

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHANIE FRANCIS,)
)
 Petitioner,)
)
 vs.) Case No. 04-0392
)
 HOLMES REGIONAL MEDICAL CENTER,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final administrative hearing in this case on December 14, 2004, in Viera, Florida.

APPEARANCES

For Petitioner: Stephanie Francis, pro se
Post Office Box 161
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For Respondent: Andrew S. Hament, Esquire
Gray, Harris & Robinson, P.A.
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STATEMENT OF THE ISSUE

Whether Respondent, Holmes Regional Medical Center, is guilty of violating Subsection 760.10, Florida Statutes (2003), by allowing Petitioner, Stephanie Francis, to be harassed

because of her race and denying her reasonable accommodations for her pregnancy during her employment.

PRELIMINARY STATEMENT

On January 29, 2004, Petitioner filed a Petition for Relief with the Florida Commission on Human Relations. The Petition was forwarded to the Division of Administrative Hearings on January 7, 2004. On February 3, 2004, an Initial Order was sent to both parties. On February 19, 2004, the case was scheduled for final hearing at 9:00 a.m., on April 13, 2004, in Viera, Florida. On Respondent's motion, the case was rescheduled at the same place and time on May 25, 2004.

On May 24, 2004, the time of the final hearing was changed from 9:00 a.m. to 1:00 p.m. by an Amended Notice of Hearing. On May 25, 2004, Petitioner failed to appear for the final hearing. As a result of Petitioner's failure to appear for the final hearing, a Recommended Order of Dismissal was forwarded to the Florida Commission on Human Relations.

Not being satisfied that Petitioner had received adequate notice of the time-change of the final hearing, the Florida Commission on Human Relations remanded the case with directions to reschedule the final hearing. The final hearing was rescheduled for December 14, 2004, in Viera, Florida.

The final hearing took place as rescheduled on December 14, 2004. At the onset of the hearing, Petitioner advised that her

claim of discrimination was based on her race and that she was denied reasonable accommodations because of her pregnancy. Petitioner presented two witnesses in addition to herself, Sue Stehman and Jennifer Struthers. Petitioner offered 20 exhibits that were received into evidence and marked Petitioner's Exhibits 1 through 20. Respondent presented three witnesses: Sue Stehman, Jennifer Struthers, and Pegreen Bibby. Respondent offered 17 exhibits that were received in evidence and marked Respondent's Exhibits 1 through 16 and 22.

No transcript of proceedings was prepared. The parties were given until January 10, 2005, to submit proposed recommended orders. Respondent submitted a Proposed Recommended Order. Petitioner submitted copies of various statutes, a portion of a Glossary of Terms, and letters. On January 5, 2005, the Florida Commission on Human Relations forwarded copies of all original documents filed with it.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following findings of facts are made:

1. Petitioner is an African-American female who was employed by Respondent as a Certified Nursing Assistant. At the time of the incidents that led to her dismissal from employment, she was pregnant although her condition was not apparent and was unknown initially, at least, by her employer.

2. Respondent is a Florida corporation that operates a major hospital facility in Brevard County, Florida. Respondent is subject to Chapter 760, Florida Statutes (2003).

3. Having recently received her certification, Petitioner's employment began in October 2002. Several months after she became employed, Petitioner requested and received permission to attend Health Unit Coordinator classes. This training would provide the opportunity for career advancement.

4. In order to enable Petitioner to attend Health Unit Coordinator classes, adjustments were made in the work schedules of Petitioner and her co-workers. As the classes were during the day, Petitioner began working night shift.

5. Shortly after she began taking Health Unit Coordinator classes, Petitioner became aware that she would not receive additional pay for attending the training.

6. Petitioner, whose work had been satisfactory, had a marked change in attitude after she learned that she would not receive additional pay.

7. Beginning in April 2003, Petitioner requested numerous transfers from the acute care unit to which she had been initially assigned. Her immediate supervisor, Pegreen Bibby, approved each of Petitioner's transfer requests. Petitioner was not transferred. No evidence was received regarding the

reason(s) why Petitioner was not transferred. Petitioner indicated that she was not aware of why she was not transferred.

8. On April 23, 2003, a co-worker complained that Petitioner spoke to a patient in an inappropriate manner. An investigation confirmed the inappropriate conduct. Petitioner was counseled by her immediate supervisor and received a Counseling Memo which noted that Petitioner had a "poor attitude." Petitioner refused to sign the Counseling Memo.

9. On April 28, 2003, Petitioner's immediate supervisor received a complaint from a patient about Petitioner's conduct. An investigation revealed that Petitioner had treated the patient callously and had made several inappropriate comments to the patient. In the course of the investigation, Licensed Practical Nurse Linda Sweeney (LPN Sweeney) commented that Petitioner made inappropriate comments and had a bad attitude, which according to LPN Sweeney was "normal behavior" for Petitioner. LPN Sweeney is African-American.

10. As a result of the April 28, 2003, incident and related investigation, Petitioner received a written warning and information about the Employee Assistance Program. Petitioner refused to sign the written warning.

11. On March 3, 2003, Petitioner presented a note from a gynecologist stating that she required light-duty and that she could not lift more than 20 pounds. Petitioner did not offer an

explanation for the note and her supervisor, unaware that Petitioner was pregnant, did not inquire, believing that the basis for the light-duty was a private matter. Petitioner did not indicate that she had made her co-workers aware of her pregnancy.

12. Petitioner's job description requires her to have the ability to lift up to 40 pounds unassisted and to lift, assist, bathe, and dress patients. No positions were available in the acute care unit that did not require fulfillment of the job description. Light-duty work is reserved for employees who suffer job-related injuries. As a result, Petitioner was not scheduled for work.

13. On May 14, 2003, Petitioner presented a note indicating that she was able to return to work without restrictions. She was immediately rescheduled for work.

14. Upon her return to work, her co-workers complained that Petitioner's attitude was "hostile." Co-workers, both African-American and Caucasian, complained that Petitioner resisted helping them. Petitioner was observed wearing headphones and reading a newspaper for approximately two hours while co-workers performed her and their responsibilities.

15. As a result of Petitioner's demonstrated poor attitude and lack of job-effectiveness, Respondent initiated the final stage of its progressive disciplinary process: "decision day."

On May 23, 2003, Petitioner received a Counseling Memo which documented her inappropriate work behavior, co-workers' complaints, and failure to follow Respondent's employee rules. Again she refused to sign the Counseling Memo.

16. When "decision day" is invoked, an employee is given paid leave and presented the opportunity to offer a written action plan addressing the deficiencies listed in the Counseling Memo. Petitioner refused to present an action plan as required. Petitioner refused a memo regarding the Employee Assistance Program, indicating that she had one.

17. Petitioner left work and did not return. As a result, on May 30, 2003, Respondent terminated Petitioner's employment.

18. Petitioner failed to identify a similarly situated employee who received different treatment than did Petitioner. Respondent presented evidence of a Caucasian male employee who had refused to submit an action plan following a "decision day" and was discharged.

19. Petitioner suggests, without offering evidence, that she was "harassed" by LPN Sweeney. As previously noted, LPN Sweeney is African-American.

20. In addition to Petitioner's noted inappropriate behavior, subsequent to her discharge, Petitioner made Respondent aware that she had secretly tape-recorded conversations of her co-workers. She acknowledged this during

her testimony. This, of course, is a violation of Section 934, Florida Statutes (2003), and is punishable as a third-degree felony. While not the basis for her dismissal from employment, Respondent's representative testified that this conduct constituted a dischargeable offense in accordance with Respondent's policies.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat. (2004).

22. Subsection 760.10(1)(a), Florida Statutes (2003), provides that it is an unlawful employment practice for an employer:

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.

23. Florida courts have determined that federal discrimination law should be used as a guidance when construing provisions of Section 760.10, Florida Statutes (2003). Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

24. The United States Supreme Court established, in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII, which is persuasive in the instant case, as reiterated and refined in the case of St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

25. This analysis illustrates that a petitioner has the burden of establishing, by a preponderance of evidence, a prima facie case of discrimination. If that prima facie case is established, the respondent must articulate a legitimate, non-discriminatory reason for the action taken. The burden then shifts back to the petitioner to go forward with evidence to demonstrate that the offered reason is merely a pretext for unlawful discrimination. The Supreme Court stated in Hicks, before finding discrimination in that case, that:

[T]he factfinder must believe the plaintiff's explanation of intentional discrimination.

509 U.S. at 519.

26. In the Hicks case, the Court stressed that even if the factfinder does not believe the proffered reason given by the employer, the burden still remains with the petitioner to demonstrate a discriminatory motive for the adverse employment action taken.

27. In order to establish a prima facie case, Petitioner must establish that she is a member of a protected class or group; that she is qualified for her position; that she was subjected to an adverse employment action; and that she was treated less favorably or differently than similarly situated persons outside her protected class. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973); Canino v. U.S. E.E.O.C., 707 F.2d 468, (11th Cir. 1983). In so doing, Petitioner demonstrates that there is a causal connection between Petitioner's status as a member of the protected group and the adverse employment action.

28. There is no dispute in this case that Petitioner is a member of a protected class or that she suffered an adverse employment action. The evidence clearly and convincingly (although that is a greater quantum of proof than required) revealed that by her personal conduct and attitude she disqualified herself from her job. In addition, she has failed to demonstrate that she was treated dissimilarly than persons outside her protected class.

29. Petitioner has failed to advance a prima facie case of discrimination based on her race.

30. Petitioner suggests that she was discriminated against because she was pregnant and that respondent failed to make reasonable accommodations for her condition. Notwithstanding

that the evidence reveals that none of her co-workers were aware that she was pregnant, an employer is not required to give preferential treatment to pregnant employees. Spivey v. Beverly Enterprises, Inc., 196 F.3d 1309 (11th Cir. 1999).

31. In addition, Petitioner offered, again without evidence, that she was harassed by other employees. The evidence demonstrates that by her conduct and attitude she isolated herself from her co-workers. She was counseled and when offered an opportunity to participate in the Employee Assistance Program, she refused. Finally, Petitioner refused to submit an action plan as mandated by the published employee discipline procedures.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner's Petition for Relief be dismissed.

DONE AND ENTERED this 19th day of January, 2005, in
Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of January, 2005.

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.