STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMMA J. BROWN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-0511
	)	
SUNBELT HEALTH CARE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice and in accordance with Section 120.569 and Subsection 120.57(1), Florida Statutes (2003), a final hearing was held on May 17, 2004, in Dade City, Florida, before Fred L. Buckine, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Emma J. Brown, pro se
38723 Barbara Lane
Dade City, Florida 33523

For Respondent: Alan M. Gerlach, Esquire
Adventist Health System-Legal Services
111 North Orlando Avenue
Winter Park, Florida 32789

STATEMENT OF THE ISSUE

The issue to be resolved is whether Petitioner, Emma J. Brown, was subject to discrimination in her employment by Respondent for the reasons alleged in her Petition for Relief.

PRELIMINARY STATEMENT

On June 27, 2003, Petitioner, Emma J. Brown, filed a complaint with the Florida Commission of Human Relations ("Commission"), alleging that she believed she had been

> discriminated against pursuant to Chapter 760 of the Florida Civil Rights Act, and/or Title VII of the Federal Civil Rights Act, and/or Age Discrimination in Employment Act, and/or the Americans with Disabilities Act as applicable for the following reason(s):
>
> On July 5, 2002, I was subject to different terms and conditions and terminated because of my race (black).

The Commission, after investigation of Petitioner's complaint, found no reasonable basis to conclude that Petitioner had been subject to discrimination, and on January 9, 2004, issued a Notice of Determination: No Cause.

Petitioner filed a timely request for hearing pursuant to Section 120.569 and Subsections 120.57(1) and 760.11(7), Florida Statutes (2003). On February 12, 2004, this matter was referred to the Division of Administrative Hearings, and on that date, the Initial Order was entered.

On February 18, 2004, Petitioner responded to the Initial Order, and on February 19, 2004, Petitioner filed a letter regarding being represented by a non-lawyer at the hearing.

On February 20, 2004, a Notice of Hearing, scheduling the final hearing for April 8, 2004; an Order of Pre-hearing

Instructions; and an Order, enclosing rules regarding qualified representatives, were entered.

On February 27, 2004, Petitioner filed a request for continuance of the final hearing, and on March 11, 2004, an Order was entered, rescheduling the final hearing for May 17, 2004. On March 12, 2004, an Order extending the time for filing the authorization of Petitioner's prospective qualified representative to April 2, 2004, was entered.

On April 29, 2004, a Notice of Appearance and Respondent's Witness List were filed by Alan M. Gerlach, Esquire.

On May 5, 2004, a copy of a letter to Charlene Barrett from Petitioner regarding resolution of the matter was filed. On May 14, 2004, Respondent's Motion to Preclude Petitioner's Calling Witnesses and Introducing Exhibits was filed.

On May 17, 2004, at the final hearing, it was established that Petitioner and Respondent had engaged in ongoing discussions over a five-day period but were unable to resolve their differences. The parties did not exchange exhibits or witness lists and did not engage in any discovery. Based upon the failure to engage in discovery, Respondent's Motion to Preclude Petitioner's Calling Witnesses and Introducing Exhibits was denied.

Petitioner testified in the narrative, cross-examined five of Respondent's seven witnesses, and offered three exhibits (P-1

through P-3), which were accepted into evidence. Respondent offered the testimony of seven witnesses and offered ten exhibits (R-A through R-J), which were accepted into evidence.

On May 19, 2004, Respondent filed a Motion for Extension of Time to file proposed recommended orders. On June 1, 2004, the one-volume Transcript of the final hearing was filed, and on that date, an Order granting Respondent's Motion for Extension of Time to file proposed recommended orders was entered.

On June 14, 2004, Petitioner filed a motion for extension of time to file proposed recommended orders, and on June 17, 2004, an Order granting Petitioner's motion was entered, extending the time for filing proposed recommended orders to July 11, 2004, thereby waiving the time requirement for this Recommended Order. See Fla. Admin. Code R. 28-106.216.

Respondent's Proposed Recommended Order was filed on June 18, 2004, and Petitioner's Proposed Recommended Order was filed on July 20, 2004. Both parties' proposals were given consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the demeanor of the witnesses while testifying, exhibits admitted in evidence, and stipulations and argument of the parties, the following relevant, material, and substantive facts are found:

1. Petitioner, Emma J. Brown (Ms. Brown), an African-American female, began working for Respondent, Sunbelt Health Care (Sunbelt), a nursing home in Zephyrhills, Florida, as a Certified Nursing Assistant (CNA) on or about February 11, 2002, after an interview by Barbara Derby-Bartlett (Ms. Derby-Bartlett), director of nursing, who made the decision to hire Ms. Brown. Margaret Levesque (Ms. Levesque), a white female, was hired as a CNA by Sunbelt in June of 2002. A CNA's duties include assisting the nursing staff in overall patient care.

2. At the time of their hire, all new employees were required to attend an orientation process. During orientation, new employees, including Ms. Brown, were given a copy of Sunbelt's employee handbook and other printed materials, including Sunbelt's "Call-Off Guides" policy. The "Call-Off Guides" policy specifies the means and method employees are required to follow when they can not be present for their scheduled work shifts. The policy also informs the new employee that repeated absenteeism will result in immediate dismissal.

3. Sunbelt is a 24-hour, full-care facility with residents located in both its north side wing and south side wing. Employees work on both wings. Sunbelt used two shifts, the day shift and the night shift, to provide residents with 24-hour care and service. Ms. Brown testified that at the time of her hire, she informed Sunbelt that she could not work the day

(first) shift because she had another job. Her request to work the night (second) shift was granted.

4. On February 22, 2002, after 11 days of employment, Ms. Brown suffered an on-the-job injury to her wrist. Ms. Brown re-injured her wrist on March 22, 2002, and suffered an on-the-job back injury on April 7, 2002.

5. Ms. Brown, through counsel, filed workers' compensation claims for her on-the-job injuries. Ms. Brown's treating physician placed her on work restrictions, limiting her duties to no bending and no lifting over 20 pounds. On or about May 24, 2002, Ms. Brown returned to work and presented her work restrictions, and Sunbelt assigned Ms. Brown to the night shift to perform light-duty work assignments. The light-duty work assigned to Ms. Brown consisted of answering residents' call lights, checking their vital signs, assisting residents with their meals (passing trays), and replenishing their water supplies on both the north and south wings.

6. Ms. Brown requested that Sunbelt change her work schedule to day shift and allow her to work five consecutive days with weekends off. This request was denied.

7. During the pertinent time, two other CNAs, Ms. Levesque and Shirley Manley (Ms. Manley), were also on light-duty.

Ms. Levesque and Ms. Manley, white females, performed light-duty work assignments on both the north and south wings similar to those performed by Ms. Brown.

8. According to Ms. Brown, Ms. Levesque worked weekdays for two consecutive months with no weekend duty, and she was not allowed to do likewise.

9. On June 6, 2002, Sunbelt transferred Ms. Brown from night shift to day shift. Ms. Brown maintained that there is "more light-duty work" during the day shift than during the night shift, and by keeping her on the day shift, her workload was increased when compared to CNAs working during the night shift.

10. Ms. Brown filed her claim of discrimination, and Sunbelt, by and through counsel, attempted settlement of Ms. Brown's claim of discrimination without success. Ms. Brown maintained that the proffered settlement did not justify the treatment she received.

11. Sunbelt presented the testimony of Ms. Levesque, who was hired in June 2002 as a CNA but was initially assigned to the duty and function of "staffing coordinator." The staffing coordinator is a day shift employee whose primarily duties consisted of preparing CNAs' work schedules and identifying and securing replacements for those CNAs who called in and, for

whatever reasons, did not or could not report for duty as scheduled. During her staffing coordinator assignment, Ms. Levesque also assisted CNAs in their duties, but was assigned light-duty with a 20-pound lifting restriction. Her CNA duties include passing food trays during breakfast, lunch, and dinner; replenishing water; and anything that did not require her to physically pick-up and/or lift a resident.

12. In or about mid-August of 2002, Ms. Levesque's schedule changed, and she was required to work every other weekend. On several occasions, Ms. Levesque and Ms. Brown worked on the same shift, but not on the same wing.

13. Ms. Derby-Bartlett testified that upon receipt from an employee's physician detailing the employee's limitations, she would work within those specific limitations in assigning CNAs to light-duty. According to Ms. Derby-Bartlett, light-duty work assignments are less during the night when residents are asleep and more during the day when residents are awake.

14. After her appointment to the position of director of nursing, Ms. Derby-Bartlett became aware that Ms. Levesque was not working every other weekend and informed Ms. Levesque that she would be scheduled to work every other weekend. Ms. Levesque's request for a couple of weeks to make adjustments was granted, and she thereafter was scheduled to work every other weekend.

15. Ms. Derby-Bartlett confirmed that Ms. Brown was assigned light-duty work assignments on June 6, 2002, and Ms. Brown was a no-show for work. On July 3, 2002, Ms. Brown was assigned light-duty, and she called in as a no-show. On July 4, 2002, Ms. Brown was assigned light-duty, and she did not call in or show for work. On July 5, 2002, Ms. Brown was assigned light-duty, and she did not call in or show for work.

16. Ms. Derby-Bartlett contacted the staffing person on each day Ms. Brown called in and on each day Ms. Brown was a no-show, confirming the accuracy of the reports.

17. Ms. Derby-Bartlett contacted Ms. Brown regarding her no-calls and no-shows and informed her of Sunbelt's policy of termination for repeated absenteeism. Ms. Brown, believing her doctor had called Sunbelt on one of the days she was a no-show, was mistaken because no doctor called. On July 5, 2002, Ms. Derby-Bartlett completed Sunbelt's disciplinary form to terminate Ms. Brown due to her several no-calls and no-shows, in violation of Sunbelt's policy, and forwarded her recommendation to Maria Coddington, Sunbelt's unit manager.

18. Ms. Derby-Bartlett testified that since her appointment as director of nursing, the no-show/no-call termination policy has been consistently applied, and she was not aware of any employee who had been no-show/no-call for two consecutive days who had not been terminated.

19. Five months after hiring Ms. Brown, Ms. Derby-Bartlett terminated her.

20. Sunbelt's employee handbook's "Call-Off Guides" policy regarding absenteeism provides, in pertinent part that: "if employees do not call in or do not show up for work for two consecutive days or three nonconsecutive days, it is grounds for termination." Each employee, as did Ms. Brown, signed individual employment documents attesting to having received a copy of Sunbelt's "Call-Off Guides" policy when hired.

21. Ms. Brown was terminated because of her violation of Sunbelt's policy regarding two or more absenteeism without notice to her employer and her repeated failure, albeit her belief that her physician was going to call on her behalf and did not do so, to timely inform her employer of her absence from scheduled duty.

22. Ms. Brown's termination by Sunbelt was based on her violation of their employee work attendance policy and not because of her race and/or ethnic origin.

23. Ms. Brown failed to present a prima facie case of discrimination based on her race as alleged in her complaint of discrimination.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this

proceeding. §§ 120.569, 120.57(1), and 760.11, Fla. Stat. (2003).

25. Petitioner has the burden of proving, by the preponderance of the evidence, that Respondent committed an unlawful employment practice. Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

26. It is an unlawful employment practice for an employer to discharge or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race. § 760.10(1)(a), Fla. Stat. (2003).

27. It also is an unlawful employment practice to discriminate against any person because the person opposes an unlawful employment practice or has filed a charge of an unlawful employment practice. § 760.10(7), Fla. Stat. (2003).

28. The provisions of Chapter 760, Florida Statutes (2003), are analogous to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq. Cases interpreting Title VII are, therefore, applicable to Chapter 760, Florida Statutes. School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

29. Subsection 760.11(1), Florida Statutes (2003), provides as follows, in pertinent part:

> Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation . . .

30. Petitioner filed her Charge of Discrimination with the Commission on June 27, 2003.

Disparate Treatment

31. In cases alleging racial discrimination based on disparate treatment, the complainant bears the burden of proof established in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under this model of proof, the complainant bears the initial burden of establishing a prima facie of discrimination. If the complainant meets his or her initial burden, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). If the employer meets its burden of production, the complainant must then persuade the court that the employer's proffered reason is a pretext for intentional discrimination. Conversely, if Petitioner fails to meet the initial burden of proof to establish a prima facie case, the inquiry ends.

32. To establish a prima facie case of racial discrimination based on disparate treatment, Petitioner must show the following: (a) she belongs to a racial minority; (b) she was subjected to an adverse employment action; (c) she was qualified for her position; and (d) Respondent treated similarly situated employees outside the protected class more favorably. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

33. Here, Petitioner proved that she, as an African-American, belongs to a racial minority.

34. Petitioner proved that she suffered an adverse employment action because of her repeated failures to comply with the policy of her employer regarding timely notice when one is unable to report to work as scheduled and was terminated by her employer.

35. Petitioner proved that she was qualified for her position as a CNA with Respondent.

36. Respondent's treatment of all employees who violated the above-referenced policy was the same; more than one failure to timely call in when the employee knows he/she would not be able to report to work as scheduled resulted in termination.

37. Petitioner does not deny that she did not call in when she knew she was not going to be at work as scheduled. She excused her failure by her attempt to blame her doctor (unnamed)

for failing to carry out his alleged promise to call her employer for her and inform her employer that she would not be at work on a date and time certain. This excuse was not borne out by Petitioner's physician. The fact that she did not appear for work on two consecutive scheduled workdays and did not call on either of those days and the fact that she may have had a reason, albeit a mistaken reason, for one of her non-appearances would not have deprived her employer of a legitimate non-discriminatory reason for taking disciplinary action for two consecutive scheduled work days of non-appearance. Petitioner has not shown that Respondent's strict enforcement of its policy was a pretext for racial discrimination.

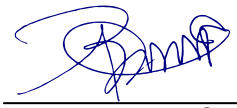
38. Petitioner has failed to carry the initial burden of making a prima facie case of discrimination, and her Petition for Relief must be dismissed.

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 the Petition for Relief filed by Petitioner, Emma J. Brown.

DONE AND ENTERED this 20th day of August, 2004, in Tallahassee, Leon County, Florida.



FRED L. BUCKINE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 2004.

COPIES FURNISHED:

Emma J. Brown
38723 Barbara Lane
Dade City, Florida 33523

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Alan M. Gerlach, Esquire
Adventist Health System-Legal Services
111 North Orlando Avenue
Winter Park, Florida 32789

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.