

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SELWYN TITUS,

Petitioner,

vs.

Case No. 19-5536

MIAMI DADE COUNTY,

Respondent.

RECOMMENDED ORDER

This case was heard by Administrative Law Judge Robert L. Kilbride of the Division of Administrative Hearings at a final hearing on January 16, 2020, by video teleconference from sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Selwyn Don Titus, pro se
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For Respondent: William X. Candela, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Miami-Dade County ("MDC" or the "County"), discriminated against Petitioner ("Petitioner" or "Titus") on the basis of his race, age, national origin, disability, or retaliation in violation of the Florida Civil Rights Act ("FCRA"), when it did not hire or promote him to the Technical Equipment Instructor ("TEI") vacancy.

PRELIMINARY STATEMENT

On November 6, 2018, Petitioner, Titus, filed a race, age, national origin, disability, and retaliation discrimination charge with the Florida Commission on Human Relations ("FCHR") alleging that Respondent, MDC, did not hire him for the Solid Waste TEI position in 2017 in violation of the FCRA. FCHR investigated the case and issued a "No Reasonable Cause" determination on September 13, 2019.

Dissatisfied with that decision, Petitioner filed a Petition for Relief and requested an administrative hearing. FCHR transmitted the Petition for Relief to the Division of Administrative Hearings ("DOAH") and the undersigned was assigned to hear the case. The final hearing was scheduled for January 16, 2020.

At the evidentiary hearing, Titus testified on his own behalf. The County then presented the testimony of two witnesses, Michelle Sifontes and Jesmar Olivo. Petitioner's Exhibits 1 through 12 were admitted into evidence. Respondent's Exhibits 1 through 26 were admitted into evidence.

A Transcript of the proceeding was filed on January 31, 2020. The deadline for the filing of post-hearing submittals was February 14, 2020.

The parties timely filed proposed recommended orders ("PROs"), which were reviewed and considered by the undersigned in the preparation of this Recommended Order.

All references to the Florida Statutes are to the version in effect on the date of the incident. Referenced to Respondent's exhibits will be "Cty. (County) Ex." and Petitioner's Exhibits will be "Pet. Ex."

FINDINGS OF FACT

Based on the evidence presented at the hearing and the record as a whole, the following findings of fact are made:

1. MDC is comprised of 25 working departments, including the Miami-Dade Water & Sewer Department ("W&S") and the Miami-Dade Solid Waste Department ("Solid Waste"). The County employs over 28,000 employees.

2. Petitioner, Selwyn Titus, is a black male who was born in Trinidad. During the relevant time period, the County employed Titus as a W&S Heavy Equipment Operator.

3. Michelle Sifontes ("Sifontes") is a black female, who was also born in Trinidad. Sifontes is the Solid Waste Chief of Human Resources at MDC and has served in that capacity for over 11 years.¹ As the Chief of Human Resources, she is responsible for ensuring that the Solid Waste hiring and recruitment complies with the County's hiring policies.

4. In late 2017, Solid Waste posted a job announcement for a TEI vacancy.² Cty. Ex. 1, Career Employment Opportunity Bulletin. The job announcement established the minimum qualifications for the position. Applicants submitted resumes through the County's PeopleSoft program.

5. This position fell within the Solid Waste Human Resources Division and is under Sifontes's chain of command.

6. A TEI performs "specialized instructional work in the training of commercial drivers and heavy equipment operators for waste collection and disposal operation systems." Cty. Ex. 7, Job Description Technical Equipment Instructor.

¹ Ms. Sifontes has been a Solid Waste employee for over 24 years. T. at p. 72.

² This 2017 TEI job announcement is identical to the previous 2016 TEI job announcement, which Titus had applied for, and been rejected, for the reasons stated infra.

Solid Waste Department Posts Previous 2016 Technical Equipment
Instructor Job Announcement

7. As background to the current dispute, it is important to note that in 2016 Titus had applied with MDC for the same job posting for TEI.

8. Titus applied for the TEI position in 2016 and submitted his resume via the PeopleSoft program. Pet. Ex. 9. Sifontes reviewed Titus's resume and determined that he met the minimum qualifications. Consequently, Titus was interviewed by a three-member panel of Solid Waste supervisors.

9. As a result of Titus's performance during the first interview related to his 2016 application, the panel placed Titus in the second "band." Because Titus was placed in the second band, and no applicant was placed in the first band, Titus was considered as a finalist for the TEI vacancy posted in 2016.

10. As the Chief of Human Resources, and because the TEI reports to her and is under her supervision, Sifontes reviewed Titus's personnel file to determine if Titus should be selected for the 2016 TEI vacancy.

11. Upon review, Sifontes noted that Titus's personnel file contained information that he had been disciplined by W&S supervisors, and that Titus received a Written Reprimand and Record of Counseling in 2013. Cty. Ex. 26.

12. Those disciplinary records speak for themselves. The undersigned finds that the disruptive, aggressive, and unbecoming conduct by Titus outlined in the County's Exhibit 26 was incompatible and unsuitable for a person being considered for an instructional or training role with MDC.

13. Sifontes considered the events in the Written Reprimand "very concerning [because] the behavior that was described ... shouting and loud, disruptive tone, argumentative with the supervisor ... in light of the position that we are hiring for ... It just would not be a good business practice to promote or hire someone with a record such as this."

14. As a result of this disciplinary information, Titus was not selected for the 2016 TEI position, and his application was rejected by MDC.

Solid Waste Department Posts 2017 Technical Equipment Instructor Job
Announcement

15. In the latter part of 2017, Solid Waste again posted an announcement for a vacant TEI position. Cty. Ex. 1. The announcement set minimum qualifications for the position. *Id.*

16. A total of 68 applicants, including Titus, applied for the TEI position through the PeopleSoft program. Cty. Ex. 6. Titus met the minimum qualifications for the position.

17. Sifontes reviewed the list of applicants who applied for the position and recognized Titus's name. Sifontes recollected and considered her previous experience with Titus, particularly the disciplinary issues she had uncovered, and decided to eliminate Titus from further contention for the 2017 TEI vacancy. As a result, she did not permit him to interview for the position--for the same reasons she did not select him for the 2016 TEI vacancy.

18. Sifontes explained that "based on the information that I reviewed previously at the beginning of the year (2017) and the decision I made at that time, [Titus] was not invited to an interview later that year."

19. Sifontes did not know Titus's age, religion, or alleged disability when she made the decision not to pass Titus along for an interview for the TEI position. Similarly, Sifontes was not aware that Titus had filed a charge of discrimination against W&S with FCHR or the Equal Employment Opportunity Commission ("EEOC") when she rejected his name for the second TEI opening in late 2017.

The Panel Selects Luis Monteil For The 2017 TEI Position As The Most
Qualified Applicant

20. On November 21, 2017, a racially diverse three-member panel of Solid Waste supervisors interviewed 11 applicants for the TEI position. Cty. Ex. 8.

21. Jesmar Olivo ("Olivo") was one of the panel members that interviewed applicants for the TEI position. Olivo is employed with Solid Waste as a Solid

Waste Human Resource Manager with the Labor and Discipline section. She reports to Sifontes.

22. According to Olivo, the panel conducted a structured interview. All of the applicants were individually asked a series of pre-selected questions in the same order and then scored on their answers. Olivo further explained that the individual applicants' resumes were not reviewed or considered during the interview.

23. Olivo recounted, "we [the interview panel] do not do the reviewing of the applications. Once we are there [interviewing] it's determined that whoever we are interviewing has met the minimum qualifications." She further testified that her decisions were based solely on the interview answers.

24. Luis Montiel ("Montiel"), a Hispanic male, applied for the 2017 TEI position. Montiel was employed as a W&S Heavy Equipment Operator. Montiel met the minimum qualifications and was selected to be interviewed.

25. At the conclusion of the panel interviews, Montiel was the highest scoring applicant. Cty. Ex. 20, Interview Score Sheet. As a result, Sifontes reviewed Montiel's personnel file. While doing so, she determined that he had never been disciplined. She ultimately selected Montiel for the 2017 TEI position.

26. At the evidentiary hearing, Titus took the position that he should have been hired or promoted to the 2017 TEI position because he was the "most qualified." This was the core and substance of his argument throughout the hearing and arguments made by him thereafter.

27. He also argued that the fact that he had been interviewed for the 2016 position "proved" that Respondent must have discriminated against him when he was not promoted in 2017.

28. It is understandable that such arguments would be made by any individual unhappy with the selection of another person for a position he desired and coveted. However apparent these arguments may seem, they are

unavailing and not persuasive. Under the facts presented, there are several reasons for this conclusion.

29. First, Titus failed to identify anyone at Solid Waste who directly discriminated or retaliated against him, nor did he present any direct evidence to that affect. More specifically, there was no evidence presented to show that any blatant, direct, or overt statements, emails, or memos were issued or made by management personnel or Sifontes, targeting him for discrimination or failing to promote him because of his race, age, national origin, or a disability. *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999); *Lee v. Miami-Dade Police Dep't*, 2005 U.S. Dist. LEXIS 22890 (S.D. Fla. 2005).

30. Moreover, Titus failed to identify a similarly-situated comparator or employee at MDC who was promoted to TEI and who had a disciplinary record like his.

31. Likewise, he failed to prove that Respondent's consideration of his disciplinary record was only a pretext for not hiring or promoting him. As will be discussed, this factor can be legitimately considered in cases involving failure to hire or promote.

32. Titus did not establish that the decision maker--Sifontes--was aware of his age, disability, religion, or protected activity.

33. Finally, there was not sufficient circumstantial evidence presented by Titus under the burden shifting analysis outlined in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), to carry his burden of proving a circumstantial case of discrimination or retaliation.

CONCLUSIONS OF LAW

34. DOAH has jurisdiction of the subject matter and parties under the Florida Civil Rights Act, and sections 120.569 and 120.57(1), Florida Statutes (2019).

35. The Florida Civil Rights Act of 1992 ("Act"), is codified in sections 760.01 through 760.11, Florida Statutes, and section 509.092, Florida Statutes.

36. A "discriminatory practice," is defined by the Act to include "any practice made unlawful by the Florida Civil Rights Act of 1992." § 760.02(4), Fla. Stat.

37. In this administrative hearing, Titus had the burden of proving his case by a preponderance of the evidence. *See Balino v. Dep't of HRS*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977).

Establishing a Prima Facie Case of Race, National Origin, Disability, Religion, and Age Discrimination

38. Sections 760.10 (1) (a) and (b) provide that it is an unlawful employment practice for an employer to discriminate on the ground of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status against any individual with respect to compensation, terms, conditions, or privileges of employment; or to limit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities or adversely affect any individual's status as an employee.

39. The applicable law in this case is simple and straightforward. In order to establish a prima facie case of discrimination, Titus must prove four elements through direct or circumstantial evidence: (1) that he belongs to a protected class; (2) that he was subjected to an adverse employment action; (3) that he was qualified to perform the job in question; and (4) that the County treated "similarly situated" employees outside his class more favorably. *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1220-21 (11th Cir. 2019). Here, Titus arguably met the first three prongs but did not establish the fourth.

40. More to the point, Titus was required to prove that the comparator employee who got the promotion, Montiel, was similarly situated in all

material respects when he was hired for the 2017 TEI vacancy. *Id.* Of particular consequence to this case is the determination by the undersigned that Montiel was not similarly situated in all material respects to Titus.

41. Unlike Titus, Montiel had not been previously disciplined. This was a significant distinguishing factor between the two applicants.

42. Moreover, the prior misconduct resulting in discipline for Titus raised legitimate concerns for Sifontes about Titus's ability to serve as a TEI.

43. There is a significant body of federal case law which emphasizes the principle that disciplinary issues of an applicant may be considered and serve as a legitimate basis to reject one candidate over another. *See generally, Horn v. City of Cleveland* 674 Fed. Appx. 511 (6th Cir. 2017)(past performance and prior discipline of an employee may be legitimate reasons for not promoting); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612 (7th Cir. 2000)(job performance problems related to one employee and not another, make the two materially different, and not similarly situated); *Holmes v. Am. Drug Stores, Inc.*, 2003 U.S. LEXIS 11992 (N.D. Ill. 2003)("[o]ne feature distinguishing Stivers from Holmes is that Holmes was disciplined for using profanity, whereas Stivers' disciplinary record was clean.").

44. Likewise, proving that an employee is more qualified does not mean that the employer discriminated or had a pretext for hiring another person. *Lee v. GTE Fla. Inc.* 226 F.3d 1249, 1253 (11th Cir. 2000). *Lee* involved sex discrimination, but its comments regarding discrimination related to promotional opportunities are worth noting:

In a failure to promote case, a plaintiff cannot prove pretext by simply showing that she was better qualified than the individual who received the position that she wanted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by sex. *See Alexander v. Fulton County*, 207 F.3d 1303, 1339 (11th Cir. 2000). We have explained that "a plaintiff may not establish that an employer's proffered reason is pretextual merely

by questioning the wisdom of the employer's reasons, at least not where ... the reason is one that might motivate a reasonable employer." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997), cert. denied, sub nom., *Combs v. Meadowcraft Co.*, 522 U.S. 1045, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998); see also *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999), cert. denied, U.S., 120 S. Ct. 1962, 146 L. Ed. 2d 793 (2000)(emphasizing 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.").

No Evidence of Pretext

45. Even if Titus had established a prima facie case of discrimination, which he did not, he failed to prove that Sifontes's decision not to select him for TEI was a pretext for unlawful discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993)(in order to prove pretext, a plaintiff must demonstrate that the reason is not only false, but also that intentional discrimination was the real reason).

46. MDC had legitimate, nondiscriminatory reasons to not hire or promote Titus for the 2017 TEI position, not the least of which was its legitimate concern that he did not have the temperament, character, or disposition to be placed in an instructional or training role.

47. Likewise, the undersigned does not sit as a superior human resource department to second guess the wisdom of MDC's employment decisions. *Fleming*, 196 F.3d at 1354, 1359.

48. Finally, the decision maker, Sifontes, was the same race (black) and of the same country (Trinidad) as Titus. This seriously undercuts Titus's claim of discrimination by Sifontes. *Belser v. City of Decatur*, 2007 U.S. Dist. LEXIS 105352 (N.D. Ga. Dec. 12, 2007)(granting summary judgment in Title VII discrimination case because "the ultimate decision maker ... was the same

race as plaintiff, which undercuts any evidence of discrimination"), *citing Holston v. Sports Auth., Inc.*, 136 F. Supp. 2d 1319, 1335 (N.D. Ga. 2000)(because the race of plaintiff and decision maker are the same "the employee faces a more difficult burden in establishing that a discriminatory animus played a role").

Titus Cannot Establish a Prima Facie Case Of Retaliation³

49. Because Titus did not present any direct evidence of retaliation, his claim of retaliation may still be proven by circumstantial evidence.

50. In order to prove a prima facie case of unlawful retaliation under chapter 760, Florida Statutes, by indirect or circumstantial evidence, Petitioner must establish that: (1) he engaged in protected activity; (2) he was subjected to an adverse employment action; (3) and that the protected activity and adverse action are causally related. *Johnson v. Miami-Dade Cty.*, 948 F.3d 1318 (11th Cir. 2020)

51. Here, Titus failed to establish the third prong because the undisputed evidence reflects that the decision maker--Sifontes--had no knowledge of Titus's protected activity.

52. In addition to that, there was no persuasive evidence that his protected activity and the failure to promote were causally related. That is, Titus did not prove that he was not promoted because of any protected activity, nor did Titus show that his protected activity was a "but for cause" of the alleged failure to promote. *Palm Beach Cty. School Board v. Wright*, 217 So. 3d 163 (Fla. 4th DCA 2017)("Nassar requires Title VII retaliation claims to employ the "but-for" causation standard. That standard must be applied with equal force to FCRA claims.").

³ Section 760.10(7), Florida Statutes, provides :

It is an unlawful employment practice for an employer ... to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section.

53. Based on the findings of fact herein and a consideration of the totality of the circumstances, there was insufficient evidence or proof that MDC discriminated or retaliated against Titus. Titus failed to establish that the County committed an unlawful discriminatory employment action against him within the meaning of the FCRA.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that FCHR find in favor of Respondent and dismiss Petitioner's claim with prejudice. The undersigned also recommends that after considering the findings herein, FCHR determine the appropriate disposition of Respondent's Amended Motion for Attorney Fees, filed January 16, 2020.

DONE AND ENTERED this 13th day of March, 2020, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
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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.