STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JIMITRE R. SMITH,)
)
Petitioner,)
)
vs.) Case No. 12-1565
)
SANFORD HOUSING AUTHORITY,)
)
Respondent.)
_______________________________)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case before J. D. Parrish, an Administrative Law Judge of the Division of Administrative Hearings, on November 16, 2012, in Sanford, Florida.

APPEARANCES

For Petitioner: Jimitre R. Smith, pro se
804 South Bay Avenue
Sanford, Florida 32771

For Respondent: Ricardo Lanier Gilmore, Esquire
Saxon, Gilmore, Carraway,
and Gibbons, P.A.
Suite 600
201 East Kennedy Boulevard
Tampa, Florida 33602

STATEMENT OF THE ISSUES

Whether Respondent, Sanford Housing Authority (Respondent), committed an unlawful employment practice as alleged in the Petition for Relief filed with the Florida Commission on Human

Relations (FCHR) and, if so, what relief should Petitioner, Jimitre Smith (Petitioner), be granted.

PRELIMINARY STATEMENT

On October 3, 2011, Petitioner filed a Complaint of Discrimination with the FCHR claiming that her former employer, Respondent, had discriminated against her based on gender and pregancy. According to the complaint, the most recent act of discrimination took place on January 13, 2011.

On April 6, 2012, following the completion of its investigation of Petitioner's complaint, the FCHR issued a Notice of Determination: No Cause, advising Petitioner that a determination had been made that "no reasonable cause exists to believe that an unlawful employment practice occurred." Thereafter, on or about April 30, 2012, Petitioner filed a Petition for Relief. The case was forwarded to the Division of Administrative Hearings for formal proceedings on April 30, 2012. A Notice of Hearing scheduled the matter for hearing for June 21, 2012. Thereafter, the case was continued, but was ultimately heard on November 16, 2012.

At the hearing, Petitioner testified in her own behalf and presented the testimony of Ericka Sipp. Petitioner’s Exhibits 2, 3, and 4 were admitted into evidence. Respondent presented the testimony of Vivian Bryant and Ayub Fleming. Respondent’s

Exhibits C, F, G, and H were also admitted in evidence. A transcript of the proceedings has not been filed.

The parties were granted until November 27, 2012, to file proposed orders. Respondent timely filed a proposed recommended order that has been considered in the preparation of this Recommended Order. Petitioner filed an Objection to (sic) Respondent's proposed order. As indicated at the conclusion of this order, Petitioner may file exceptions to the findings of this order with the FCHR. There is no procedure for Petitioner to file exceptions to a party's proposed order.

FINDINGS OF FACT

1. Petitioner is a female who was pregnant during a portion of the time events occurred related to her employment with Respondent.

2. At the time of Petitioner's initial employment with Respondent, the Sanford Housing Authority operated public housing complexes within its geographical area pursuant to a HUD program to provide housing assistant to low income, qualified residents.

3. At some point, the Orlando Housing Authority stepped in to take over the management of Respondent's properties. Due to the deteriorating condition of Respondent's properties, residents were provided Section 8 vouchers so that they could

obtain private rental opportunities. In the midst of the transition period, Petitioner's employment with Respondent ended.

4. Petitioner was initially hired by Respondent to replace a receptionist who was out on maternity leave. The assignment was part-time and temporary. It began on or about March 31, 2010.

5. When the receptionist returned to work, Petitioner was offered a second part-time job as leasing clerk. Although the record is not clear when this second job started, it is undisputed that Petitioner sought and was granted maternity leave due to her own pregnancy on September 27, 2010.

6. It was during this time period that the Orlando Housing Authority stepped in to take over Respondent's responsibilities. Mr. Fleming, an employee of the Orlando Housing Authority, served as the Interim Executive Director for Respondent.

7. In November 2010 residents were advised of the plan to demolish the substandard housing units. Since the units would not be leased, a leasing clerk was no longer required. Although Petitioner had been told she could return to work after her maternity leave, there was no position available for her at that time.

8. Once the Orlando Housing Authority took over management, all of the day-to-day work was assigned to its

employees. Respondent kept a handful of maintenance workers, but there is no evidence Petitioner sought and/or was denied that type of job. Petitioner claimed she should have been offered or allowed to apply for a job with the Orlando Housing Authority. There is no evidence that entity was required to hire her or that it refused to hire her because of her gender or pregnancy or that Respondent refused to recommend Petitioner for employment due to her gender or pregnancy.

9. When Petitioner was cleared for return to work in December 2010, there was not a job to return to as Respondent did not have a position for her. There is no evidence that Respondent hired anyone during or after Petitioner's pregnancy or that Petitioner was refused a job that she was qualified to perform. Had a suitable job been available, it most likely would have come through the Orlando Housing Authority.

10. In January of 2011, Respondent formally eliminated Respondent's part-time position through a reduction in workforce decision. At that time, Petitioner received a severance payment from Respondent and an offer for other job training opportunities.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these

proceedings. §§ 120.57(1) and 760.11, Fla. Stat. (2012).

12. The Florida Civil Rights Act of 1992 (the Act) is codified in sections 760.01 through 760.11, Florida Statutes (2011). "The Act, as amended, was [generally] 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 [provisions of] Title VII and the ADEA is [therefore] applicable to cases [involving counterpart provisions of the Florida Act." FSU v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996); see also Joshua v. Cty of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)("The [Act's] stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964.").

13. The Act makes certain acts prohibited "unlawful employment practices," including those described in section 760.10, Florida Statutes (2011), which provides:

> (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.

(2) It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, national origin, age, handicap, or marital status or to classify or refer for employment any individual on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.

(3) It is an unlawful employment practice for a labor organization:

(a) To exclude or to expel from its membership, or otherwise to discriminate against, any individual because of race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, 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 or as an applicant for employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(c) To cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(4) It is an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of race, color, religion, sex, national origin, age, handicap, or marital status in admission to, or employment in, any program established to provide apprenticeship or other training.

(5) Whenever, in order to engage in a profession, occupation, or trade, it is required that a person receive a license, certification, or other credential, become a member or an associate of any club, association, or other organization, or pass any examination, it is an unlawful employment practice for any person to discriminate against any other person seeking such license, certification, or other credential, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, national origin, age, handicap, or marital status.

(6) It is an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee to print, or cause to be printed or published, any notice or advertisement relating to employment, membership, classification, referral for employment, or apprenticeship or other training, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, national origin, age, absence of handicap, or marital status.

(7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any

person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

(8) Notwithstanding any other provision of this section, it is not an unlawful employment practice under ss. 760.01-760.10 for an employer, employment agency, labor organization, or joint labor-management committee to:

(a) Take or fail to take any action on the basis of religion, sex, national origin, age, handicap, or marital status in those certain instances in which religion, sex, national origin, age, absence of a particular handicap, or marital status is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

(b) Observe the terms of a bona fide seniority system, a bona fide employee benefit plan such as a retirement, pension, or insurance plan, or a system which measures earnings by quantity or quality of production, which is not designed, intended, or used to evade the purposes of ss. 760.01-760.10. However, no such employee benefit plan or system which measures earnings shall excuse the failure to hire, and no such seniority system, employee benefit plan, or system which measures earnings shall excuse the involuntary retirement of, any individual on the basis of any factor not related to the ability of such individual to perform the particular employment for which such individual has applied or in which such individual is engaged. This subsection shall not be construed to make unlawful the rejection or termination of employment when the individual applicant or employee has

failed to meet bona fide requirements for the job or position sought or held or to require any changes in any bona fide retirement or pension programs or existing collective bargaining agreements during the life of the contract, or for 2 years after October 1, 1981, whichever occurs first, nor shall this act preclude such physical and medical examinations of applicants and employees as an employer may require of applicants and employees to determine fitness for the job or position sought or held.

(c) Take or fail to take any action on the basis of age, pursuant to law or regulation governing any employment or training program designed to benefit persons of a particular age group.

(d) Take or fail to take any action on the basis of marital status if that status is prohibited under its antinepotism policy.

(9) This section shall not apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public accommodation to members of that religious corporation, association, educational institution, or society or to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities.

(10) Each employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice provided by the commission setting forth such information as the

> commission deems appropriate to effectuate the purposes of ss. 760.01-760.10.

14. The Act gives the FCHR the authority to issue an order prohibiting the practice and providing affirmative relief from the effects of the practice, including back-pay, if it finds following an administrative hearing that an unlawful employment practice has occurred. See § 760.11, Fla. Stat (2011). To obtain relief from the FCHR, a person who claims to have been the victim of an "unlawful employment practice" must, "within 365 days of the alleged violation," file a complaint ("contain[ing] a short and plain statement of the facts describing the violation and the relief sought") with the FCHR. § 760.11(1), Fla. Stat. (2011). Petitioner filed a complaint within the statutory time limitation.

15. Petitioner's complaint alleged that she was discriminated against based on her gender and pregnancy. Presumably, others not in her condition were treated more favorably.

16. Petitioner was not discriminated against based upon gender and pregnancy. Petitioner’s place of business was going through upheaval and change during her maternity leave. Residents were being moved from public housing to private housing. No units would be leased when Petitioner was eligible to return to work. Petitioner did not present evidence that any

employee was given more favorable treatment than she. Respondent did not hire or transfer an employee to do Petitioner’s work.

17. Petitioner has the burden of proving the allegations asserted. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001).

18. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption." See Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004)("Direct evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.'"). "If the [complainant] offers direct evidence and the trier of fact accepts that evidence, then the [complainant] has proven discrimination." Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). In this case, Petitioner failed to prove discrimination by direct evidence. She proved she is a female who was pregnant during a portion of the relevant time period of this case, but she established little else.

19. Moreover, although victims of discrimination may, by indirect evidence, be "permitted to establish their cases through inferential and circumstantial proof," Petitioner similarly failed to present credible inferential or

circumstantial proof. See Kline v. Tennessee Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

20. Had Petitioner established evidence of discrimination, the burden would have shifted to Respondent to articulate a legitimate, non-discriminatory reason for its action. In this case, although not required to do so, Respondent addressed Petitioner's claim. As previously stated, once the Orlando Housing Authority took over the management of the facilities, Petitioner was not needed as a leasing clerk. Units were being closed, not leased. Families were being moved to private, Section 8-subsidized opportunities. When an employer successfully articulates a reason for its action, then the burden shifts back to the complainant to establish that the proffered reason was a pretext for the unlawful discrimination. See Malu v. Cty of Gainesville, 270 Fed. Appx. 945; 2008 U.S. App. LEXIS 6775 (11th Cir. 2008). In this case, the persuasive evidence established that Petitioner was not terminated or denied employment based upon her gender or pregnancy. Respondent's explanation was not a pretext for unlawful discrimination, and Petitioner established no facts that would suggest otherwise. In light of the foregoing, Petitioner's employment discrimination complaint must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding no cause for an unlawful employment practice as alleged by Petitioner, and dismissing her employment discrimination complaint.

DONE AND ENTERED this 3rd day of January, 2013, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
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Filed with the Clerk of the
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this 3rd day of January, 2013.

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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.