STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLAUDIA S. WILLIAMS,

Petitioner,

vs. Case No. 16-3461

ESCAMBIA COUNTY SCHOOL DISTRICT,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on October 28, 2016, in Pensacola, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jamison Jessup
557 Noremac Avenue
Deltona, Florida 32738

For Respondent: Joseph L. Hammons, Esquire
The Hammons Law Firm, P.A.
17 West Cervantes Street
Pensacola, Florida 32501

STATEMENT OF THE ISSUE

Whether Respondent, Escambia County School District (Respondent, School District, or School Board), violated the Florida Civil Rights Act of 1992, sections 760.01–760.11 and 509.092, Florida Statutes,[1/] by discriminating against Petitioner, Claudia Williams (Petitioner), based upon

Petitioner's race, age, or in retaliation for her participation in protected activity.

PRELIMINARY STATEMENT

On April 22, 2015, Petitioner filed an Employment Charge of Discrimination (Complaint) with the Florida Commission on Human Relations (Commission or FCHR), alleging that Respondent had discriminated against her based upon her race and age, and retaliated against her in violation of the Florida Civil Rights Act. The Commission investigated the Complaint, which was assigned FCHR No. 201500806.

Following completion of its investigation, the Commission's executive director issued a Determination dated May 13, 2016, stating that that "no reasonable cause exists to believe that an unlawful practice occurred." That same day, the Commission sent Petitioner a Notice of Determination: No Reasonable Cause (Notice) which advised Petitioner of her right to file a Petition for Relief within 35 days of the Notice. Petitioner timely filed a Petition for Relief with FCHR on June 15, 2016. FCHR referred the matter to the Division of Administrative Hearings and the case was assigned to the undersigned to conduct an administrative hearing pursuant to chapter 120, Florida Statutes.

The final hearing was originally scheduled for August 17, 2016, but was subsequently rescheduled for October 28, 2016,

after Respondent's unopposed Motion to Continue and Reschedule Hearing was granted.

At the final hearing, Petitioner testified on her own behalf and called as witnesses Dr. Alan Scott, Glen Smith, Jim Taylor, and Lisa Arnold. Petitioner submitted into evidence, without objection, Exhibits P-D1; P-E5; P-E2; P-A, p. 29; P-D2; P-A, pp. 285, 286; and P-A, pp. 204-243. Respondent presented the testimony of Steven Marcanio and submitted into evidence, without objection, Exhibits R-1 and R-2. In addition, as authorized during the final hearing, on October 31, 2016, Respondent timely submitted a Post-Hearing Submission, consisting of documents identifying the compensation Petitioner would have received had she been a successful applicant for the two positions identified in School District job postings 00047313 and 00048094.

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the filing of the transcript within which to file proposed recommended orders. A one-volume Transcript of the proceedings was filed December 7, 2016. Respondent timely filed its Proposed Recommended Order on January 6, 2017, which was considered in preparing this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner, Claudia S. Williams, also known as Claudia Curry Brown Williams, is a 60-year-old African-American woman.

2. At the time of the final hearing, Petitioner had worked for the School District for 28 years and was employed by Respondent as a guidance counselor.

3. During her employment with Respondent, Petitioner was evaluated annually. The School District's employee evaluation forms during the pertinent time period included evaluation categories of "needs improvement," "effective," and "highly effective." For school year 2016, Petitioner was evaluated "effective."

4. The parties agree that the relevant timeframe for Petitioner's Complaint is limited to one year prior to April 22, 2015, the date that Petitioner's Complaint was filed with FCHR.

5. In her Complaint, Petitioner alleges that she was denied promotion to the administrative position of assistant principal because of race, age, and retaliation. There were three assistant principal positions for which Petitioner applied in the year leading up to the filing of her Complaint. The three positions are identified by School District job posting numbers 00048094, 00048095, and 00047313. Job posting 00048095 is not at issue because Petitioner withdrew her application for that position prior to completion of the selection process.

6. The School District considers applicants and fills positions for administrative positions through a selection process involving a selection committee. According to the School District's selection process, the selection committee interviews all qualified applicants. All qualified applicants interviewed are ranked in order based on numerical scores assigned by the selection committee members. The names of the highest ranked applicants are then sent to the School District's superintendent for consideration. The superintendent is responsible for selecting the successful candidate from among those listed as most qualified. The superintendent is not involved with the selection committee's scoring process.

7. The candidate who is selected by the superintendent is then submitted to the School Board for approval of an employment contract. The School Board may only reject the superintendent’s recommendations of candidates to fill vacant positions for just cause.

8. School District selection committees that interview candidates for administrative positions are organized by the School District's director of the Division of Education for the position at issue. The School District's director of elementary education is responsible for organizing selection committees for elementary school administrative positions. The selection committees are organized based on objective human resource

materials identifying the types of persons that should serve on selection committees. In addition to other members, the director of education for the school level at issue participates in the selection committee, along with a member of the bargaining unit for the teacher's unit, and a parent representative.

9. Selection committees are sometimes called upon to fill more than one position. The committees follow the same process for interviewing applicants each time, whether there is one position to be filled or several positions. The committee develops the questions that will be asked of applicants for the positions at issue. Once the questions are agreed upon, the same questions are asked of every applicant. Each committee member receives a packet consisting of each applicant's application, resume, and background material.

10. The two selection committees that considered Petitioner, and applicants for the two positions at issue, consisted of a variety of individuals, including parents. The committee members had the task of scoring each applicant and giving them a numerical score that was then ranked. Petitioner did not identify anyone on either of the two selection committees as demonstrating any racial or age bias in their communications with Petitioner.

11. For the two positions at issue, position posting number 00048094 and position posting number 00047313, Petitioner's name was not included on the short list of those deemed most qualified by the selection committees that was sent to the superintendent for selection.

12. Position posting number 00048094 was for an assistant principal position. With regard to that position, Petitioner was ranked 25 out of 26 of the applicants evaluated by the selection committee. As an applicant who was ranked 25 out of 26 applicants, according to the School District's process, Petitioner's name would not be among those sent to the superintendent for final selection.

13. Position posting number 00047313 was also for an assistant principal position. The selection committee for that posting ranked Petitioner 26 out of 27 applicants. Therefore, Petitioner’s name was not among those submitted to the superintendent for selection for that position.

14. Steven Marcanio, at all pertinent times, served as the School District's assistant superintendent for curriculum instruction. In that capacity, Mr. Marcanio oversees all of the departments that service students in elementary, middle, and high school, as well as alternative education. He previously served as director of middle schools. By virtue of his position, Mr. Marcanio is familiar with the selection process

the School District utilizes when considering applicants for administrative positions. His experience includes actual service on selection committees considering candidates for administrative positions.

15. Mr. Marcanio presented credible testimony that age and race are not considerations that are allowed to be considered by selection committees for the selection of the names of those applicants deemed most qualified to be sent to the superintendent. The purpose of the selection committee scoring is to send to the superintendent the names of those applicants deemed best qualified among the group of applicants for the position at issue. Under the School District's process, the superintendent does not have the ability to influence the scoring of applicants for administrative positions.

16. Petitioner submitted no evidence to support her claim that she was unlawfully denied selection for the two positions at issue. In an attempt to support the allegations of her Complaint, Petitioner testified that she was told by Jim Taylor, a 2012 selection committee member, that at the end of the interview process with the selection committee in 2012, the School District's director of elementary education, Linda Malesides, said that Petitioner did not meet necessary qualifications and her name could not be submitted to the superintendent because the superintendent "does not like her."

17. Jim Taylor was called to testify at the hearing in this cause. Mr. Taylor testified he is employed by the School District as a social worker. He testified that he thought Petitioner had applied a number of times for a couple of different jobs. When asked whether it was for either of the two positions at issue, he testified that he did not remember. Mr. Taylor described the subject of his testimony as "a few years ago." Mr. Taylor stated that there was an occasion where he had a conversation with Petitioner and that he told her there was a comment made by someone from the District that he did not agree with. According to Mr. Taylor, the comment that he recalled consisted of an individual saying to the committee that it does not matter how you score her, the superintendent does not want her. He did not recall the person who made that statement, but described the person as "a District person." He did not know the person's position. Rather, he stated that "[t]hey worked for the District."

18. School District records reflect that in June of 2012, Mr. Taylor served on a selection committee for job posting 00045934, for employment as a Coordinator III for Student Services. Mr. Taylor acknowledged scoring all of the applicants during that selection process along with other committee members and agreed that if School District records reflect all committee members ranked applicant Lisa Joiner, the person selected, as

the best qualified, that he would not dispute that. Mr. Taylor's testimony does not support Petitioner's Complaint.

19. Petitioner also testified that Carolyn Spooner, the School District's director of high schools, told Petitioner that Petitioner had not been given credit for prior administrative experience. No timeframe was provided for this statement. Petitioner testified that her administrative experience included that of a school principal and as a teacher in charge of a teen parent program for the School District.

20. Petitioner's Complaint includes the allegation that she feels that the superintendent "is blackballing me" because she ran for the same elective position as the superintendent and that he tried to convince her to drop out of the race, which she declined to do. When asked at hearing about that allegation and her claims that she had been denied the administrative positions at issue, Petitioner acknowledged that her name was not on the short list prepared by the selection committee representing those deemed most qualified. Petitioner also acknowledged that her name was not among those the superintendent was in a position to consider when reviewing those deemed best qualified by the selection committee for the positions at issue.

21. In sum, the evidence was insufficient to support Petitioner's claim of age, race, or retaliation discrimination.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.; Fla. Admin. Code R. 60Y-4.016(1).

23. The state of Florida secures freedom from discrimination for its citizens under the legislative scheme contained in sections 760.01-760.11 and 509.092, Florida Statutes, known as the Florida Civil Rights Act of 1992 (the Act). Section 760.10(2)(b) of the Act prohibits discrimination in the workplace, and makes it unlawful for an employer:

> To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

24. In addition, section 760.10(7) of the Act makes it an unlawful employment practice for an employer to discriminate against a person because that person has, "opposed any practice which is an unlawful employment practice" or because that person "has made a charge . . . under this subsection."

25. The Act incorporates and adopts the legal principles and precedents established in the federal anti-discrimination

laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. See 42 U.S.C. § 2000e, et seq.

26. Florida courts have held that because the Act is patterned after Title VII of the Civil Rights Act of 1964, as amended, federal case law dealing with Title VII is applicable. See, e.g., Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21-22 (Fla. 3d DCA 2009).

27. As developed in federal cases, discrimination under Title VII may be established by statistical proof of a pattern of discrimination, or on the basis of direct evidence which, if believed, would prove the existence of discrimination without inference or presumption.[2/] Usually, however, direct evidence is lacking and one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the shifting burden of proof pattern established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

28. Under the shifting burden pattern developed in McDonnell Douglas:

> First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action.

> Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)(housing discrimination claim); accord, Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d at 22 (gender discrimination claim)("Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination.").

29. In this case, Petitioner did not present statistical or direct evidence of discrimination. Therefore, in order to prevail in her claim against the School District, Petitioner must first establish a prima facie case by a preponderance of the evidence. Id.; § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.").

30. Petitioner alleges that the School District discriminated against her based upon Petitioner's race and age, and in retaliation for her participation in protected activity. The evidence, summarized in the Findings of Fact, above, does not support those claims and Petitioner otherwise failed to present sufficient evidence necessary to establish even a prima

facie case for any of those claims. Petitioner's claims are analyzed under separate headings A through C, below.

A. Race Discrimination

31. In order to prevail on her claim of discrimination based on race, the Plaintiff bears the burden of establishing a prima facie case. In the failure-to-promote context, the prima facie case consists of showing these elements: (1) that the plaintiff belongs to a protected class; (2) that she applied for and was qualified for a promotion; (3) that she was rejected despite her qualifications; and (4) that other equally or less-qualified employees outside her class were promoted. Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1089 (11th Cir. 2004). The comparators for the fourth prong must be "similarly situated in all relevant respects". Holifield v. Reno, 115 F.3d at 1562.

32. If a plaintiff makes the required showing of a prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. Rojas v. Fla., 285 F.3d 1339, 1342 (11th Cir. 2002) (citing McDonnell Douglas Corp. v. Green, 411 U.S. at 802). Once the employer "articulates" one or more reasons, the presumption of discrimination is rebutted and the burden of production shifts to the plaintiff to offer evidence that the alleged reason of the employer is a pretext for illegal discrimination. Wilson v. B/E Aero, Inc., 376 F.3d at 1087.

33. In this case, Petitioner failed to establish a prima facie case of race discrimination because she failed to present direct or circumstantial evidence that other equally or less-qualified employees outside her class (race) were promoted. Because the selection process for the two administrative positions at issue involved all applicants meeting minimum qualifications, it was incumbent upon the Petitioner to demonstrate with credible evidence that a similarly situated, equally-qualified employee outside the protected class was treated more favorably.

34. Petitioner did not present evidence that any of the applicants were treated more favorably than Petitioner. The only evidence of record is that the selection committees, without any evidence of racial bias, ranked numerous qualified applicants based on scores assigned by individual members of the selection committees and that those deemed best qualified had their names forwarded to the superintendent for selection. According to the numerical scores assigned by the members of the selection committees, Petitioner was among the least qualified after rankings were completed for the two positions at issue. While, ultimately, the persons selected to fill the positions at issue received favorable consideration, there is no evidence that the selection committees' evaluations and ranking of the applicants was other than fair and impartial.

35. Even if Petitioner had established a prima facie claim of racial discrimination, Respondent's legitimate, non-discriminatory reason proffered at the final hearing was that only the names of the most qualified and highly ranked applicants were submitted to the superintendent for selection of the successful applicant. For both positions, Petitioner was ranked near the bottom of all the applicants. Respondent's legitimate non-discriminatory reason for the selection of the successful applicants is that they were among those ranked by the selection committees as the best qualified.

36. No evidence was presented indicating that race played any role in the ranking of the candidates by the selection committees. The superintendent was constrained to select the successful candidate from among those presented to him by the committees as highest ranked and best qualified, and he did so. Petitioner failed to demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could find unworthy of credence." See Combs v. Plantation Patterns, Meadowcraft Inc., 106 F.3d 1519, 1538 (11th Cir. 1997).

B. Age Discrimination

37. A plaintiff claiming discrimination based on age bears the ultimate burden of proving that age was a determining factor

in the employer's decision. As in race discrimination, the elements for a prima facie showing of age discrimination follow the pattern for other Title VII discrimination cases using the McDonnell Douglas standard, in which Petitioner must make a showing that: (1) she belongs to a protected group; (2) she was qualified for the position at issue; (3) she suffered an adverse employment action; and (4) a similarly situated employee outside the protected class was treated more favorably.

38. As to the first element, it is undisputed that Petitioner's age, 60, is in an age-protected class. As for the second element, it is undisputed that Petitioner was qualified for the two positions at issue because only qualified candidates were interviewed. The Petitioner can also satisfy the third element of a prima facie case because she suffered an adverse employment action by not being selected for either of the two positions. Petitioner cannot, however, satisfy the fourth element of a prima facie case. Petitioner has not demonstrated with any evidence of record that Respondent treated similarly situated employees of a different age or any age more favorably. See City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008); Johnny L. Torrence v. Hendrick Honda Daytona, Case No. 14-5506 (Fla. DOAH Feb. 26, 2015; Fla. FCHR May 21, 2015).

39. While Petitioner's Complaint includes discrimination on the basis of age, Petitioner presented no evidence that age

played any role in the selection of the successful candidates for the two positions at issue. Because Petitioner failed to demonstrate that she was treated less favorably than other equally qualified applicants because of age, she did not demonstrate a prima facie case.

40. Even if Petitioner had established a prima facie case of age discrimination, Respondent's legitimate non-discriminatory reason proffered at hearing was that only the names of the most qualified and highly ranked applicants were submitted to the superintendent for selection of the successful applicant. For both positions considered, Petitioner was ranked near the bottom of all the applicants. Petitioner failed to submit any evidence to rebut the employer's legitimate non-discriminatory reason for selecting successful candidates, that being that the best qualified were selected.

C. Retaliation

41. The Act prohibits an employer from retaliating against an employee that has opposed an unlawful act. See § 760.10(7), Fla. Stat. This opposition is often referred to as the employee "engaging in protected activity." Similar to claims of race and age discrimination, claims of retaliation are analyzed under the McDonnell Douglas burden-shifting paradigm.

42. In order to demonstrate a prima facie case of retaliation, Petitioner must show: (1) that she was engaged in statutorily protected expression or conduct; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Holifield v. Reno, 115 F.3d at 1556. The lesser standard of "some causal relationship" articulated in Holifield has been replaced with "the causation in fact" standard. In University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517, 2525 (2013), the United States Supreme Court held that the proper standard of causation for Title VII retaliation claims would be causation in fact rather than the lesser motivating-factor standard applicable to status-based[3/] claims of discrimination. Id. at 2534.

43. If the employee makes out a prima facie case of retaliation, then the burden shifts to the employer to demonstrate a legitimate, non-retaliatory reason for its challenged action. Once the employer does so, the burden returns to the employee to demonstrate that the employer's articulated reason is pretext for retaliatory action. See McDonnell Douglas, supra.

44. Before the Complaint filed April 22, 2015, the only protected activity that Petitioner demonstrated is that she

filed previous EEOC complaints of discrimination. This would, arguably, satisfy the first part of the three-part test.

45. Petitioner also demonstrated the second element by showing adverse employment action, given the fact she was not the successful applicant.

46. Petitioner, however, failed to satisfy the third element for a prima facie case of retaliation in that she did not provide credible evidence showing a causal relationship between her previous EEOC complaints and her failure to secure the two administrative positions at issue. Petitioner presented no evidence that those who served on the selection committees for the two positions had any knowledge that Petitioner had engaged in a protected activity, or that, even if it is assumed that one or more members of the selection committee had such knowledge, the alleged protected activity had any relationship whatsoever with the overall committee evaluation finding Petitioner among the least qualified of those candidates interviewed.

47. Thus, Petitioner failed to demonstrate a prima facie case of retaliation. Even if she had, the evidence otherwise demonstrated that the selection process for the two positions was designed and functioned to identify those best qualified and that the names of those deemed best qualified were submitted to the superintendent for selection. Petitioner's name was not

among those deemed best qualified and there is no evidence that Petitioner was treated unfairly with regard to the evaluation and selection process.

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 Petitioner's Complaint of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 31st day of January, 2017, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of January, 2017.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes, Florida Administrative Code, and federal laws are to the current versions which have not substantively changed since the time of the alleged discrimination.

[2/] For instance, an example of direct evidence in an age discrimination case would be the employer's memorandum stating, "Fire [petitioner] – he is too old," clearly and directly evincing that the plaintiff was terminated based on his age. See Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

[3/] That is, race, color, religion, sex, and national origin.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

Jamison Jessup
557 Noremac Avenue
Deltona, Florida 32738
(eServed)

Joseph L. Hammons, Esquire
The Hammons Law Firm, P.A.
17 West Cervantes Street
Pensacola, Florida 32501
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

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.