

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANNETTE WHITNER,

Petitioner,

vs.

Case No. 15-5982

HIGHLANDS COUNTY BOARD OF COUNTY
COMMISSIONERS,

Respondent.

_____ /

SUMMARY FINAL ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH) conducted the final hearing on February 8, 2016, in Sebring, Florida.

APPEARANCES

For Petitioner: Annette B. Whitner, pro se
3805 Enchanted Oaks Lane
Sebring, Florida 33875

For Respondent: Cindy Ann Townsend, Esquire
Bell & Roper, P.A.
2707 East Jefferson Street
Orlando, Florida 32803

STATEMENT OF THE ISSUE

Did Respondent, Highlands County Board of County Commissioners (County), discriminate against Petitioner, Annette Whitner, on account of her age?

PRELIMINARY STATEMENT

On February 12, 2015, Ms. Whitner filed a charge of discrimination with the Florida Commission on Human Relations (Commission). The charge alleged the County discriminated against Ms. Whitner by not selecting her for an interview on account of her age and gender. On September 14, 2015, the Commission issued a Determination finding no reasonable cause existed to believe that an unlawful practice occurred.

On October 19, 2015, Ms. Whitner filed a Petition for Relief for unlawful employment practices with the Commission. That same day the Commission referred the matter to DOAH to conduct a hearing.

On November 3, 2015, the County and Ms. Whitner filed a joint motion requesting a summary proceeding. On November 4, 2015, a Pre-Hearing Teleconference was held on the joint motion. The parties, who previously suggested dates outside the 30-day requirement of section 120.574(1)(b), Florida Statutes (2015)^{1/}, waived the requirement. The joint motion for a summary proceeding was granted.

The undersigned conducted the hearing on February 8, 2016. At the hearing, Ms. Whitner withdrew her complaint of gender discrimination. Ms. Whitner testified on her own behalf and entered Exhibits F and I through O into evidence. The County

presented the testimony of Randal Vosburg and Gloria Rybinski and entered Exhibits 1 through 24 into evidence.

The Transcript was filed on February 17, 2016. The County timely filed a Proposed Order. Ms. Whitner filed an untimely Proposed Order. It is accepted as timely. The parties' Proposed Orders have been considered in the preparation of this Order.

FINDINGS OF FACT

1. At the time of the alleged discrimination, Ms. Whitner was 71 years old.

2. Ms. Whitner claims that the County discriminated against her by not interviewing her for its business services director position due to her age. Ms. Whitner claims that she was discriminated against because the position required an applicant to be a Certified Public Accountant (CPA). She argues that older people are less likely to hold a CPA certification. The weight of the credible evidence did not establish this claim. Ms. Whitner did not establish any connection between possessing a CPA certification and age.

3. On November 10, 2014, the County posted the position online. It was a newly created position, established as part of a reorganization by the County. Because of previous audit errors and the departments the position would oversee, the County determined the minimum qualifications for the position should be:

Bachelor's degree with major course work in public administration, business administration, accounting, finance or related field and possession of Certified Public Accountant (CPA) professional certification or equivalent is required. Master degree in business administration, finance management, public administration, or related discipline is preferred.

4. In determining the equivalent to a CPA, the County referred to the Guide for Certifications for Accounting, Finance and Operations Management (Guide). This was a reasonable non-discriminatory decision. Based on the Guide, the County determined a Certified Government Auditing Professional, Certified Governmental Financial Manager, and Certified Internal Auditor would constitute an equivalent to a CPA certification. The certifications were deemed equivalent because they required similar education, experience, and completion of an examination, similar to one taken for a CPA certification.

5. The closing date for all applicants was December 15, 2014. Ms. Whitner submitted her application near midnight of December 15.

6. Ms. Whitner is not a CPA. In addition, Ms. Whitner did not follow the instructions on the application. She scratched out the instructions on the application and wrote "first" above where it read "current or most recent employer." Ms. Whitner's application contained typed and handwritten information. Ms. Whitner's application did not provide her complete work history

as the application instructed. In one of the fields of employment, after 1992, Ms. Whitner wrote "various employers." Ms. Whitner's application left an unexplained gap in work history, from 1992 to the present.

7. Ms. Whitner's application included copies of her Bachelor of Science in Business Administration degree, Master of Public Affairs degree, certification as a Certified District Manager, Certificate of Recognition from the Indiana Executive Program, and a letter of reference from Al Grieshaber, General Manager at Sun 'N Lake of Sebring, dated February 8, 2010.

8. Ms. Whitner's application indicated she had a certification as a Certified Professional Government Accountant. Ms. Whitner asserts that a certification as a Certified Professional Government Accountant should be equivalent to a CPA certification. However, the Guide does not include a certification for a Certified Professional Government Accountant as a CPA equivalent, nor does the County consider it equivalent. Additionally, Ms. Whitner did not attach a copy of her certification or provide persuasive evidence of the certification criteria and their similarity to CPA criteria.

9. The County could not determine if Ms. Whitner had worked since 1992. Ms. Whitner argues that her letter of reference from Al Grieshaber demonstrated her employment since 1992. However,

the letter did not include the dates Ms. Whitner worked, the position held, or her duties and the type of work she performed at Sun 'N Lake of Sebring.

10. Randal Vosburg, Assistant County Administrator, was involved in the hiring and selection process for the position. The primary criteria he was looking for when reviewing the applications was whether the applicant had a CPA. Mr. Vosburg did not have any contact with Ms. Whitner and did not know her age when reviewing her application. Mr. Vosburg did not consider Ms. Whitner's age when reviewing her application.

11. The County did not select Ms. Whitner for an interview because she was not a CPA and did not possess a certificate that is equivalent to a CPA certification. Additionally, Ms. Whitner presented an unprofessional application, did not provide a complete work history so that there appeared to be more than a twenty-year gap in employment, and did not follow the instructions on the employment application. These were all reasonable non-discriminatory bases for deciding not to interview Ms. Whitner.

12. On January 5, 2015, Ms. Whitner submitted an addendum to her employment application. This was after the application deadline and after the County had selected candidates to interview. Ms. Whitner's addendum did not provide documentation

or certification that she possessed a CPA certification or the equivalent.

13. The County selected Tanya Cannady and Stanoil Raley for interviews. Both possessed CPAs. Both were reasonably deemed to be more qualified than Ms. Whitner.

14. A panel of three people interviewed Ms. Cannady and Mr. Raley. Randal Vosburg, June Fisher, County Administrator, and Mark Hill, then-Development Services Director, served on the panel.

15. Ms. Cannady performed much better than Mr. Raley during the interview. Additionally, Ms. Cannady's work experience was more relevant to the position than Mr. Raley's work experience.

16. The County selected Ms. Cannady for the position because she met the requirement of having a minimum of five-years of progressively responsible relevant experience, was a CPA, and was more qualified than Mr. Raley and the other applicants.

17. The County offered the position to Ms. Cannady. She did not accept the offer and withdrew her application.

18. On August 5, 2015, the County re-posted the position online. The county changed the CPA requirement from "required" to "preferred" because the County was having trouble finding CPA applicants.

19. Ms. Whitner did not reapply for the position. The County conducted additional interviews and selected Tasha Morgan. Ms. Morgan was female and was a CPA.

20. The preponderance of the credible, persuasive evidence did not establish that the County discriminated against Ms. Whitner due to her age.

21. The preponderance of the credible, persuasive evidence established that the County had legitimate non-discriminatory reasons for not interviewing Ms. Whitner.

CONCLUSIONS OF LAW

22. Sections 120.569 and 120.57(1) grant DOAH jurisdiction over the subject matter of this proceeding and of the parties.

23. Ms. Whitner maintains that Highlands County Board of County Commissioners discriminated against her in her application for employment on account of her age. Ms. Whitner must prove her claims by a preponderance of the evidence. Dep't. of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996).

24. Sections 760.10(1)(a) and (b) make it unlawful for an employer to take adverse action against an individual because of the individual's age. Sunbeam TV Corp. v. Mitzel, 83 So. 3d 865, 866 (Fla. 3d DCA 2012); Miami-Dade Cnty. v. Eghbal, 54 So. 3d 525 (Fla. 3d DCA 2011), reh. denied, Case No. 3D10-1596 (Fla. 3d DCA Feb. 22, 2011), rev. denied, 71 So. 3d 117 (Fla. 2011); Bratcher v. City of High Springs, Case No. 11-2999 (Fla. DOAH Sept. 28,

2011), rejected in part, Case No. 2011-358, FO No. 11-91 (Fla. FCHR Dec. 7, 2011).

25. The Florida Legislature patterned chapter 760 after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting chapter 760. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009).

26. A party may prove unlawful discrimination through direct evidence of discrimination. City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008), reh. denied, Case No. 4D07-392 (Fla. 4th Dist. Ct. App. Aug. 21, 2008). Direct evidence is something like a discriminatory statement by a supervisor that requires no interpretation or inferences to manifest the discrimination. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999).

27. An employee may also prove a claim of discrimination by circumstantial evidence establishing that similarly situated employees, who were not in her protected class, were treated more favorably than she was. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004).

28. The persuasive evidence, credible evidence, and circumstantial evidence do not establish that Highlands County Board of County Commissioners discriminated against Ms. Whitner because of her age.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Petition for Relief of Annette Whitner in FCHR Case No. 2015-00779 is DENIED.

DONE AND ORDERED this 23rd day of March, 2016, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative
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Filed with the Clerk of the
Division of Administrative
Hearings
this 23rd day of March, 2016.

ENDNOTE

^{1/} All citations to the Florida Statutes are to the 2015 compilation unless otherwise noted.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.