STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHARON SINGLETON,

Petitioner,

vs. Case No. 15-1800

ESCAMBIA COUNTY SCHOOL DISTRICT,

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 August 6, 2015, in Pensacola, Florida.

APPEARANCES

For Petitioner: Ryan M. Barnett, Esquire
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For Respondent: Joseph L. Hammons, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner was terminated from her employment with Respondent for a discriminatory reason.

PRELIMINARY STATEMENT

Petitioner, Sharon Singleton, filed an Employment Complaint of Discrimination, along with supporting documents, with the Florida Commission on Human Relations (FCHR) against the Escambia County School District ("Respondent" or "District"), alleging she was discriminated against based upon her age. Following an investigation, FCHR issued a Determination: No Cause on February 23, 2015.

Petitioner filed a Petition for Relief on March 31, 2015, with FCHR challenging its determination. The petition was forwarded to the Division of Administrative Hearings on April 1, 2015.

The final hearing in this case was scheduled to commence on June 10 and 11, 2015. On June 2, 2015, the parties filed a Joint Motion for Continuance and Extension to File Prehearing Stipulations. The motion was granted. The final hearing was rescheduled for August 6 and 7, 2015, in Pensacola, Florida.

At the hearing, Petitioner testified on her own behalf and presented the testimony of Tammy Kirkland, Edna Greene, and Jeannie Taylor Bodie. Petitioner offered 12 exhibits, all of which were admitted into evidence. Respondent presented the testimony of Kathy Cooper, Johnnie Odom, Sean Griffith, Ben Romano, and Thomas Ingram. Respondent offered 15 exhibits, all

of which were admitted into evidence. The final hearing was completed on August 6, 2015.

A two-volume Transcript was filed on September 18, 2015. Petitioner and Respondent filed their proposed findings of fact and conclusions of law on October 1, 2015.

References to statutes are to Florida Statutes (2015), unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Sharon Singleton, was employed by Respondent in the Information Technology (IT) Department. Petitioner served, as did other IT employees, under an annual contract.

2. Respondent is the administrative government entity for the public schools of Escambia County, Florida. Contracts of employment are with the Escambia County School Board.

3. Mr. Johnnie Odom supervised Petitioner until the last eight months of her employment. Her supervisor was Kathy Cooper during the last eight months of her employment.

4. For many years, Petitioner and the other technicians used a software program that supported the management of school records that was known as "TERMS." During the last few years of Petitioner's employment, the District changed the supporting software program from TERMS to a program known as "FOCUS." This was a major conversion of software programs that took place over an extended period of time.

5. When the FOCUS program was initiated, Respondent hired three additional technicians to support FOCUS. Petitioner disagreed with the hiring of new technicians to support FOCUS, but acknowledges she was not treated any differently from the other Tech III support staff. Her disagreement was over the hiring of the new technicians, rather than allowing the existing ones to serve as primary support for FOCUS.

6. Petitioner sought a promotion to a higher level position in 2011. The promotion process was administered by a selection committee that interviewed and evaluated candidates. As a result of the competitive selection, Petitioner was not recommended or selected for the promotion. On two prior occasions, Petitioner had sought a promotion, and on both occasions a selection committee ranked and evaluated the candidates. Petitioner was not successful in being selected or promoted on those two prior occasions.

7. For the 2011-2012 school year, Petitioner received unsatisfactory ratings for her administrative/professional techniques and skills, as well as for her professional relationships with staff. The evaluation contained a note stating that Petitioner has difficulty in resolving conflicts with her co-workers and that her supervisor would like to see her resolve conflicts with her co-workers in a more diplomatic manner.

8. Petitioner had received some unsatisfactory or needs improvement marks in her previous years' evaluations, so 2011-2012 was not the first time she had received less than satisfactory marks. Nevertheless, following the 2011-2012 annual evaluation, Petitioner received an annual employment contract for the next school year.

9. At the end of the next school year, Petitioner again received an unsatisfactory mark for her professional techniques and skills. She also was cited for needing improvement in other areas. The notes to that evaluation stated Petitioner had improved her relationships with co-workers, but was still having problems adjusting to the new programs that required modernizing her skill set. Despite a few negative marks on her evaluation, Petitioner received an annual contract for the 2013-2014 school year.

10. Petitioner did not dispute the fact that her evaluator and supervisor, Mr. Odom, believed her performance was unsatisfactory. She disagreed, however, with his assessment of her performance.

11. Petitioner believed she had been demoted in the 2013-2014 school year and testified she signed a paper acknowledging a demotion in a disciplinary meeting with the IT department director, Tom Ingram. She did not receive a reduction in salary or benefits, however.

12. Mr. Ingram classified the action taken against Petitioner as a restriction of her duties to Level I telephone support, rather than the more challenging Level II telephone support duties that she had performed in the past. He did not consider this a demotion, but more of a recognition of assigning Petitioner to duties that he believed she could better handle with her skill set.

13. Petitioner testified that Ms. Cooper told her on several occasions she should consider retirement. Petitioner took this as evidence of Ms. Cooper's belief she was too old to perform her job. Ms. Cooper testified she made the suggestion because Petitioner had an elderly mother who lived in a nursing home and needed assistance. Ms. Cooper was responding to Petitioner having told her she was left with little time to care for her mother when she finished with work. Petitioner acknowledged that her mother was elderly and needed help and that she had told this to Ms. Cooper.

14. During Petitioner's final eight months of employment, she worked mainly telephone support under the direction of Ms. Cooper, the support manager for the District. Ms. Cooper manages the help desk and IT support staff. She manages two levels of support. Level I support involves matters that can be resolved by telephone, while Level II support is for matters that

cannot be resolved in five minutes or less and require more expertise to cure.

15. Ms. Cooper developed concerns about Petitioner's support performance. She took her concerns to the Director of IT, Mr. Ingram. Similar concerns with Petitioner's performance had been raised by another support technician, as well. That technician reported that one of the schools to which he and Petitioner had both been assigned, asked that Petitioner not be allowed to return there for support in the future.

16. When Ms. Cooper brought her concerns about Petitioner to Mr. Ingram, he asked that she bring him documentation of her concerns evidencing recent issues concerning Petitioner's performance.

17. Mr. Ingram met with Petitioner on September 3, 2013, to review her performance. Mr. Ingram's notes from that meeting document his concern with Petitioner's performance and he restricted her duties at that time to telephone support because he did not believe she could independently provide on-site support to more schools. His notes further indicate that Petitioner was not satisfied with his conclusions regarding her performance.

18. Mr. Ingram conducted a follow-up interview with Petitioner on September 4, 2013, because Petitioner wanted to share with him the evaluation she had received from Mr. Odom for

the 2012-2013 school year. Mr. Ingram told Petitioner he agreed with the evaluation conducted and recorded by Mr. Odom.

19. Mr. Ingram had yet another meeting with Petitioner in March 2014 regarding her performance. With Ms. Cooper present, Mr. Ingram reviewed documentation concerning Petitioner's unsatisfactory performance. The meeting was held pursuant to a Notice of Consideration of Disciplinary Action served on Petitioner. As a result of the meeting, Mr. Ingram was not confident Petitioner could satisfactorily improve her performance. He believed that Petitioner refused to accept the representative examples he gave her of her unsatisfactory performance.

20. After concluding at the March meeting that Petitioner's performance would not sufficiently improve, Mr. Ingram decided not to renew Petitioner's annual contract when it expired in June 2014.

21. Petitioner believed she had been marginalized by her perceived demotion to a Level I telephone support technician. She also was removed from ZENworks, a scheduling program she had previously been involved with over the years, becoming the only employee on the support team that was not allowed to participate in that program.

22. Petitioner believed that all the criticisms of her work by management were hyper-technical, and that she received little,

if any, feedback or training during the period for which she was evaluated when the unsatisfactory findings were made. She also attempted to show that others who made errors similar to hers were given promotions. The evidence presented on this point was insufficient to support her claim of disparate treatment.

23. Several retired or long-serving District employees testified that their interaction over the years with Petitioner resulted in responsive and high-quality service from Petitioner. None of these witnesses testified about specific support they received from Petitioner during the last three years of her employment, employing the new FOCUS system, which served as the basis for the non-renewal of her contract.

24. Petitioner testified she should receive damages in the amount of $384,000 as the result of her employment being terminated while she was a participant in the midst of D.R.O.P.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569, 120.57(1), and 760.11(4)(b), Florida Statutes.

26. Section 760.10(1)(a) states as follows:

> (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.

27. Petitioner is an "aggrieved person," and Respondent is an "employer" within the meaning of section 760.02(10) and (7), respectively.

28. The Florida Civil Rights Act (FCRA), sections 760.01 through 760.11, as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. Federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Green v. Burger King Corp., 728 So. 2d 369, 370-71 (Fla. 3d DCA 1999); FSU v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

29. Petitioner has the burden of proving by a preponderance of the evidence that Respondent has discriminated against her. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

30. The United States Supreme Court has established an analytical framework within which courts should examine claims of discrimination, including claims of age and disability discrimination. In cases alleging discriminatory treatment, the petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502

(1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

31. Petitioner can establish a prima facie case of discrimination in one of three ways: (1) by producing direct evidence of discriminatory intent; (2) by circumstantial evidence under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); or (3) by establishing statistical proof of a pattern of discriminatory conduct. Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989). If Petitioner cannot establish all of the elements necessary to prove a prima facie case, Respondent is entitled to entry of judgment in its favor. Earley v. Champion Int'l Corp., 907 F.2d 1077 (11th Cir. 1990).

32. To establish a prima facie case of discrimination, Petitioner must show: (1) that she is a member of a protected class; (2) that she suffered an adverse employment action; (3) that she received disparate treatment from other similarly situated individuals in a non-protected class; and (4) that there is sufficient evidence of bias to infer a causal connection between her age or sex and the disparate treatment. Andrade v. Morse Ops., Inc., 946 F. Supp. 979, 982 (M.D. Fla. 1996).

33. "[N]ot every comment concerning a person's age presents direct evidence of discrimination." Young v. Gen. Foods Corp., 840 F.2d 825, 829 (11th Cir. 1988). "[D]irect 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 . . . . If an alleged statement at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Likewise, a statement "that is subject to more than one interpretation . . . does not constitute direct evidence." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997). The comments made by Ms. Cooper that maybe Petitioner should retire appear related to the fact that Petitioner has an elderly mother in a nursing home who would benefit from her care, not that she is too old to perform the essential tasks of her job. Ms. Cooper's testimony on this point was credible, and the evidence does not support a finding that Ms. Cooper's remarks regarding Petitioner retiring were intended to discriminate against her.

34. "[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 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).

35. In McDonnell Douglas, 411 U.S. 792, 800-803 (1973), the Supreme Court articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where

the plaintiff relies upon circumstantial evidence. The McDonnell Douglas decision is persuasive in this case, as is Hicks, 509 U.S. 502, 506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis. Pursuant to this analysis, the plaintiff (Petitioner herein) has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)).

36. If, however, the plaintiff (Petitioner herein) succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent herein) to articulate some legitimate, nondiscriminatory reason for its complained-of conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

37. In Hicks, the Court stressed that even if the trier-of-fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the

ultimate question of whether the defendant intentionally had discriminated against him. Hicks, 509 U.S. at 511. "It is not enough, in other words, to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

38. In order to prove intentional discrimination, Petitioner must prove that Respondent intentionally discriminated against her. It is not the role of this tribunal to second-guess Respondent's business judgment. As stated by the court in Chapman v. AI Transportation, 229 F.3d 1012, 1030 (11th Cir. 2000):

> [C]ourts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how mistaken the firm's managers, the [Civil Rights Act] does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior. An employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.

(citations omitted).

39. At the administrative hearing held in this case, Petitioner had the burden of proving that she was the victim of a discriminatorily motivated action. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996) ("The general rule is that a party asserting

the affirmative of an issue has the burden of presenting evidence as to that issue."); Fla. Dep't of Health & Rehabilitative Servs. v. Career Serv. Comm'n, 289 So. 2d 412, 414 (Fla. 4th DCA 1974) ("The burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'").

40. Petitioner made a prima facie showing that due to her age, 62, she is a member of a protected class, and the non-renewal of her contract qualified as an adverse employment action, but failed to make a prima facie case that she received dissimilar treatment from other similarly-situated individuals in a non-protected class, that there was any bias against her, or that her employment was terminated for a discriminatory reason.

41. "To show that employees are similarly-situated the Petitioner must show that the 'employees are similarly-situated in all relevant aspects.'" Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003). "The comparator must be nearly identical to the petitioner, to prevent courts from second guessing a reasonable decision by the employer." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1091 (11th Cir. 2004). In other words, Petitioner must be "matched with persons having similar job-related characteristics who were similarly situated" to Petitioner. MacPherson v. Univ. of Montevallo, 922 F.2d 766, 775 (11th Cir. 1991).

42. Plainly stated, in order to establish the third element of the prima facie case, Petitioner must produce evidence that would permit the trier of fact to conclude that Respondent treated employees of a different age more favorably than Petitioner. See Lathem v. Dep't of Child. & Youth Servs., 172 F.3d 786, 793 (11th Cir. 1999).

43. Petitioner cannot meet this burden because she has presented no competent evidence of any similarly-situated employees outside of her protected class being treated more favorably. The comments from Ms. Cooper are easily construed to relate to Petitioner's mother's need for more of her time, rather than related to her job performance or her perception that her employers believed she could not perform her job due to her age.

44. In Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999), the court noted that courts "are not in the business of adjudging whether employment decisions are prudent or fair. Instead our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." The present case lacks proof of discriminatory intent in the District's non-renewal of Petitioner's employment contract.

45. Based upon the evidence and testimony offered at hearing, Petitioner failed to establish a prima facie case against Respondent for age discrimination or any other type of

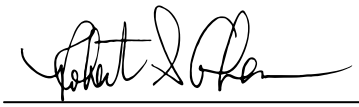
discrimination. Accordingly, Respondent is not found to have committed the "unlawful employment practice" alleged in the employment discrimination charge which is the subject of this proceeding. Therefore, the employment discrimination charge should be dismissed and none of the damages claimed by Petitioner should be awarded to her.

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 Respondent did not commit the "unlawful employment practice" alleged by Petitioner and dismissing Petitioner's employment discrimination charge.

DONE AND ENTERED this 11th day of December, 2015, in Tallahassee, Leon County, Florida.



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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.