STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANGELA HARRIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-4260
	)	
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing in the above-styled cause was begun pursuant to notice by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings, on January 18, 2002, in Tallahassee, Florida. The hearing was recessed to compel the attendance of one of the witnesses who did not respond to subpoena. The hearing was concluded on February 11, 2002.

APPEARANCES

For Petitioner: Ben R. Patterson, Esquire
Patterson & Traynham
315 Beard Street
Post Office Box 4289
Tallahassee, Florida 32315

For Respondent: John R. Perry, Esquire
Department of Children
and Family Services
2639 North Monroe Street
Tallahassee, Florida 32399-2949

STATEMENT OF THE ISSUE

Whether Petitioner is disqualified for employment, and, if so, should she be granted an exemption.

PRELIMINARY STATEMENT

Petitioner was a career service employee of Respondent at the Florida State Hospital. She was terminated from her position on July 30, 2001, because Respondent determined that her plea of nolo contendere to the offense of simple battery charge was a disqualifying offense under the provisions of Chapter 435, Florida Statutes. Petitioner was also notified that Respondent had determined that it would not grant her an exemption and of her right to request a formal hearing on that determination. She requested a hearing on Respondent's denial of an exemption and raised as an issue the initial determination whether she was subject to disqualification.

The matter was forwarded to the Division of Administrative Hearings where it was set for formal hearing and heard, as noticed. At the initial hearing, the parties stipulated to certain facts. Petitioner testified in her own behalf and presented the testimony of Jimmy Butler; Beverly Ann Dixon; Kenneth Jackson; Raymond Baker; Curtis Green; and J.W. Hodges. Petitioner entered into the record Petitioner's Exhibits 1-3 and 5. Respondent introduced Respondent's Exhibits 1-6, of which 1, 3, 4, 5 and 6 were received into evidence.

Respondent's Exhibit 2 was objected to and the objection sustained.

Petitioner's witness, Mr. Frank L. Martin, did not attend. The hearing was recessed to compel his attendance. The hearing was reconvened on February 11, 2002, and Mr. Martin's testimony was received together with Petitioner's Exhibit 5. Respondent presented the testimony of Officer David Sims of the Tallahassee Police Department and the hearing concluded.

After the hearing, both parties submitted proposed findings that were read and considered.

FINDINGS OF FACT

1. Petitioner, Angela Harris, is a 39-year-old divorced black woman who is the mother of two children, including a 16-year-old daughter who remains dependent upon her.

2. Petitioner is a high school graduate who is a certified nursing assistant.

3. Petitioner was employed by Respondent at Florida State Hospital on June 29, 1990, as a Human Services Worker I-F/C, a career service position. She worked continuously for Respondent until she was dismissed on July 30, 2001.

4. Petitioner attained permanent status in the Career Service System as a Human Service Worker I, Human Services Worker II, and Unit Treatment Rehabilitation Specialist.

She was working as a unit treatment rehabilitation specialist at the time of the termination.

5. Petitioner's duties as a unit treatment rehabilitation specialist involved the supervision of residents or patients as they did their laundry and monitoring patients engaged in classes and physical exercise groups. The patients were ambulatory adults who were being treated at the Florida State Hospital. She did this for more than fours hours each day.

6. Subsequent to her discharge, Ms. Harris has been employed as a dishwasher for the Cracker Barrel Restaurant.

7. Petitioner was terminated from her employment on July 30, 2001, because the Department determined that the plea of nolo contendere that she had entered to simple battery was a disqualifying offense under the provisions of Chapter 435, Florida Statutes.

8. The court withheld adjudication of guilt when it accepted Petitioner's plea. The court noted that it was unlikely that she would engage in a criminal conduct in the future.

9. The alleged victim of the battery to which Ms. Harris plead was Frank Martin. Mr. Martin was born in 1950. He is not a minor.

10. Mr. Martin testified in this proceeding. On the morning of August 11, 2000, Ms. Harris took Mr. Martin in her vehicle to an employment training class held by Kirby Vacuum Cleaners in Tallahassee. The two had an argument during the trip. After Petitioner dropped him off in the vicinity of his class, Mr. Martin went to a McDonald's Restaurant that was across the street from Kirby's.

11. While inside the dining room, he observed that Ms. Harris had not left and was in her car in the parking lot of McDonald’s. When he exited McDonald's, Ms. Harris drove around the block and approached him in her vehicle. As they met, they were headed in opposite directions. Mr. Martin did not stop to talk to Petitioner but continued to walk in the direction he had been going opposite from the direction the vehicle was heading. To continue the conversation, Petitioner backed up her car. To avoid further conversation, Mr. Martin crossed behind her vehicle as it was backing up and his foot was touched by the rear tire. There is conflicting evidence regarding which side of the car, passenger or driver, struck Mr. Martin.

12. Mr. Martin suffered no injury and his clothing was unsoiled and reflected no contact with the vehicle. He did, however, call the police and reported that Ms. Harris had hit him with her vehicle. This led to criminal charges being filed against Ms. Harris.

13. David Sims, an officer with the Tallahassee Police Department, interviewed Mr. Martin. Based upon the information obtained from Mr. Martin, Officer Sims prepared an offense report. This report indicates the victim, Mr. Martin, was not a minor and that he lived with the Petitioner, who was his girlfriend. There was no evidence presented that the employer had this record when it disqualified the Petitioner, because it would not be a document generated by screening. The parties stipulated to this relationship.

14. After Mr. Martin spoke to a police officer, Mr. Martin proceeded to attend the full and complete training session at Kirby's.

15. As Petitioner and Mr. Martin had previously agreed, Petitioner arrived to pick up Mr. Martin when his training session ended at approximately 4:30 p.m. It was raining and Mr. Martin and another person loaded a vacuum cleaner into the back seat of Petitioner's car. From there, Petitioner drove Mr. Martin to the home of Mr. Martin’s sister in Tallahassee.

16. At no time did Mr. Martin tell Ms. Harris that he had called the police and reported to them that she had purposely hit him with her car.

17. Subsequent to August 11, 2000, and before Ms. Harris was notified of any pending criminal charges, Mr. Martin attempted to withdraw his complaint. The authorities decided to

prosecute anyway, and Ms. Harris was notified on or about September 11, 2000, of the charges.

18. Thereafter she retained an attorney to represent her and paid $1,000 to Ms. Gardner to serve as her attorney. The agreement that she had with Ms. Gardner required her to pay an additional $1000 if the case was tried.

19. October 1, 2000, Mr. Martin executed an Affidavit in which he states, "Ms. Angela Harris accidentally bumped into my foot with her car. I was not injured during this accident and do not wish to pursue any criminal charges against Ms. Harris." At hearing Mr. Martin explained that their argument had influenced his initial conclusion that Petitioner struck him on purpose. Upon reflection, he felt it was an accident and not an intentional act. Petitioner also testified she did not intentionally strike Mr. Martin.

20. In May 2001, Ms. Gardner informed Petitioner of a plea bargain offer. If Petitioner agreed to a plea of no contest to a simple battery charge, she would be placed on probation for a year and there would be no adjudication of guilt. Ms. Gardner represented to Petitioner that there would be no consequences to her employment from the plea.

21. Petitioner also understood that she would not have to pay an additional $1000 to Ms. Gardner to represent her at trial.

22. Petitioner chose to enter a plea of no contest to a charge of simple battery.

23. Petitioner is a friendly person who performed her job duties satisfactorily and related well to both staff and fellow employees. She attends church regularly and is liked and respected in her community.

24. Her employment record shows some minor infractions; however, there is no indication that she ever has been abusive to any patient or suspected of any abusive treatment.

25. There is no evidence that an injunction pursuant to Section 741.30, Florida Statutes, was ever entered against Petitioner.

26. There was and is no reasonable cause for the employer to believe there were grounds to disqualify Petitioner from employment based upon Sections 435.04(2) or 435.04(4), Florida Statutes.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this cause. This Recommended Order is entered pursuant to Section 120.57, Florida Statutes.

28. This case arises under the provisions of Chapter 435, Florida Statutes, governing employment screening. The process contemplated by the chapter is based upon background screening

of persons holding critical positions as a basis to eliminate them from those positions.

29. Section 435.01, Florida Statutes, provides generally that Chapter 435, Florida Statutes, will apply when background screening for employment is required by law. Section 435.03, Florida Statutes, provides the criteria for Level 1 screening and Section 435.04, Florida Statutes, provides the criteria for Level 2 screening.

30. Section 435.06(1), Florida Statutes, provides for exclusion from employment for persons in certain positions who do not pass screening. An employer will provide written notice to an employee when it has reasonable cause to believe that grounds exists for denial or termination of employment when a specific record indicates noncompliance with the background standards. This notice accompanies the notice of discharge that is mandatory. It is the responsibility of the employee to contest disqualification, and the only basis for contesting disqualification is mistaken identity.

31. The primary issue in this case is whether Petitioner is subject to disqualification. This ought to be a simple determination, but in this case, there are several subtexts that make it more complex. The issues raised by these subtexts will be discussed in the order they arose.

Disqualification on the Plea to Battery

32. This case commenced when the employer determined that Petitioner was disqualified and that it must terminate her based upon her having entered a plea of nolo contendere to simple battery. Specifically, the letter of dismissal stated the grounds as follows:

> Offense: Battery
> Date of Offense: 08/11/00
> State: Florida
> County: Leon

33. From the description and the penalty stated in the plea document, it is clear that the offense to which the plea was entered was Section 784.03(1)(a)1, Florida Statutes. Section 784.03, Florida Statutes, provides in pertinent part:

> 784.03 Battery; felony battery.-
>
> (1)(a) The offense of battery occurs when a person:
>
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
> 2. Intentionally causes bodily harm to another person.
> (b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

34. Section 435.04(2)(i), Florida Statutes, limits disqualification pursuant to violation of Section 784.03, Florida Statutes, to battery committed on a minor. There is nothing in the documents to reveal a minor was involved and, in

fact, a minor was not involved. Therefore, the plea to the battery was not disqualifying.

Disqualification Based Upon an Act of Domestic Violence

35. There is nothing in the initial letter of dismissal and disqualification relating to domestic violence; however, at some point in the proceedings, the "act of disqualification" evolved into an "act of domestic violence." There is nothing in the screening record, per se, that raises an issue of "domestic violence" because the plea entered by Petitioner was to "Simple Battery" as stated above. The only "record" upon which an act of domestic violence could possibly be predicated is the offense report; however, there is no evidence this was in the hands of the employer when Petitioner was discharged. Domestic violence, as mentioned above, was not referenced in the letter of dismissal.

36. The portion of Section 435.04, Florida Statutes, relating to disqualification for domestic violence provides as follows:

> (4) Standards must also ensure that the person:
>
> * * *
>
> (b) Has not committed an act that constitutes domestic violence as defined in s. 741.30.

37. Section 741.30, Florida Statutes, does not contain a definition of domestic violence. Section 741.30, Florida Statutes, creates a cause of action for injunctive relief by a person who is the victim of any act of domestic violence or has reasonable cause to believe he or she is in imminent danger of becoming the victim of any act of domestic violence.

38. The definition of “domestic violence” used in Section 741.30, Florida Statutes, is contained in Section 741.28, Florida Statutes, which provides that the definition is applicable only to Sections 741.28 through 741.31, Florida Statutes. Therefore, this definition is limited to its use in the aforementioned sections and cannot be grafted, per se, into Section 435.04, Florida Statutes.

39. The Legislature is presumed to know its laws. Therefore, what does the reference to the “wrong” definitional citation for domestic violence mean? The reference to “an act that constitutes domestic violence as defined in s. 741.30” indicates the legislative intent to limit this disqualification to those situations in which an injunction has been entered for "an act that constitutes domestic violence" as opposed to an injunction entered because the person has a reasonable belief they are in imminent danger.

40. Mindful that Chapter 435, Florida Statutes, is about screening records, the reference to Section 741.30, Florida Statutes, provides a court record as "reasonable cause" to believe that grounds exist for the denial or termination of employment of an employee as a result of background screening. This provision is similar to and consistent with the provisions regarding a court's findings of guilty and the entry of pleas of guilty and nolo contendere. See Section 435.04(2), Florida Statutes.

41. This requirement for an encapsulated judicial record is that Section 435.06, Florida Statutes, permits the employer to deny or terminate an important right, that of employment, without a pre-termination proceeding, and limits the grounds for contesting the disqualification to proof of mistaken identity. Clearly, such a process raises significant due process issues. The Legislature wanted to permit non-criminal domestic violence to be disqualifying, but wanted to provide some protections for the employee. By limiting Section 435.04, Florida Statutes, to injunction cases, the facts of the case have already been adjudicated by a court.

42. In this case, the agency urges that it can combine the plea that Petitioner entered with extrinsic evidence showing the offense involved her boy friend to prove an "act of domestic violence." Clearly it does not comport with basic concepts of

due process and fairness to permit the employee to present a complete case and limit the employee's defense to mistaken identity. Although the employer, to its credit, has not sought to limit Petitioner’s defenses, its actions are not consistent with Section 435.06, Florida Statutes, limiting the employee’s defenses. The Legislature did not intend to create a separate cause of action for termination that an employer might prove extrinsically.

43. The investigations in Section 435, Florida Statutes, are record’s checks by their very definition. Many employers subject to the act are non-governmental employers and have no way to "investigate" the circumstances surrounding a plea or injunction. The disqualifying condition must be evidence from the judicial record alone. In this case, the Legislature intended that disqualification for an act of domestic violence be based upon a record of the entry of an injunction by the court pursuant to Section 741.30, Florida Statutes. The burden always lies upon Respondent to show evidence of the disqualification. In the absence of evidence of the entry of such an injunction pursuant to Section 741.30, Florida Statutes, Respondent has failed to show a disqualifying act.

Consideration of the Alternative

44. If one concludes that an employer can consider whether Petitioner committed an act of domestic violence de novo, the

initial burden still lies with the employer. The first issue to be considered is whether there is credible evidence that Petitioner intentionally struck her boyfriend, Mr. Martin, with her car. (The personal relationship was admitted by Petitioner.) Petitioner's plea was nolo contendere. The plea of nolo contendere is not an admission of the facts alleged in the criminal case which are also at issue in this cause, to wit: Did she intentionally strike her boyfriend with her car?

45. Regarding this critical issue, Petitioner states she did not intend to strike him. Mr. Martin recanted his original statement to the police that she intended to strike him and withdrew his complaint prior to Petitioner's knowledge of the complaint. Mr. Martin is sorry that he made the original complaint because he concluded Petitioner's act was not intentional.

46. Given the facts surrounding the event, it was possible that Petitioner accidentally struck Mr. Martin while she was backing up to keep up with him and as he crossed behind her car to avoid further conversation with her.

47. Therefore, even if one concludes that an employer can prove a disqualifying act de novo, Respondent failed to carry its burden to prove that Petitioner committed an act of domestic violence by intentionally striking her boyfriend with her car.

Summary

48. Section 435.06, Florida Statutes, creates a process for denying employment or discharging an employee for a past action based upon screening of a record that has already been subject to adjudication, adjudicatory review, or admission by the individual. The disqualifying event is encapsulated in the records of the court or registry. In each instance, the individual has had the opportunity to controvert the allegations and has been found guilty, entered a plea of guilty or nolo contendere, been enjoined, or did not contest the allegations after notice. The factual issue of what occurred has been determined. It is in a sense res judicata, which is why summary action can be taken. The employer failed to introduce record of a civil injunction. However, under either interpretation of the statute, the employer failed to prove its case.

RECOMMENDATION

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

RECOMMENDED:

That Respondent failed to establish a factual predicate for Petitioner's disqualification. There is no basis for Petitioner needing an exemption and no impediment to her employment pursuant to Chapter 435, Florida Statutes.

That Respondent failed to prove Petitioner intentionally struck her boyfriend with her car. There is no basis for Petitioner needing an exemption and no impediment to her employment pursuant to Chapter 435, Florida Statutes.

DONE AND ENTERED this 13th day of March, 2002, in Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 13th day of March, 2002.

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.