

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PUSPA RATH,)
)
 Petitioner,)
)
 vs.) Case No. 13-1234
)
 SCHOOL BOARD OF LEON COUNTY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A hearing was held pursuant to notice, on August 26, 2013, in Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Puspa Rath, pro se
2468 Rain Lily Way
Tallahassee, Florida 32311

For Respondent: Deborah Stephens Minnis, Esquire
Ausley & McMullen
123 South Calhoun Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Complaint of Discrimination filed by Petitioner on August 27, 2012.

PRELIMINARY STATEMENT

On or about August 27, 2012, Petitioner, Puspa Rath, filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR), which alleged that the Leon County School Board violated section 760.10, Florida Statutes, by not hiring her on the basis of race, age, gender, and national origin.

The allegations were investigated and on March 5, 2013, FCHR issued its Determination: No Cause. A Petition for Relief was filed by Petitioner with FCHR on April 8, 2013.

FCHR transmitted the case to the Division of Administrative Hearings on or about April 9, 2013. A Notice of Hearing was issued setting the case for formal hearing on June 24, 2013. Two requests for continuance were granted and the hearing was rescheduled for August 26, 2013. The hearing proceeded as scheduled.

At hearing, Petitioner testified on her own behalf and presented the testimony of Sudhanshu Shekhar Rath and Akshaya Kumar Rath. Petitioner offered Exhibits numbered 1 through 11. Petitioner's Exhibits 1, 6, and 7 were admitted in part. Exhibits 2, 4, 5, 8, 9, and 10 were admitted into evidence. Exhibits 3 and 11 were rejected. Respondent presented the testimony of Charles Finley, Demetria Clemons, Clebern Russell

Edwards, Daniel Dielbeck, and Vitalis Dennis. Respondent's Exhibits numbered 1 through 8 were admitted into evidence.

A one-volume Transcript was filed on September 23, 2013. Petitioner filed a post-hearing written submission and Respondent filed a Proposed Recommended Order, which have been considered in the preparation of this Recommended Order.^{1/}

FINDINGS OF FACT

1. Petitioner is a female who has identified her race as Asian and her national origin as Indian. Petitioner's age was not established in evidence. However, based upon the attachments to Petitioner's Petition for Relief, Petitioner was identified as 43 years old, presumably at the time she filed the Complaint of Employment Discrimination. There is nothing in the record to indicate otherwise and, based upon observations of her while testifying at hearing, 43 is a reasonable approximation of her age.

2. Respondent, Leon County School Board (LCSB), is an employer within the meaning of the Florida Civil Rights Act.

3. Petitioner has applied for numerous job openings with the School Board over a number of years. However, based upon the applicable statute of limitations as explained more fully in the Conclusions of Law, there are five LCSB job postings that are at issue in this proceeding, one of which was never filled. The job positions applied for are as follows:

--Job posting 1071-2012, Custodian position at Nims Middle School.

--Job Posting 0170-2012, Instructional paraprofessional position at Sealy Elementary School.

--Job Posting 011-2012, custodian position at Rickards High School.

--Job posting 0201-2012, Assistant Manager for Extended Day Program at J. Michael Conley Elementary School.

--Job posting 0215-2012, Receptionist at Leon County High School. This position was not filled.

4. Petitioner is the mother of two children who are or have been students in the Leon County schools. Petitioner has extensive volunteering experience in LCSB schools. In 2008, she received the Volunteer of the Year award for her volunteer work at Sealy Elementary School. She was invited to and attended the Volunteers of the Year Luncheon in 2008.

5. Petitioner also volunteered at Conley Elementary School in 2011. While Petitioner has considerable volunteer experience in Leon County Schools, she has no job/employment experience since coming to the United States in 1998.

6. Petitioner holds a college degree from Utkal University in India. The unofficial transcript states that it is a "Honours Diploma for Bachelor of Arts (Three Year Degree Course)."

7. Respondent uses the PATS (Paperless Applicant Tracking System) system to accept applications for all job openings within the Leon County School District. Based on information inputted into PATS by applicants, a list of qualified individuals is generated for each position.

8. The PATS system does not ask for or identify an applicant's age, race, national origin, or sex.

9. Vitalis Dennis is the Director of Human Resources for the LCSB. She has general supervision over the PATS system.

10. According to Ms. Dennis, LCSB does not count volunteer work in evaluating work experience. This is a generally applied policy, applied to all applicants, including Petitioner.

11. Hiring decisions are made by each school's principal. The school principals send recommendations for hiring to the District Human Resources office.

Job Posting 1071-2012

12. Petitioner applied for job posting 1071-2012, a custodial position at Nims Middle School.

13. At that time, Charles Finley was assistant principal at Nims. He was in charge of interviewing and hiring vacant custodial positions. The executive secretary at Nims printed a list of applicants from PATS. He then accessed PATS to check applicants' educational and work history to identify applicants

with previous custodial work experience. Generally, he would interview eight to 12 applicants.

14. The successful candidate for this position was Eloise Hatten. Ms. Hatten was 52 years of age, is African-American, and is female.^{2/}

15. Ms. Hatten's application reflects approximately nine years' of cleaning commercial/institutional experience. Mr. Finnley interviewed Ms. Hatten and testified that the interview went well. He describes Ms. Hatten, who is still employed at Nims, as tied for the best hire he ever made.

Job Posting 0170-2012

16. Petitioner applied for Job Posting 0170-2012, Instructional Paraprofessional at Sealy Elementary.

17. Demetria Clemons is the principal of Sealy Elementary School. Ms. Clemons receives and reviews the PATS list of applicants. She then makes a list of applicants for her secretary to call to set up interviews. When reviewing the list, she looks to see if any applicant is a veteran. Then she looks to see if anyone on the list had previous work experience with her or was recommended by a colleague.

18. The successful applicant was Alisha Saint Cloud. Ms. Saint Cloud was 24 years of age, is African-American, and is female. Ms. Clemons interviewed Ms. Saint Cloud and offered her the job. Ms. Saint Cloud was selected for this position

primarily because she held the position as an annual contract employee the previous school year. Annual contract employees often are given notice letters at the end of a school year, as principals do not know at that time whether they will be able to rehire them for the following school year. If staffing allocations allow, the job is then posted. Ms. Saint Cloud was in that situation when Ms. Clemons hired her for this permanent position.

19. Ms. Clemons knew of Petitioner's volunteer work at Sealy, but the volunteer work was done in individual classrooms, not directly for Ms. Clemons.

Job Posting 011-2012

20. Petitioner applied for Job Posting 011-2012, custodian position at Rickards High School.

21. Clebern Russell Edwards is the assistant principal at Rickards High School. He made the hiring decision for this custodial position for which Petitioner applied.

22. A list of applicants generated from PATS was printed by the principal's secretary. He looked to see if any applicants were veterans, then whether any were recommended by colleagues.

23. The successful applicant for that position was Jaterrius Robinson. Mr. Robinson was 23 years of age, and is an African-American male. Mr. Robinson had institutional/

Commercial-cleaning experience and was a graduate of Rickards High School. Mr. Edwards believes that it is important to have someone with experience cleaning in an environment similar to a school in such a position.

24. Mr. Edwards took into consideration Mr. Robinson's work experience, being an alumnus of Rickards, and his outstanding interview when making the decision to hire Mr. Robinson for the job.

Job Posting 0201-2012

25. Petitioner applied for job posting 0201-2012, assistant manager for the Extended Day Program at J. Michael Conley Elementary School.

26. Danielle Dielbeck is the Extended Day Manager at Conley Elementary School. She is responsible for hiring the Extended Day personnel and supervising those employees.

27. Jeremy Rollins was the successful applicant for this position. Mr. Rollins was 23 years of age, and is an African-American male. Ms. Dielbeck reviewed the PATS list of applicants to determine who would be a good fit for the job. She also takes into consideration any recommendations that may come from other schools.

28. Mr. Robinson has work experience as an after-school teacher. Ms. Dielback selected Mr. Robinson because of his experience as an after-school teacher in another program with a

large number of students, and because he also had experience as a cashier for a grocery company. Ms. Dielbeck believed his cashier experience demonstrated that he had experience handling money. She determined that this was a benefit because the Extended Day Program is responsible for its own budget.

Petitioner's assertions

29. Petitioner strongly believes that LCSB has systematically discriminated against her by not hiring her. She believes that LCSB is harassing her personally, including an unnamed person parking her car outside the Rath's home and taking photographs.^{3/} However, there is no competent evidence to support her subjective belief that the person in the car has anything to do with LCSB.

30. There is no competent evidence in the record that supports any coordinated efforts or conspiracy by LCSB personnel to deny her employment. Each person with the responsibility to make hiring decisions did so independently.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2013).

32. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to fail or

refuse to hire or otherwise discriminate against an individual on the basis of age, gender, race, or national origin.

33. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. See Valenzuela v. GlobeGround North America, LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

34. In the instant case, Petitioner alleged in her Employment Complaint of Discrimination which she filed with FCHR that she was not hired by Respondent because of her age, sex, race, and national origin.

35. As a threshold matter, the issue of the applicable statute of limitations must be addressed. Section 760.11 requires that any person aggrieved by a violation of the Florida Civil Rights Act may file a complaint with FCHR within 365 days of the alleged violation. The courts have interpreted that language to mean that any claim filed after the 365 days is time-barred. See EEOC v. Joe's Stone Crab, 296 F.3d 1265 (11th Cir. 2002).

36. The charge of discrimination was filed on August 27, 2012. Therefore, the applicable time period is from August 27, 2011 through August 26, 2012. Accordingly, this order only addresses those applications within this time frame.

37. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

38. "Direct evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." Schoenfeld v. Babbitt, supra. Petitioner presented no direct evidence of age, gender, racial, or national origin.

39. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

40. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Tx. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248 (1981), is applied. Under this well-established model of proof, the

complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Id.; Alexander v. Fulton Cnty., Ga., 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. Schoenfeld v. Babbitt, supra at 1267. The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, supra at 1186; Alexander v. Fulton Cnty., Ga., supra. Petitioner has not met this burden.

41. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC

v. Joe's Stone Crabs, Inc., supra; see also Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

42. The legal analysis for claims of discrimination under the various categories cited by Petitioner are all very similar. In order to make out a prima facie case of race, gender, or national origin discrimination for failure to hire, Petitioner must show that she was a member of a protected class; that she applied and was qualified for the job she was seeking; that despite her qualifications; she was not hired, and that the position was filled by another person outside of her protected class. EEOC v. Joe's Stone Crab, Inc., supra.

43. Petitioner has met the prima facie requirements for the categories of race and national origin discrimination, in that she was on the list of individuals meeting the minimum qualifications for the positions, she was not hired, and all successful candidates were of a different race (although members of a minority) and different national origin. As for gender discrimination, Petitioner has met the prima facie requirements for two of the four positions.

44. To establish a prima facie case of age discrimination under the federal Age Discrimination in Employment Act (ADEA), the complainant must show that she is a member of a protected

age group (i.e., over 40); she was qualified for the job; that she was rejected, and that she lost the position to a younger person. Benson v. Tocco, Inc., 113 F.3d 1203, 1207 (11th Cir. 1997), citing McDonnell, supra (the 11th Circuit has adopted a variation of the McDonnell test in ADEA violation claims.) Petitioner must also prove that "but for" her age, she would have been hired. Gross v. FBC Fin., 129 S. Ct. 2343 (2009).

45. However, in cases alleging age discrimination under section 760.10(1)(a), FCHR has concluded that unlike cases brought under ADEA, the age of 40 has no significance in the interpretation of the Florida Civil Rights Act of 1992. FCHR has determined that to demonstrate the last element of a prima facie case of age discrimination under Florida Law, it is sufficient for Petitioner to show that she was treated less favorably than similarly-situated individuals of a "different" age as opposed to a "younger" age. See Marchinko v. The Wittemann Co., DOAH Case No. 05-2062 (Fla. DOAH Nov. 1, 2005), rejected in part, Case No. 2005-00251 (FCHR Jan. 6, 2006), and numerous cases cited therein.

46. Arguably, Petitioner met the prima facie requirements for age discrimination for three positions: 011-2012, 0170-2012, and 0201-2012. The successful applicants for these positions were significantly younger than Petitioner. Petitioner does not meet the prima facie requirements for position 0171-2012.

Ms. Hatten was 52 at the time she was hired, which, while older, is not substantially different from Petitioner's age. Moreover, the evidence does not entirely support the requirement that the other applicants were similarly situated because of their work experience as compared to Petitioner's.

47. For those categories and positions that Petitioner has met the prima facie requirements of discrimination, Respondent articulated a legitimate, non-discriminatory explanation of the adverse employment action. In each case, the person responsible for the hiring set forth legitimate, non-discriminatory reasons (in particular, work experience), for the decisions to hire applicants other than Petitioner.

48. Applying the McDonnell analysis outlined above, the burden then shifts to Petitioner to show that a discriminatory reason more likely than not motivated the decision or that the proffered reason for the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, supra; Alexander v. Fulton Cnty., GA, supra. "Would the proffered evidence allow a reasonable factfinder to conclude that the articulated reason for the decision was not the real one." Walker v. Prudential, 286 F.3d 1270 (11th Cir. 2002). Petitioner has not met this burden.

49. Petitioner did not present evidence that the reasons given by Respondent were a pretext for discrimination. Other

than Petitioner's conclusory assertions that the motivation for not hiring her was based on discriminatory intent, Petitioner offered no competent evidence of unlawful discrimination.

50. As concluded above, Respondent presented a legitimate non-discriminatory reason for its actions in its decisions to hire applicants other than Petitioner. There is no persuasive evidence to support Petitioner's assertions that Respondent's actions in not hiring her were a pretext for unlawful discrimination. See Issenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 444 (11th Cir. 1996) ("Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for its actions.") (quoting Young v. General Food Corp., 840 F.2d 825, 830 (11th Cir. 1988)) ("Once a legitimate, non-discriminatory reason for dismissal is put forth by the employer, the burden returns to the plaintiff to prove by significant probative evidence that the proffered reason is pretext for discrimination."). Petitioner presented no persuasive evidence establishing that Respondent's reasons were pretextual. Petitioner's speculation and personal belief concerning the motives of Respondent are not sufficient to establish intentional discrimination. See Lizardo v. Denny's, Inc., 270

F.3d 94, 104 (2d Cir. 2001) ("plaintiffs have done little more than to cite to their mistreatment and ask the court to conclude it must have been related to their race. This is not sufficient."). While Petitioner believes that Respondent's actions were intentionally discriminatory, the evidence does not support this conclusion. See Byers v. Dallas Morning News, Inc., 209 F.3d 419, 427 (5th Cir. 2000) ("Byers has failed to produce any direct evidence of discriminatory intent by Brown or TDMN or sufficient evidence indirectly demonstrating discriminatory intent. Instead, Byers urges this Court to rely on his subjective belief that Brown discriminated against him because he was white. This Court will not do so."). The evidence contains no persuasive proof to support a finding that Respondent's actions were motivated by Petitioner's age, gender, race, or national origin.

51. Similarly, Petitioner has not met her burden of proving that "but for" her age, she would have been hired for any of the positions. See Gross v. FBC Fin., supra.

52. In summary, Petitioner has failed to carry her burden of proof that Respondent's actions were based on intentional discrimination on the basis of age, gender, race, or national origin.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order finding that the Leon County School Board is not guilty of the unlawful employment practice alleged by Petitioner and dismissing Petitioner's Complaint of Employment Discrimination.

DONE AND ENTERED this 29th day of October, 2013, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of October, 2013.

ENDNOTES

^{1/} All future references to Florida Statutes will be to 2012 unless otherwise indicated.

^{2/} The only evidence in the record as to the applicants' race, gender, age and national origin appears in Petitioner's Exhibit 4 which consists of charts created in part by Respondent and in part by Petitioner. There is no other independent evidence as to these characteristics of the applicants, as the applications themselves do not contain this information.

^{3/} These photographs comprise Petitioner's Exhibit 10.

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.