STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KATHERINE E. OTTO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-2475
	)	
DUVAL COUNTY PUBLIC SCHOOLS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings (DOAH), on November 1, 2012, in Jacksonville, Florida.

APPEARANCES

For Petitioner: Katherine E. Otto, pro se
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For Respondent: David J. D'Agata, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Duval County Public Schools (DCPS), violated the rights of Petitioner, Katherine E.

Otto, under the Florida Civil Rights Act, chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner alleges that DCPS terminated her employment as a school teacher due to her race, gender, and age, in violation of the Florida Civil Rights Act. She did not challenge her alleged "termination" in an administrative hearing before DOAH. Rather, she filed an Employment Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (FCHR), which, after an investigation, issued a "no cause" Notice of Determination on June 8, 2012. FCHR subsequently transferred the matter to DOAH for further proceedings upon receipt of Petitioner's Petition for Relief (Petition), dated July 13, 2012.

DCPS maintains that Petitioner did not suffer an adverse employment action, and actually resigned from her teaching position. Even assuming that DCPS did, in fact, terminate Petitioner's employment, Respondent contends that it had several legitimate reasons for doing so. Finally, DCPS asserts that FCHR did not have jurisdiction over the controversy in the first instance because Petitioner did not file the Complaint until more than one year after the alleged "last act" of discrimination. In light of these circumstances, DCPS states that it should be reimbursed its litigation expenses and costs incurred in defending the matter.

A final hearing was held on November 1, 2012. In addition to her own testimony, Petitioner presented one witness at the hearing, but did not present any documentary evidence into the record. Respondent presented three witnesses and 20 exhibits into the record, to which Petitioner did not object.

At the conclusion of the hearing, the parties were given until December 5, 2012, to file the proposed recommended orders. The Transcript of the hearing was filed on November 21, 2012, and Respondent timely filed its proposed recommended order. Petitioner did not make a post-hearing submission.

References to statutes are to Florida Statutes (2012) unless otherwise noted.

FINDINGS OF FACT

1. Ms. Otto filed a Complaint with FCHR, alleging race, sex, and age discrimination against DCPS, having been employed by the school district as a school teacher from December 2009 until September 2010.

2. The Complaint alleges that Dr. Alvin Brennan, the principal of the Forrest High School, where Ms. Otto worked as a teacher: (a) announced at a staff meeting that he "prefers all black male young teachers"; (b) announced at another staff meeting that "anyone who takes off a Friday or a Monday . . . will be fired"; (c) verbally harassed Ms. Otto; and (d) discharged her for calling in sick.

3. The face of the Complaint shows that it was signed by Ms. Otto on October 24, 2010 - only weeks after the last date of alleged discriminatory conduct on September 8, 2010.

4. However, the "date stamp," which also appears on the face of the Complaint, shows that it was not received by FCHR until October 25, 2011.

5. Notably, FCHR sent to DCPS a "Notice of Filing of Complaint of Discrimination" on November 10, 2011, which was stamped as received by DCPS on November 16, 2011.

6. At the hearing, Ms. Otto could not explain the apparent delay of exactly one year and one day between the date she signed the Complaint and the date it was stamped as received by FCHR.

7. Ms. Otto testified that she never actually typed the Complaint. Further, she stated the typed Complaint was inconsistent with a handwritten version she originally submitted to FCHR "a month or two before" October 24, 2010.

8. Surmising at the hearing that "someone" at FCHR must have typed the Complaint, Ms. Otto testified that she signed and returned the document even though it showed that she was 11 years older than her actual age of 50 years.

9. Ms. Otto's Petition for Relief contains accusations about harassment and "racists remarks" by Dr. Brennan, and adds that he and other DCPS personnel "committed purjery to [the Commission]" [sic] during its investigation of the Complaint.

10. Unlike the Complaint, the Petition for Relief also states that Ms. Otto was "was fired for no reason" as opposed to being fired for calling in sick.

11. At the final hearing, Ms. Otto testified that she did not know why she was fired, and it was only "possible" that she was fired due to her race, gender, or age.

12. Ms. Otto testified that her Complaint and Petition were based on events in August and September 2010, shortly after Dr. Brennan became the principal of Forrest High School.

13. By the end of the 2009-2010 school year, Forrest High School was identified as "critically low performing," having received consecutive "school grades" of "F" or "D" over the preceding school years.

14. The District was, therefore, required to treat Forrest High School as a "turn-around school," and replace/"reconstitute" much of its staff and administrative team.

15. Dr. Brennan, a veteran educator and administrator of 27 years, was selected by the superintendent to replace the principal at Forrest High School at the beginning of the 2010-2011 school year, since he had a successful track record for improving other low-performing schools.

16. Dr. Brennan conducted various staff meetings just before and during the first two weeks of the school year.

17. According to Ms. Otto, Dr. Brennan stated at one such meeting that anyone who took a Friday off would be fired.

18. Ms. Otto testified that Dr. Brennan stated at another meeting that he prefers to hire young African-American men. Ms. Otto thereafter "felt like [she] was being harassed, discriminated against because [Brennan] was just going after white women."

19. Despite these negative "feelings" about Dr. Brennan, Ms. Otto never made a complaint to the school district about him or his comments.

20. Ms. Otto stated that she privately met with Dr. Brennan on only two occasions. During the first private meeting at the beginning of the 2010-2011 school year, Dr. Brennan "yelled" at Ms. Otto for speaking with state officials who visited Forrest High School due to its "turn-around" status. The second private meeting was on September 8, 2010, when Dr. Brennan purportedly "harassed" Ms. Otto for missing lesson plans, and "yelled" that she was fired.

21. In the days leading up to the September 8 conference, Dr. Brennan and Assistant Principal Jeravon Wheeler visited Ms. Otto's class and warned her about missing lesson plans.

22. At all times, Ms. Otto was aware that she was required to have lesson plans readily available in her class.

23. During a scheduled classroom observation on August 31, 2010, Ms. Wheeler (once again) noted Ms. Otto's lack of lesson plans.

24. A post-observation conference was to take place on Friday, September 1, 2010. There is conflicting evidence as to whether Ms. Otto was present on that date. The record contains a post-observation "teacher assessment instrument" which Ms. Otto apparently signed and dated on September 1, 2010.

25. However, Ms. Otto claims to have called in sick after her observation and did not return to the school until September 8, 2010.

26. When summoned to Dr. Brennan's office on the morning of September 8, 2010, Ms. Otto assumed he wanted to discuss her illness-related absence and her discussions with "people from the State."

27. Ms. Wheeler also attended the September 8 conference with Ms. Otto and Dr. Brennan.

28. Contrary to Ms. Otto's view, Dr. Brennan and Ms. Wheeler testified that the September 8 conference was actually called to: (a) discuss the classroom observation; (b) present a "non-compliance letter" for Ms. Otto's repeated failure to provide lesson plans; and (c) place her on a "Success Plan" formulated to improve her overall teaching performance.

29. Ms. Otto walked out of the September 8 conference before Dr. Brennan had the chance to provide her with the Success Plan and non-compliance letter.

30. Dr. Brennan's contemporaneous handwritten notes on the non-compliance letter indicated that Ms. Otto abruptly quit during the September 8 conference and "walked off the job."

31. Ms. Otto testified that she left the September 8 conference because Dr. Brennan was screaming at her and yelled that she was fired. She denied, however, that Dr. Brennan made any comments about race, gender, or age at that time.

32. Dr. Brennan and Ms. Wheeler testified that Dr. Brennan neither raised his voice nor stated that Ms. Otto was fired during the September 8 conference.

33. Rather, according to Dr. Brennan and Ms. Wheeler, it was Ms. Otto who became indignant during the September 8 conference, and who abruptly quit and walked out of the school after "throwing" her district-issued laptop on the desk of Dr. Brennan's assistant.

34. Ms. Otto testified that she ultimately submitted lesson plans at some point after her August 31, 2010, observation, though that was disputed by Dr. Brennan.

35. Regardless, Ms. Otto admitted during the hearing that she was "unprepared" during Ms. Wheeler's observation and the lesson plans entered into the record which she purportedly

prepared for the August 31 observation were incomplete and inadequate.

36. Dr. Brennan and Ms. Wheeler concurred that the lesson plans presented at the hearing were defective.

37. Ms. Otto testified that she contacted a lawyer with the teacher's union immediately after the September 8 conference.

38. Ms. Otto thereafter learned that Dr. Brennan did not have the authority to unilaterally fire her. Nevertheless, Ms. Otto advised the union lawyer that she would not go back to the school in any event because she was "allergic to it."

39. Ms. Otto testified that the union lawyer gave her assurances that she would be reassigned to another school. These and other statements purportedly made by the union lawyer amounted to hearsay and were not corroborated by other, independent evidence.

40. Shortly after the September 8 conference, Ms. Otto received from the school district a letter dated September 9, 2012, which indicated its recognition of Ms. Otto's resignation and encouraged her to contact the sender (Ms. Dawn Gaughan) with any questions.

41. Ms. Otto did not respond to the September 9, 2012, letter, assuming that the union lawyer was securing her another teaching position in a different school.

42. Ms. Otto testified that she called in substitutes on the days immediately following the September 8 conference using the school district's automated telephone system. However, she also stated that the personal identification number she needed to access the system was invalid at the time of her departure from the school.

43. Having lost faith in the union lawyer's assurances, Ms. Otto testified that she eventually spoke with the school district human resources' personnel about the September 8 conference, but could not remember when that occurred.

44. Ms. Otto subsequently filed a claim for unemployment compensation which was rejected on the grounds that she voluntarily resigned from her position. However, an Unemployment Compensation Appeals Referee ultimately determined that Ms. Otto was entitled to compensation because (during a telephonic hearing on the matter) the school district presented inadmissible hearsay to debunk Ms. Otto's assertion that she had been fired.

45. At the hearing, Ms. Otto presented the testimony of Ms. Judith Julian, who claimed that she was "forced to resign" due to harassment by Dr. Brennan and Ms. Wheeler.

46. Ms. Julian stated that Dr. Brennan "harassed" her by forcing her to park in the teacher's parking area, and Ms. Wheeler harassed her by "following" Ms. Julian on campus during a phone call.

47. Ms. Julian had "no idea" whether such "harassment" was motivated by any animus toward her gender, age, or race, and also commented that she was "replaced" by a male Caucasian.

48. According to Ms. Julian, lesson plans: (a) are "absolutely" important; (b) should be available at all times; and (c) are part of a teacher's contractual duties.

49. Ms. Julian testified that the only personal interaction she had with Dr. Brennan was during a classroom observation when Dr. Brennan stated that she was "a great teacher."

50. Ms. Julian stated that she never heard Dr. Brennan make statements about Ms. Otto's race, gender, or age.

51. Ms. Julian did not attend and, therefore, could not comment on the September 8, 2010, conference. She did, however, recall statements purportedly made by Dr. Brennan at a staff meeting regarding a preference to hire African-American teachers.

52. Dr. Brennan and Ms. Wheeler testified that Dr. Brennan made no such announcement, though he did discuss the need for a staff which reflected the demographics of the community served by Forrest High School.

53. Dr. Brennan also presented statistics showing that his hiring decisions had no appreciable impact on staff demographics at the high school. Rather, African-American staff members increased by only seven percent and the percentage of male

teachers at the school actually decreased between the 2009-2010 and 2010-2011 school years.

54. Regardless, the testimony and evidence of record show that school principals do not have unilateral authority to terminate a teacher.

55. The testimony offered by Dr. Brennan and Ms. Wheeler was consistent with contemporaneous notes and statements they prepared in September 2010 as well as other written statements they later prepared for the School District's Office of Equity and Inclusion in November 2011.

56. The collective bargaining agreement between the school district and the teachers' union, Duval Teachers United (DTU), stresses the importance of lesson plans and the expectation that teachers shall have them at all times.

57. The agreement also provides that insubordinate conduct and failure to prepare lesson plans merit discipline up to and including dismissal.

58. Further, the collective bargaining agreement also contains school district policies against harassment and directions on how to process complaints.

59. Ms. Otto was aware of these policies and procedures, but never lodged any complaints against Dr. Brennan with school district officials.

60. Based on the testimony and evidence of record, the greater weight of the evidence demonstrates that Ms. Otto resigned from her position during a September 8, 2010, conference with Dr. Brennan and Ms. Wheeler.

61. Further, the evidence shows that Ms. Otto failed to provide timely and complete lesson plans despite several warnings from her superiors. This failure alone would support dismissal, as would Ms. Otto's insubordinate conduct or abandonment of her post.

62. The Employment Complaint of Discrimination, filed with FCHR by Ms. Otto appears to be signed and dated by her on October 24, 2010, only 46 days after the last incident giving rise to her claim occurred. However, the date stamp from FCHR on that document is for October 25, 2011, more than 365 days after the September 8, 2010 incident. No explanation was given for this discrepancy in the dates on the complaint giving rise to this matter.

63. Ms. Otto testified at the hearing that she "didn't care which way this case goes" and was "happy" just to be there.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57, and 760.11, Fla. Stat.

65. Ms. Otto claims that she was discriminated against by DCPS based on her race, gender, and age, in violation of the Florida Civil Rights Act (FCRA), which prohibits discrimination in the workplace because of these and other immutable traits, such as an individual's color, national origin, handicap, or marital status. See § 760.10, et. seq., Fla. Stat. (2012).

66. As the Petitioner in this discrimination case, Ms. Otto must prove the claims against DCPS under the preponderance of the evidence standard. See Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 179 (2009) ("we hold that a plaintiff . . . must prove, by a preponderance of the evidence, that age was the 'but for' cause of the challenged adverse employment action").

67. The FCRA is construed in conformity with its federal counterpart, Title VII of the Civil Rights Act, and its related regulations. See Chanda v. Engelhard/ICC, 234 F.3d 1219, 1221 (11th Cir. 2000), Greene v. Seminole Elec. Coop., Inc., 701 So. 2d 646, 647 (Fla. 5th DCA 1997). (Title VII provides that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(l)(2012)).

68. The "McDonnell Douglas [McDonnell Douglas Corp. v. Green, 411 U.S.792 (1973)] shifting burden analysis" is applied to claims of this nature. See St. Johns Cnty. Sch. Dist. v. O'Brien, 973 So. 2d 535, 541 (Fla. 5th DCA 2007).

69. Under McDonnell Douglas, a plaintiff must first establish a prima facie case of discrimination. This requires proof that: (a) the plaintiff belongs to a "protected class" of individuals; (b) the plaintiff was subjected to adverse employment action; (c) similarly-situated employees outside of the plaintiff's class were treated more favorably than the plaintiff; and (d) the plaintiff was qualified to do the job. See City of W. Palm Beach v. McCray, 91 So. 3d 165, 171 (Fla. 4th DCA 2012) (citing U.S. E.E.O.C. v. Mallinckrodt, Inc., 590 F. Supp. 2d 1371, 1375 (M.D. Fla. 2008)).

70. An "adverse employment action" is "an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment . . . ." Haines v. Potter, 137 Fed. Appx. 216, 217 (11th Cir. 2005).

71. Conduct that does not meet this level of substantiality may not constitute "adverse employment action," as that term is construed in the law. See, e.g, Vitt v. City of Cincinnati, 97 Fed. Appx. 634, 640 (6th Cir. 2004) (employee's unfavorable performance review which allegedly contained untrue statements

did not constitute adverse employment action), Garrison v. Gambro, Inc., 428 F.3d 933, 939 (l0th Cir. 2005) (suggestion that an employee resolve a dispute without lawyers was not a retaliatory act that affected her employment status and, therefore, did not constitute adverse employment action), Poppy v. City of Willoughby Hills, 96 Fed. Appx. 292, 296 (6th Cir. 2004) (mayor's rude gesture and comment to city employee was not adverse employment action).

72. Once a prima facie case is established, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove a claim by showing that the reason proffered is pre-textual. See O'Brien at 541.

73. The proffered reasons are not pre-textual, however, "unless it is shown both that the reason was false, and that discrimination was the real reason." Houston v. Town of Palm Beach Shores, 2012 U.S. Dist. LEXIS 167146, 19 (S.D. Fla., 2012), quoting Cooper v. S. Co., 390 F.3d 695, 725 (11th Cir. 2004).

74. Here, before applying the McDonnell Douglas shifting burden analysis, it is arguable that Ms. Otto's Complaint is "time barred" under the FCRA, which serves as the sole basis for her claims.

75. The FCRA provides that "[a]ny person aggrieved by a violation of [the Act] may file a complaint with the commission within 365 days of the alleged violation. . . ." § 760.11(1), Fla. Stat.

76. Where the charge of discrimination is filed with FCHR more than 365 days after the alleged act of discrimination, it is time-barred and not actionable. See City of W. Palm Beach v. McCray, 91 So. 3d 165, 172 (Fla. 4th DCA 2012) ("McCray's time to file a charge based on his termination expired a year after it occurred. Under the federal counterpart of the FCRA, discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges"); Brewer v. Clerk of Circuit Court, 720 So. 2d 602, 604 (Fla. 1st DCA 1998) (affirming dismissal of employment discrimination and retaliation complaint for failing to comply with statutory prerequisites).

77. For purposes of calculating this 365-day period, the FCRA provides that FCHR "shall clearly stamp on the face of the complaint" the date upon which it is filed and, "if clearly stamped . . . that date is the date of filing." § 760.11(1), Fla. Stat.

78. As explained above, although Ms. Otto appears to have signed her Complaint on October 24, 2010, FCHR's stamped receipt date is October 25, 2011. The coincidence of the October 25

stamped date versus the October 24 (even with different years) handwritten date was unexplained at the hearing. Perhaps the date stamp had the incorrect year displayed. Perhaps Ms. Otto's signature was affixed to the complaint on October 25, 2011, which would have been more than 365 days from the last incident complained of by Petitioner. These are questions left unanswered following the hearing. I accept that Ms. Otto, based upon her testimony, intended to timely file the Complaint, yet the date stamp discrepancy remains a mystery. Based upon section 760.11(1), I cannot ignore FCHR's date stamp and, since no one from the agency was called to testify on the issue of the timeliness of the Complaint, I cannot make a finding that the Complaint was definitely timely filed. I also cannot conclude that Ms. Otto filed her complaint untimely in bad faith because FCHR should have refused the Complaint at the time it was filed if it was more than 365 days from the last incident giving rise to the Complaint.

79. Regardless of the timing issue, based on the findings of fact outlined above, Ms. Otto failed to establish a prima facie case of discrimination, as the preponderance of the evidence shows that she resigned from her position and did not suffer an adverse employment action. DCPS presented substantial proof that Ms. Otto was subject to termination despite her race, age, and gender. Specifically, the record demonstrates that

Ms. Otto could have been discharged based on either: (a) her persistent failure to provide lesson plans, (b) her insubordinate conduct during the September 8, 2010, conference, or (c) the abandonment of her post when she "walked off the job" and never returned to Forrest High School. These findings render the timeliness issue moot.

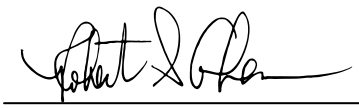
80. In sum, Ms. Otto filed a complaint of discrimination against DCPS which may have been untimely, but was definitely factually flawed. The evidence does not support her position that Dr. Brennan spoke before the faculty and made assertions that he preferred to hire only young African-American men as his teachers. It is obvious that Ms. Otto persisted with her case merely out of misplaced anger towards her principal, and not out of a sincere belief she had been discriminated against.

81. In light of the facts set out above, DCPS may be entitled to reimbursement of its legal fees, costs, and expenses incurred in defending this cause pursuant to chapter 120, Florida Statutes. In order to determine whether Ms. Otto's complaint of discrimination was brought for an improper purpose or was not supported by sufficient law or fact at the time it was filed, a separate action for attorney's fees and costs may be filed by the DCPS pursuant to section 120.595 or 57.105, Florida Statutes, in the event FCHR enters a final order in favor of Respondent.

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 Katherine E. Otto's Employment Complaint of Discrimination and Petition for Relief.

DONE AND ENTERED this 28th day of December, 2012, 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.