STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIE A. ERICKSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-0464
	)	
MEMORIAL HOSPITAL OF TAMPA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On April 13 and 14, 2006, an administrative hearing in this case was held in Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas W. Caufman, Esquire
Gallagher & Howard, P.A.
505 East Jackson Street, Suite 302
Tampa, Florida 33602

For Respondent: Robert W. Horton, Esquire
Alonda McCutcheon, Esquire
Bass, Berry & Sims, PLC
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Nashville, Tennessee 37238

STATEMENT OF THE ISSUES

The issues are whether Marie A. Erickson (Petitioner) timely filed her Charge of Discrimination against Memorial Hospital of Tampa (Respondent) in this case, and whether the Respondent discriminated against the Petitioner on the basis of

age when the Respondent proposed to demote the Petitioner from charge nurse to a staff nurse position, which the Petitioner asserts constituted constructive discharge.

PRELIMINARY STATEMENT

By a complaint filed September 26, 2001, with the Florida Commission on Human Relations (FCHR), the Petitioner alleged that she had been "constructively discharged" by, and had resigned from employment with, the Respondent on August 17, 2000, on the basis of age. The complaint stated that the Petitioner "was not given a reason for the actions taken."

By Determination of No Cause dated July 21, 2003, FCHR notified the Petitioner that a "no cause" determination had been made, and advised her of the right to file a Petition for Relief. On August 22, 2003, Petitioner filed a Petition for Relief, which FCHR forwarded in February 2004 to the Division of Administrative Hearings (DOAH) for further proceedings. The hearing was initially scheduled to commence on April 12, 2004, and was rescheduled without objection to June 18, 2004, at the request of the Respondent.

On May 28, 2004, the Respondent filed a Motion to Dismiss the case asserting that the Petitioner had not timely filed her complaint of discrimination pursuant to the deadline set forth at Subsection 760.11(1), Florida Statutes (2000), which requires

that a complaint of discrimination be filed within 365 days of the date of the alleged discriminatory act.

Initial review of the case file indicated that the Petitioner resigned her employment (the "constructive discharge") on August 17, 2000. A letter dated September 5, 2001, from an FCHR investigator to the Petitioner, stated "[t]he information you have provided us to-date is not sufficient for the filing of a complaint of discrimination." A second letter to the Petitioner from the FCHR investigator dated September 18, 2001, apparently accompanied a draft of an amended complaint of employment discrimination prepared for use by the Petitioner and directed the Petitioner to review, sign, and return the complaint. The Charge of Discrimination was filed on September 26, 2001. On June 6, 2004, by Recommended Order of Dismissal, jurisdiction in the case was returned to FCHR.

By an Order dated September 22, 2004, FCHR concluded that the complaint had been timely filed, and remanded the matter back to DOAH, directing the administrative law judge to proceed accordingly.

The case was reopened, and the hearing was scheduled to commence on January 12, 2005; however, the Respondent appealed the FCHR Order of Remand to the State of Florida Court of Appeal for the Second District, and the case was placed in abeyance pending resolution of the appeal.

On February 22, 2005, the Respondent filed a Renewed Motion to Dismiss, asserting that the adverse employment action to which the Petitioner complained occurred in April 2000, and therefore the Petitioner's complaint had not been timely filed. The Petitioner filed a Response in Opposition to the Motion on March 14, 2005. Because FCHR had issued an Order stating that the filing of the complaint was timely, and because the appeal of the FCHR Order was pending, the Renewed Motion to Dismiss was denied by Order dated March 30, 2005.

On December 16, 2005, the parties filed a status report that indicated the District Court had declined to hear the appeal and requested that the case be rescheduled for hearing. The hearing was subsequently conducted on April 13 and 14, 2006.

At the hearing, the Petitioner presented the testimony of four witnesses, testified on her own behalf, and had Exhibits numbered 1 through 6 admitted into evidence. The Respondent presented the testimony of one witness and had Exhibits numbered 1 through 23, 25 through 29, 33, 35 through 36, 39 through 41, 43, and 48 through 56 admitted into evidence.

The parties were invited during a telephone conference conducted on April 10, 2005, and again at commencement of the administrative hearing, to address the matter of timeliness, specifically the assertion by the Respondent that the employment

action of which the Petitioner complained occurred during April 2000, in post-hearing proposed recommended orders.

The Transcript of the hearing was filed on May 3, 2006. The Respondent filed a Proposed Recommended Order on May 15, 2006.

FINDINGS OF FACT

1. The Petitioner was born on May 28, 1939. Beginning in 1981 and at all times material to this case, the Petitioner, a registered nurse, was employed in the Respondent's psychiatric unit. The unit was typically referred to as "Four East," indicative of the physical location of the unit within the hospital facility.

2. Prior to her employment in 1981 at Four East, the Petitioner had been employed as a nurse by the Respondent from 1973 to 1976.

3. In 1990, the Petitioner was promoted to the position of "charge nurse" for the Four East night shift.

4. The charge nurse was responsible for supervision of other nurses working in the unit on the same shift. In addition to performing typical nursing duties including rounds, the night shift charge nurse was responsible for completing unfinished tasks from previous shifts. The night shift charge nurse was responsible for obtaining and reviewing reports from previous

shifts, including patient charts and nursing notes, and for reconciling conflicting information.

5. The night shift charge nurse was also responsible for transcribing physician medication orders onto individual patient Medication Administration Records (MARs). MARs specifically identify medications to be provided to each patient, including dosages, frequencies, and times of administration. Generally, one nurse transcribed the information from physician orders to the MAR, and a second nurse reviewed and verified the transcription. Each MAR included space for the nurse who administered medication to a patient to document each administration.

6. In March 1999, Jackie Larson became the "Nurse Manager" for the Respondent and was the Petitioner's immediate supervisor. By that date, the Petitioner was 59 years of age.

7. At the direction of physicians, nurses were directed to observe some patients with greater frequency than others. Soon after becoming the nurse manager, Ms. Larson became aware that the Petitioner had reduced the frequency of observation for a specific patient without obtaining consent or direction from the patient's physician. Ms. Larson verbally counseled, and issued a written reprimand to, the Petitioner on March 18, 1999, for the incident.

8. In May 1999, Ms. Larson completed a performance appraisal of the Petitioner with generally favorable comments, although Ms. Larson wrote that the Petitioner could be "scattered and difficult to follow with respect to her train of thought." Ms. Larson also noted a tendency by the Petitioner to shift responsibility for errors or uncompleted tasks to other staff members.

9. Ms. Larson's May 1999 performance appraisal was consistent with those of previous supervisors. The evidence fails to establish that the Petitioner's age was considered by Ms. Larson in any manner when evaluating the Petitioner's performance in May 1999.

10. By June 1999, Ms. Larson had discovered several errors in patients' charts and in MARs that had not been identified and corrected by the night shift. Ms. Larson was also concerned that the "cardex," an index card system used to provide medical information for each patient, was not being maintained.

11. When Ms. Larson called the situation to the Petitioner's attention, the Petitioner complained that the night shift was being given too much responsibility and asked whether she was the only one being held responsible. Ms. Larson replied that all responsible parties were being advised of the problem, but that the night shift was tasked with the review of charting by earlier shifts, including the cardex files.

12. The evidence establishes that other employees were also counseled regarding patient records issues. The evidence fails to establish that the Petitioner's age played any role in Ms. Larson's attempts to correct performance issues in the unit.

13. On November 3, 1999, Ms. Larson issued to the Petitioner a written reprimand related to two issues. First, Ms. Larson was concerned about a patient who had been admitted without certification of insurance coverage and who had remained uncertified for three days after admission. The Petitioner had worked two of the three days and had not discovered that the patient's insurance certification had not been completed. Second, Ms. Larson was concerned about an undiscovered error in transcribing a physician's medication order onto an MAR which resulted in the patient receiving less medication that the physician had prescribed. Ms. Larson believed that the Petitioner should have discovered both issues as part of her responsibility to review patient documentation.

14. The Petitioner's response was to suggest that the nurses on duty at the times of the incidents should be held responsible. She also inexplicably suggested that she should have been given two written reprimands, rather than combining the incidents into one document.

15. The other employees involved in the referenced incidents were also disciplined for the errors. Ms. Larson did

not reissue separate reprimands as invited by the Petitioner. The evidence fails to establish that Ms. Larson's imposition of discipline was related in any manner to the ages of any employees.

16. In January 2000, the Petitioner failed to transcribe accurately onto a patient's MAR, medications that had been prescribed by the patient's physician which resulted in the patient not receiving prescribed medication for several days. On January 21, 2000, Ms. Larson issued a written reprimand to the Petitioner for the incident. Another night shift employee was also disciplined for failing to review the MAR that contained the Petitioner's error.

17. At the time of the reprimand, the Petitioner asserted that she had been ill for a few days and those tasks had not been completed by persons whom she had asked.

18. There is no evidence that Ms. Larson's disciplinary decisions relevant to this episode were related in any way to the Petitioner's age.

19. On March 28, 2000, the Petitioner was disciplined for an error in failing to accurately transcribe a physician-ordered medication ("Lasix") onto a patient's MAR. The physician became aware of the error and instructed a staff nurse to report the error to Ms. Larson.

20. After reviewing the matter, Ms. Larson told the Petitioner that she could choose to be reassigned to work in a staff nurse position on the night shift or in a staff nurse position on another shift. Ms. Larson advised the Petitioner that she could accept the reassignment without any reduction in salary, and that she would be suspended if she declined to accept reassignment. The Petitioner declined to accept the reassignment, and asked to meet with the Respondent's CEO, a meeting that did not occur.

21. Ms. Larson shortly thereafter discussed the matter with the Respondent's Human Relations (HR) director, who apparently had some concern about implementation of the suspension option given Ms. Larson's concern about the Petitioner's performance.

22. Subsequent to the discussion between Ms. Larson and the HR director, the proposed suspension was changed on March 30, 2000, to termination. The Petitioner was advised on that date that she could, again at her option, accept the reassignment without salary reduction or resign from employment. The Petitioner was asked to respond by April 7, 2000.

23. On April 4, 2000, the Petitioner's physician advised her to take a medical leave of absence for a period of four weeks, and the Petitioner relayed the information to the

Respondent. The Respondent approved the Petitioner's request for the medical leave of absence.

24. Between March 30, 2000 and August 17, 2000, there was minimal communication between the Petitioner and the Respondent, other than regarding her medical leave of absence and return to work.

25. On August 17, 2000, the Petitioner resigned from employment with the Respondent.

26. The night shift charge nurse position was filled by an employee approximately 35-40 years of age, and younger than the Petitioner.

27. The Petitioner sought no significant employment after her resignation on August 17, 2000, and at the hearing, she testified she has been physically unable to work.

28. The Petitioner testified that she believed she was discriminated against because of her age, and that when Ms. Larson was hired as the Respondent's Nurse Manager she sought to terminate the employment of a number of long-time employees.

29. The Petitioner asserted that an undated memo from Ms. Larson to the Four East staff indicated Ms. Larson's distain for long-term employees and an intent to discriminate on the basis of age. The memo addressed "attitude and morale" in the unit, and suggested that employees consider whether they were

"negative, cynical, sarcastic, avoidant of change" and therefore "could be part of the problem." The memo further stated as follows:

> Ask yourself what you envision for this unit. Do you want to be part of a dynamic team of psych professionals who strive to deliver a superior service-not merely a mediocre, acceptable one. Or would you rather we all just leave you alone, not make waves, so you can slide off into retirement sometime down the road.

30. The memo continued by asking employees to "develop a sense of pride in your work" and take the "opportunity for challenge, growth and improvement." Ms. Larson concluded by asking the employees to "identify and commit yourselves to 4 things that will either improve the attitude and morale, or directly improve the quality of work you deliver."

31. Considered in its entirety, the memo indicates that Ms. Larson sought to elevate the performance of the employees under her supervision. The evidence fails to establish that Ms. Larson's reference to employee's "sliding off into retirement" indicated an intention to discriminate against employees based on age. The reference was applicable to any employee, regardless of age, working in the unit.

32. The evidence fails to establish that the Petitioner's age was a factor in Ms. Larson's review of the Petitioner's job performance. The evidence also fails to establish that the

Petitioner's age was a consideration in the disciplinary actions Ms. Larson imposed against the Petitioner.

33. In May of 1999, Ms. Larson addressed performance concerns with another employee, Tina Pearson, who worked as the charge nurse on the evening shift and was approximately 37 years of age. Ms. Larson offered Ms. Pearson the option of being reassigned to a staff nurse position or resign. Ms. Pearson accepted the reassignment and then later resigned from her employment position.

34. The Petitioner testified that the tasks assigned to the night shift charge nurse were excessive given staff levels, but there is no credible evidence that Ms. Larson significantly increased the work assigned to any of the shifts under her supervision.

35. At the hearing, the Petitioner asserted that some of the records referenced in the disciplinary reports were falsified by the Respondent and that she had correctly transcribed the information onto the MARs. The original documents were reviewed during the hearing, and none exhibited any sign of alteration. There is no evidence that any of the documentation relevant to this proceeding was falsified or manipulated in any manner by any representative of the Respondent, and the Petitioner's assertions in this regard are rejected without reservation.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2000).

37. Subsection 760.11(1), Florida Statutes (2000), provides a period of 365 days during which a party seeking redress for an unlawful employment practice to file a complaint with FCHR. The Respondent disciplined the Petitioner on March 30, 2000, and told the Petitioner to either accept a demotion in responsibility or face termination. The Respondent asked the Petitioner to respond by April 7, 2000. The Respondent took no further action against the Petitioner, who thereafter went on a medical leave of absence and resigned on August 17, 2000. The Petitioner filed the Charge of Discrimination on September 26, 2001.

38. The period for filing a complaint commences on the date a decision was made and communicated to the employee regardless of the fact that the effect of the decision did not occur until a later date. Dept. of Transportation v. Fla. Comm. on Human Rel., 867 So. 2d 489, (Fla. 1st DCA 2004); St. Petersburg Motor Club v. Cook. 567 So. 2d 488 (Fla. 2d DCA 1990).

39. In this case, the employment decision was made and communicated to the Petitioner on March 30, 2000. The

Petitioner's filing of the Charge of Discrimination on September 26, 2001, is clearly beyond the statutory 365-day period, and the complaint must be dismissed. Even if the August 17, 2000, date of resignation is considered (incorrectly) to be the commencement of the 365-day period, the Petitioner's September 26, 2001, complaint was not timely filed, and the complaint must be dismissed.

40. The following conclusions of law are set forth in the event that FCHR determines that the Petitioner's complaint was timely filed.

41. The Respondent is an employer as the term is defined at Section 760.02, Florida Statutes (2000).

42. Section 760.10, Florida Statutes (2000), provides as follows:

> (1) It is an unlawful employment practice for an employer:
>
> (a) 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.

43. Florida courts interpreting the provisions of Section 760.10, Florida Statutes (2000), have held that federal discrimination laws should be used as guidance when construing provisions of the Florida law. See Brand v. Florida Power

Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

44. The Petitioner has the ultimate burden to establish discrimination either by direct or indirect evidence. Direct evidence is evidence that, if believed, would prove the existence of discrimination without inference or presumption. Carter v. City of Miami, 870 F.2d 578, 581-582 (11th Cir. 1989). Blatant remarks, whose intent could be nothing other than to discriminate, constitute direct evidence of discrimination. See Earley v. Champion International Corporation, 907 F.2d 1077, 1081 (11th Cir. 1990). There is no evidence of direct discrimination on Respondent's part in this case.

45. Absent direct evidence of discrimination, Petitioner has the burden of establishing a prima facie case of discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In order to establish a prima facie case of age discrimination, the Petitioner must show that she was: (1) a member of the protected class; (2) qualified for the position; (3) subjected to an adverse employment action; and (4) replaced by a person outside the protected class or subjected to disparate treatment because of membership in the

protected class. Kelliher v. Veneman, 313 F.3d 1270, 1275 (11th Cir. 2002); Anderson v. Lykes Pasco Packing Co., 503 So. 2d 1269, 1270 (Fla. 2d DCA 1986).

46. If the Petitioner establishes the facts necessary to demonstrate a prima facie case, the employer must then articulate some legitimate, nondiscriminatory reason for the challenged employment decision. The employer is required only to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, 450 U.S. at 257. The employer "need not persuade the court that it was actually motivated by the proffered reasons . . ." Burdine, 450 U.S. at 254. This burden has been characterized as "exceedingly light." Perryman v. Johnson Products Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983).

47. Assuming the employer articulates a legitimate, nondiscriminatory reason for the employment decision, the burden shifts back to the Petitioner who then must establish that the reason offered by the employer is not the true reason, but is mere pretext for the decision. The question becomes whether or not the proffered reasons are "a coverup for a . . . discriminatory decision." McDonnell Douglas, 411 U.S. at 805.

48. The ultimate burden of persuading the trier of fact that there was intentional discrimination by the Respondent remains with the Petitioner. Burdine, 450 U.S. at 253.

49. In this case, the evidence is insufficient to establish the elements of a prima facie case of discrimination. The Petitioner is a member of a protected group based on age.

50. The evidence establishes that the Petitioner was subject to an adverse employment decision through the Respondent's intention to demote the Petitioner to a position of reduced responsibility, notwithstanding the fact that the Petitioner's salary would have been unchanged. However, the evidence fails to support the Petitioner's assertion that she was "constructively discharged." In order to prevail on a constructive discharge claim, an employee must show that the employer made working conditions so difficult that a reasonable person would feel compelled to resign. Webb v. Fla. Health Care Mgmt. Corp., 804 So. 2d 422 (Fla. 4th DCA 2001); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989); McCaw Cellular Communications of Fla., Inc. v. Kwiatek, 763 So. 2d 1063 (Fla. 4th DCA 1999). The evidence in this case fails to establish that a reasonable person presented with the same option would have felt compelled to resign.

51. Further, the evidence fails to establish that the Petitioner was qualified for employment as a charge nurse. The

performance issues that ultimately led to the March 2000 reassignment/termination proposal establish that the Petitioner was unable to perform the responsibilities of the position.

52. The evidence establishes that a person outside the protected class replaced the Petitioner, but fails to establish that the Petitioner was subjected to disparate treatment because of her membership in the protected class. Approximately ten months prior to presenting the Petitioner with the reassignment/resign option, the Respondent imposed the same disciplinary option against another charge nurse who was 37 years old at the time.

53. Assuming that the Petitioner demonstrated a prima facie case of age discrimination, the burden would shift to the Respondent to articulate some legitimate, nondiscriminatory reason for the challenged employment decision. The Respondent presented evidence sufficient to meet the burden. The performance issues set forth in the disciplinary records establish sufficient grounds for the Respondent's decision to reassign the Petitioner to a staff nurse position.

54. The Petitioner's evidence fails to establish that the Respondent's imposition of discipline against the Petitioner was pretext for discrimination based on age. The Respondent had previously imposed identical discipline against a 37-year-old charge nurse working on a different shift. There is no credible

evidence that the Petitioner's age formed the basis for any decision made by the Respondent regarding her employment responsibilities.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed by Marie A. Erickson.

DONE AND ENTERED this 6th day of June, 2006, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
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Filed with the Clerk of the
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this 6th day of June, 2006.

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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.