 'disability' as 'a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment; or being regarded as having such an impairment.'" 42 U.S.C. § 12102(2). "'Major life activities' include 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.'" 948 So. 2d at 926(citing Bragdon v. Abbott, 524 U.S. 624 (1998); 45 C.F.R. § 84.3(j)(2)(ii); and 28 C.F.R. 41.31(b)(2)(1997)).

26. Although Petitioner proved that he is "handicapped" or "disabled" within the meaning of the law, Petitioner failed to prove the other two elements required to prove discrimination by failing to show 2) that he is a qualified individual, or (3) that Respondent discriminated against him on the basis of his disability.

27. In order to show that he is "qualified," Petitioner must show that he can perform the essential functions of the job, either with or without reasonable accommodation. McCaw Cellular Commc'ns of Fla. v. Kwiatek, 763 So. 2d 1063, 1065 (Fla. 4th DCA 1999)(citing 42 U.S.C.A. § 1211(8)). An employer

is not required to reallocate job duties to change the functions of a job. Earl, 207 F.3d at 1367. "[T]he duty to accommodate does not require an employer to lower its performance standards, reallocate essential job functions, create new jobs, or reassign disabled employees to positions that are already occupied."

Salmon v. Dade Cnty. Sch. Bd., 4 F. Supp. 2d 1157, 1162 (S.D. Fla. 1998) (citing 29 C.F.R. § 1630.2(0)(2); 42 U.S.C. 12111(9)).

28. As noted in the Findings of Fact, above, Petitioner did not possess the qualifications for either of the two positions he sought with the School Board. Respondent need not waive essential elements of a position to accommodate Petitioner. Id.

29. Finally, Petitioner failed to show that Respondent discriminated against him because of his disability. The undisputed testimony showed that the School Board did not hire Petitioner because he was not qualified and that Petitioner's disability played no role in the School Board's decision.

30. In sum, Petitioner failed to present a prima facie case. Failure to establish a prima facie case of discrimination ends the inquiry. Cf. Ratliff v. State, 666 So. 2d, 1008, 1013 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (Fla. 1996) (same rationale in case regarding racial discrimination).

31. Even if Petitioner had established a prima facie case, Respondent's evidence presented at the final hearing refuted

Petitioner's argument that Respondent's actions were discriminatory. Respondent provided persuasive evidence that the reason it did not hire Petitioner is that he did not possess the required qualifications for the positions.

32. Petitioner otherwise failed to demonstrate, as he must to prevail in his claim, that Respondent's proffered reason for not hiring Petitioner was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03.

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 Complaint and Petition for Relief.

DONE AND ENTERED this 17th day of May, 2011, in Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of May, 2011.

ENDNOTE

^{1/} Unless otherwise indicated, all references to statutes or rules are to the current, 2010, versions, which have not been substantively revised since the relevant hiring decision in this case.

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.