STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARLENE SERRANO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-2551
	)	
ORANGE COUNTY FIRE RESCUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On December 17, 2012, an administrative hearing in this case was held by video teleconference between Tallahassee and Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott Christopher Adams, Esquire
LaBar and Adams, P.A.
1527 East Concord Street
Orlando, Florida 32803

For Respondent: Susan T. Spradley, Esquire
Gray Robinson, P.A.
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STATEMENT OF THE ISSUE

The issue in this case is whether Orange County Fire Rescue (Respondent) committed an act of unlawful employment discrimination against Marlene Serrano (Petitioner) in violation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

On December 12, 2011, the Petitioner filed a discrimination complaint with the Florida Commission on Human Relations (FCHR), alleging that the Respondent had committed unlawful employment discrimination against the Petitioner because of her race and national origin.

On May 29, 2012, the FCHR issued a "reasonable cause" determination, and, on June 21, 2012, the Petitioner filed a Petition for Relief with the FCHR. On July 27, 2012, the FCHR forwarded the case to the Division of Administrative Hearings for further proceedings.

The administrative hearing was initially scheduled for October 1, 2012, and was subsequently rescheduled for December 17 and 18, 2012, upon the joint request of the parties. The hearing concluded after the first day of hearing.

At the hearing, the Petitioner testified on her own behalf, presented the testimony of two additional witnesses, and had Exhibits numbered 1 and 2 admitted into evidence. The Respondent presented the testimony of five witnesses and had Exhibits numbered 1 and 2 admitted into evidence. Joint Exhibits numbered 1 through 28 were also admitted into evidence.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation including a statement of admitted facts that are accepted and have been incorporated herein as necessary.

A Transcript of the hearing was filed on January 7, 2013. Both parties filed proposed recommended orders on January 14, 2013, that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is a Puerto Rican-born Hispanic female. At all times material to this case, the Petitioner was employed by the Orange County Fire Rescue Department (FRD), a unit of the Orange County government.

2. In order to increase the number of firefighters available to the Respondent, the FRD posted a job advertisement in July 2008 ("Job Req. #007931"), seeking to hire state-certified paramedics who were capable of becoming state-certified firefighters.

3. The advertisement clearly indicated that applicants should be state-certified paramedics who were "[c]apable of successfully completing and maintaining the Florida State Firefighter certification after three (3) years of being hired."

4. Employees hired into the new paramedic-firefighter positions were identified as "paramedics." Employees hired as paramedics only were identified as "PMOs."

5. On September 8, 2008, the FRD officially hired four paramedics for the positions advertised by Job Req. #007931. The group included the Petitioner, two Caucasian females (Sarah

Wilson and Jennifer Massey) and a Caucasian male (Shane Doolittle).

6. It was commonly understood by those hired, including the Petitioner, that they were required to obtain state certification as firefighters by September 18, 2011, the third anniversary of their employment.

7. Pursuant to the advertised job requirements, the paramedics were required to pass a physical ability test (referred to as the "CPAT") and complete the Orange County firefighter orientation program. The Petitioner passed the CPAT on her second attempt and completed the orientation program.

8. Candidates seeking to be certified by the State of Florida as firefighters are required to complete a 450-hour firefighter training course (commonly referred to as Firefighter I and II Minimum Standards classes) and to pass a firefighter certification exam.

9. The Petitioner had completed the Firefighter I and II Minimum Standards classes as of December 17, 2010.

10. On December 22, 2010, the Petitioner took the firefighter certification exam at the Central Florida Firefighter Academy and failed the hose and ladder components of the exam.

11. When the Petitioner failed to pass the exam, the Respondent placed her in a fire station with a ladder truck company so that she could improve her ladder skills.

12. On February 22, 2011, the Petitioner retook the firefighter certification exam at a training facility in Ocala, Florida, where she successfully completed the hose component of the exam, but again failed the ladder component.

13. A candidate for firefighter certification is permitted to take the exam twice. A candidate who twice fails the exam is required to retake the Firefighter II Minimum Standards class before being permitted to retake the certification exam.

14. On March 8, 2011, the Petitioner met with FRD officials to assess her progress towards obtaining the firefighter certification.

15. The Petitioner had received notice of the meeting on March 1, 2011, from Assistant Fire Chief Brian Morrow. Similar meetings occurred with the other paramedics employed by the Respondent.

16. During the meeting, the Petitioner advised the FRD officials that she intended to dispute the results of her second test.

17. The Petitioner was aware that she could not retake the certification exam without retaking the Firefighter II Minimum Standards class. Although the Petitioner contacted a training facility to inquire about course schedules, she did not attempt to retake the training course.

18. The March 8 meeting and discussion was memorialized in a letter to the Petitioner dated March 14, 2011. The letter contained an assessment of her progress towards certification. The letter also noted that she was required to obtain her state certification prior to September 18, 2011, and that failure to obtain certification by that date could result in termination of her employment. The Petitioner received the letter on March 16, 2011.

19. In an email dated March 22, 2011, to FRD Lieutenant John Benton, the Petitioner advised that she was trying to determine how she would be able to go to class and maintain her work schedule. Lt. Benton forwarded the email to Assistant Fire Chief Morrow.

20. Assistant Fire Chief Morrow replied to the Petitioner's email on March 29, 2011, wherein he advised her that the FRD had met its obligation to fund the certification training. He asked the Petitioner to advise him of the status of her appeal, to identify the class she was planning to take, and to outline her schedule and specify the hours she would use as vacation time and as "time trades." He asked for a response "as soon as possible" and invited the Petitioner to contact him directly to resolve any questions.

21. The Petitioner received Assistant Fire Chief Morrow's March 29 email, but did not respond to it.

22. Assistant Fire Chief Morrow subsequently contacted the Petitioner by telephone to inquire as to the issues noted in the email, but received little additional information from the Petitioner regarding her plans.

23. After receiving the official notice that she had failed her second attempt at the certification exam, the Petitioner filed an administrative appeal (DOAH Case No 11-1556) to dispute the scoring of the exam. A hearing was conducted before an Administrative Law Judge (ALJ) on May 24, 2011.

24. On July 7, 2011, the ALJ issued a Recommended Order finding that the Respondent failed the exam and recommending that the appeal be denied. By Final Order dated August 20, 2011, the State of Florida, Department of Financial Services, Division of State Fire Marshall, adopted the findings and recommendation of the ALJ and denied the Petitioner's appeal of the exam grading.

25. The Final Order specifically noted that the Petitioner's certification was denied until she obtained a passing score on the exam.

26. The Petitioner made no further efforts to become a state-certified firefighter. She did not register to retake the Firefighter II Minimum Standards class.

27. As of September 17, 2011, the Petitioner was not a certified firefighter and was not actively engaged in seeking certification.

28. Because the Petitioner did not meet the published job requirements and was making no effort to meet them, the Respondent terminated the Petitioner from employment on September 17, 2011.

29. The Respondent offered to permit the Petitioner to resign from her employment rather than be terminated, but she declined the offer.

30. At the hearing, the Petitioner testified that, after she twice failed to pass the certification exam and was unsuccessful in challenging the scoring of the second attempt, she had no further interest in obtaining the certification.

31. There is no evidence that the Petitioner requested an extension of the applicable three-year certification deadline. Nonetheless, the Petitioner has asserted that the Respondent provided deadline extensions to other paramedics and that the Respondent's actions, in not providing an extension to her and in terminating her employment, were based on her race or national origin. There is no evidence to support the assertion.

32. The March 14, 2011, letter specifically referenced the published job requirements set forth in Job Req. #007931, as well as the applicable provisions of the Collective Bargaining Agreement (CBA) governing the Petitioner's employment by the Respondent.

33. The Petitioner was a member of the Orange County Professional Fire Fighters Association. Her employment by the Respondent was subject to a CBA dated December 14, 2010, between the Respondent and the Orange County Professional Fire Fighters Association, Local 2057, International Association of Fire Fighters.

34. Section IV, Article 60, of the CBA provided as follows:

> ARTICLE 60 - PARAMEDIC
> PROMOTIONS/STATUS CHANGE
>
> 60.01 Employees in the Paramedic classification agree to, upon reaching three (3) years of employment [sic] to meet the requirements of the Firefighter classification. Either upon reaching three (3) years of employment, or upon the desire of the department, the employee shall be moved from the Paramedic pay plan to Step 1 of the Firefighter pay step plan or to the higher nearest step to the employee's Paramedic current rate of pay.
>
> 60.02 Nothing in this Agreement shall prohibit the Orange County Fire/Rescue Department from terminating the employment of a Paramedic when upon reaching three (3) years employment the minimum requirements for the position of Firefighter have not been met.
>
> Employees not meeting the minimum qualifications by the three (3) year employment anniversary may be separated from county employment without a predetermination hearing (PDH) and without access to Article 17 - Grievance and Arbitration Procedure of this contract. It is the sole discretion of Fire Rescue Management to extend the three (3) year time frame limitation due to

case-by-case circumstances and/or operational need.

35. The evidence establishes that certification deadlines have rarely been extended by FRD officials. The evidence fails to establish that FRD officials have considered race or national origin in making decisions related to deadline extensions.

36. Sarah Wilson, a Caucasian female, was hired at the same time as the Petitioner and the deadline by which she was required to have obtained firefighter certification was September 18, 2011.

37. Ms. Wilson completed the training course on September 15, 2011. She was scheduled to sit for the certification exam on October 4 and 5, 2011.

38. The scheduling of the exam was the responsibility of the training facility. Neither Ms. Wilson nor the Respondent had any control over the testing date or the scheduling of the exam. The Respondent permitted Ms. Wilson to remain employed beyond the certification deadline and through the dates of the exam, an extension of 17 days.

39. The extension granted to Ms. Wilson was the only time that the Respondent has allowed a paramedic more than 36 months of employment in which to obtain the required certification.

40. Ms. Wilson passed the firefighter exam on October 4 and 5, 2011, and became a state-certified firefighter. Had

Ms. Wilson not passed the exam on October 4 and 5, 2011, her employment would have been terminated by the Respondent.

41. At the time of the hearing, Ms. Wilson retained all required certifications and remained employed as a firefighter paramedic with the FRD.

42. In contrast to Ms. Wilson, the Petitioner was making no effort to obtain the required certification when the certification deadline passed.

43. There was no evidence that the Respondent's extension of Ms. Wilson's certification deadline was based upon race or national origin.

44. Jennifer Massey, a Caucasian female who was hired at the same time as the Petitioner, left her employment with the Respondent prior to the certification deadline.

45. Shane Doolittle, a Caucasian male, was hired at the same time as the Petitioner, and the deadline by which he was required to have obtained firefighter certification was originally September 18, 2011. However, Mr. Doolittle was called to active military duty for three months during the three-year certification period.

46. In order to provide Mr. Doolittle with the full 36 months of employment prior to the certification deadline, the Respondent extended Mr. Doolittle's certification deadline by three months, to December 18, 2011.

47. In contrast to Mr. Doolittle, the Petitioner was employed and present with the FRD throughout the three-year period and had a full 36 consecutive months in which to obtain the required certification.

48. There was no evidence that the Respondent's extension of Mr. Doolittle's certification deadline was based upon race or national origin.

49. Mr. Doolittle did not become certified by the extended deadline, and the Respondent terminated his employment on December 18, 2011.

50. There is no evidence that the Respondent was not invested in each paramedic successfully completing their training and meeting the requirements set forth in Job Req. #007931. The Respondent hired 12 paramedics in 2008. The Respondent paid the tuition and equipment costs for each paramedic who sought state certification as a firefighter. Additionally, the Respondent paid the salaries and benefits for the paramedics while in classes or exams, as well as the costs of the employees who covered the shifts of such paramedics.

51. The Petitioner received the same training and benefits as all other employees seeking certification.

52. The Respondent anticipated that the Petitioner would ultimately complete the training and exam requirements for

certification, and she participated in the recruit training graduation ceremony with her colleagues.

53. The 2008 hires included a Puerto Rican-born Hispanic male who obtained his firefighter certification prior to the deadline, and a Caucasian male who resigned from employment in lieu of termination because he had not obtained the firefighter certification by the deadline and was making no progress towards doing so.

54. During the termination meeting with the Petitioner, FRD Chief Michael Howe advised the Petitioner that she was eligible for re-employment with the FRD if she obtained the firefighter certification.

55. About a week after the termination meeting, Chief Howe called the Petitioner and left a voice message, offering to loan equipment to the Petitioner and to sponsor her for a discount on tuition costs, should she choose to retake the required course and become re-eligible for the certification exam. Chief Howe received no response from the Petitioner.

CONCLUSIONS OF LAW

56. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.57(1) and 760.11(4), Fla. Stat. (2012).

57. Section 760.10(1)(a), Florida Statutes (2011), states that it is unlawful 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." Florida courts interpreting the provisions of the referenced statute have held that federal discrimination laws should be used as guidance when construing provisions of the Florida law. See Brand v. Fla. Power Corp. 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991). Accordingly, the legal analysis applicable to federal discrimination laws is properly considered in this case.

58. The Petitioner has the burden to establish discrimination either by direct or indirect evidence. Direct evidence is evidence that, if believed, would prove the existence of discrimination without inference or presumption. Carter v. City of Miami, 870 F.2d 578, 581-582 (11th Cir. 1989). Blatant remarks, whose intent could be nothing other than to discriminate, constitute direct evidence of discrimination. See Earley v. Champion International Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). There is no evidence of direct discrimination in this case.

59. Absent direct evidence of discrimination, the Petitioner has the burden of establishing a prima facie case of

discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In order to establish a prima facie case of discrimination, the Petitioner must show that: she is a member of a protected group; she is qualified for the employment position; she was subject to an adverse employment decision; and she was treated less favorably than were similarly-situated persons outside the protected class. McDonnell Douglas, 411 U.S. at 802.

60. If the Petitioner establishes the facts necessary to demonstrate a prima facie case, the employer must then articulate some legitimate, nondiscriminatory reason for the challenged employment decision. The employer is required only to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, 450 U.S. at 257. The employer "need not persuade the court that it was actually motivated by the proffered reasons. . . ." Burdine, 450 U.S. at 254. This burden has been characterized as "exceedingly light." Perryman v. Johnson Products Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983).

61. Assuming that the employer articulates a legitimate, nondiscriminatory reason for the employment decision, the burden shifts back to the Petitioner, who must then establish that the

reason offered by the employer is not the true reason, but is mere pretext for the decision.

62. The ultimate burden of persuading the trier of fact that there was intentional discrimination by the Respondent remains with the Petitioner. Burdine, 450 U.S. at 253.

63. In this case, the Petitioner has failed to establish the elements required to establish a prima facie case. While the evidence establishes that the Petitioner is a member of a protected group and that she was subject to an adverse employment decision, the evidence fails to establish that the Petitioner was qualified to retain the job for which she was hired, or that she was treated less favorably than was a similarly-situated person outside the protected class.

64. The evidence fails to establish that the Petitioner was qualified to retain her employment as a paramedic. The Respondent terminated the Petitioner's employment because she was not qualified for the position. The paramedics hired by the Respondent in response to Job Req. #007931 were expected to become state-certified firefighters within three years of their employment. At the end of the three-year period, the Petitioner had not obtained the required certification and was making no effort to become certified.

65. There is no evidence that the Respondent's termination was based on the Petitioner's race or national origin.

66. The Petitioner has also asserted that she was treated less favorably than were similarly-situated persons outside the protected class, because some paramedics received certification deadline extensions. The evidence fails to establish that any similarly-situated paramedics received extensions of the certification deadline.

67. Initially, it should be noted that there is no evidence whatsoever that the Petitioner even requested an extension. In any event, neither Ms. Wilson nor Mr. Doolittle, both of whom received certification deadline extensions, can be considered similarly situated to the Petitioner.

68. The only evidence that an uncertified paramedic has ever been employed beyond the certification deadline was the 17-day extension provided for Ms. Wilson to complete the certification process. The evidence fails to establish that the Petitioner and Ms. Wilson were similarly situated.

69. Upon the expiration of the certification deadline, Ms. Wilson had completed the required training and was waiting for the exam to be administered. Neither Ms. Wilson nor the Respondent had any control over the exam schedule. Had Ms. Wilson not passed the certification exam, her employment would have been terminated.

70. In contrast, the Petitioner was not eligible to retake the certification exam unless she repeated the Firefighter II

Minimum Standards class, and she had not even enrolled in the course.

71. As to the extension of the certification deadline applicable to Mr. Doolittle, the three-month extension did nothing other than to allow him the full three years that was allotted to all paramedics, including the Petitioner, to obtain certification. The three-month extension corresponded directly to the three-month period during which Mr. Doolittle, on active military duty, was away from the FRD.

72. When the extended deadline passed without Mr. Doolittle having obtained the required certification, the Respondent terminated his employment in the same way the Petitioner's employment had been terminated. There is no evidence that Mr. Doolittle was treated more favorably than was the Petitioner.

73. Because the Petitioner failed to establish a prima facie case of discrimination, it is unnecessary to continue the legal analysis of the Petitioner's complaint. However, presuming that the Petitioner's evidence had established a prima facie case, the Respondent has clearly articulated a legitimate, nondiscriminatory rationale for the employment decisions referenced herein, and there is no evidence that the reasons underlying the Respondent's employment decisions were a pretext for unlawful employment discrimination.

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 filed by the Petitioner against the Respondent in this case.

DONE AND ENTERED this 8th day of February, 2013, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 8th day of February, 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.