

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NICOLE M. BRANDON,)
)
 Petitioner,)
)
 vs.) Case No. 04-0757
)
 BAPTIST HOSPITAL, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in the above-styled case on November 5, 2004, by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings, in Pensacola, Florida.

APPEARANCES

For Petitioner: Nicole Brandon, pro se
314 East Blount Street
Pensacola, Florida 32503

For Respondent: Russell F. Van Sickle, Esquire
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STATEMENT OF THE ISSUE

Whether the Respondent engaged in an unlawful employment practice by discharging the Petitioner and setting different standards of employment for the Petitioner because of her race?

PRELIMINARY STATEMENT

This case arose on April 28, 2003, when the Petitioner filed a Charge of Discrimination against the Respondent with the Florida Commission on Human Relations (FCHR) alleging that the Respondent discharged the Petitioner and treated her unfairly because of her race. The FCHR investigated the complaint and made a no cause determination that it communicated to the Petitioner by letter dated February 9, 2004. The Petitioner filed a timely Petition for Relief with the FCHR, and the FCHR referred the case to the Division of Administrative Hearings to conduct a formal hearing. After a continuance occasioned by the hurricane, the matter was noticed for November 5, 2004, and heard as noticed.

The Petitioner testified in her own behalf, and introduced Petitioner's Exhibits numbered 1, 2, and 4 into the record. The Respondent presented the testimony of Venus Jones, Vicki Orcutt, Carolyn Schuster, and Jamie Greathouse. The Respondent introduced the Respondent's Exhibits numbered 1 through 10 into the record. A transcript was ordered, which was filed on November 29, 2004. The Petitioner filed proposed findings on December 13, 2004, and the Respondent filed a Proposed Recommended Order on December 9, 2004, both of which were read and considered.

FINDINGS OF FACT

1. The Petitioner is an African-American, female who was employed by the Respondent from May 5, 1998, until she was discharged on April 14, 2003.

2. The Respondent is a hospital serving the general public in Pensacola, Florida, and is an employer under the provisions of Chapter 760, Florida Statutes.

3. In 2002, Carolyn Schuster was the assistant director of the radiology department. In February of 2002, the director of the radiology department left, and Schuster became the interim director and in July of 2002, she became the director. She was the director of the radiology department at all times pertinent to the disciplining and discharge of the Petitioner.

4. Vicki Orcutt, a white female and the operations manager of the radiology department, was the Petitioner's direct supervisor, and the person who was directly responsible for her discharge.

5. The Petitioner previously had had attendance problems related to her mother who was sick and, in 2002 she again had attendance problems arising out of a bad personal relationship with a boyfriend. As a result of these problems, she was moved from the early shift to the late shift.

6. The Petitioner reacted very angrily to this change, and this led to a verbal exchange with Vicki Orcutt and to the Petitioner's getting a final warning letter.

7. A final warning letter is a disciplinary written warning that any additional employment violations will result in the violator's discharge.

8. Vicki Orcutt testified that she would have discharged the Petitioner for this verbal exchange had she been able. The basis for this animus was in no way racial.

9. The offense for which the Petitioner was ultimately discharged was for falsifying a time card. The Petitioner was originally entitled to take an hour for lunch. The manner in which the individuals accounted for their lunch breaks varied, dependent upon whether they ate in the hospital, on campus, or left the facility. If they left the facility, employees were expected to clock out; however, trips to the credit union across the street were considered to be on campus. If the employees stayed on campus, they did not have to make any adjustment to their time cards and their lunch hour was automatically deducted from their hours worked. If they left the campus, as mentioned above, they were expected to clock out.

10. In June of 2002, Orcutt instructed the payroll department to change the Petitioner to a thirty-minute lunch break. There was no evidence of how this was communicated to

the Petitioner or that it formally was communicated to her; however, examination of the payroll/pay record would have revealed the change.

11. On April 3, 2003, the Petitioner received a check, which her boyfriend brought to her at the hospital. She needed to cash this check at the credit union, and left the hospital with her boyfriend in his car to cash this check. Before she left, there was a confrontation with the boyfriend, which caused the involvement of a hospital security guard, and this was brought to Orcutt's attention together with the fact that the Petitioner had left in the car.

12. Orcutt believed that the Petitioner went from the credit union to her father's house to deliver the money to him. There was conflicting testimony about whether the Petitioner left the campus, but Orcutt believed that she had.

13. Subsequently, on April 10, 2003, the Petitioner's boyfriend had an accident in the Petitioner's automobile and called the Petitioner to have her bring him proof of insurance to the scene of the accident. She called a cab, and left the campus to take him the proof of insurance. In her haste to leave, she did not clock out.

14. During the same week, the Petitioner's co-worker was out on leave. During this period the Petitioner did not eat lunch on some days or brought her lunch back to her work station

to eat. During her absence, Orcutt covered the Petitioner's workstation. As a result, Orcutt has a good idea of the Petitioner's working during the pay period.

15. At the end of the pay period, Orcutt called the Petitioner as Orcutt was reviewing and approving the time records and questioned her about her time records. Orcutt believed that the Petitioner had left the campus and had not clocked-out on April 3, 2003.

16. A telephone conversation took place between Orcutt and the Petitioner regarding the Petitioner's time records for the pay period. Orcutt queried the Petitioner about her lunch breaks. Although Orcutt believed that the Petitioner had left the campus on April 3, 2003 and not signed out, Orcutt asked if the Petitioner wanted her to put down as "no lunch" for the whole week. The Petitioner responded that Orcutt knew she had taken lunch breaks because Orcutt had covered for her. Orcutt indicated to the Petitioner that she had gone right down and come right back, and that she was going to put down "no lunch" for those days. The Petitioner indicated that the record was right.

17. Based upon the Petitioner's response, Orcutt initiated disciplinary action and discharge proceedings against the Petitioner for falsifying a time card based upon the Petitioner leaving the campus on April 3, 2003.

18. Subsequently, when confronted about the time card, the Petitioner mentioned the April 10, 2003, incident; however, Orcutt had no prior knowledge of the April 10 absence prior to initiating charges.

19. There was no proof presented that the Petitioner left the campus on April 3, 2003, except Orcutt's testimony about a statement made by the Petitioner when confronted that she had taken the money to her father. The Petitioner admitted that she had failed to clock-out on April 10 in her haste to get to the accident scene; however, she offered no explanation regarding why she did not report the matter when called by Orcutt.

20. There was a great deal of testimony regarding other alleged disparate treatment of the Petitioner; however, it does not appear from the record that any of the allegations about pay differences had any basis in fact. It was admitted that the Respondent counseled the Petitioner about covering up a tattoo she had on her neck; however, it was not demonstrated that she was treated differently from other employees who held similar positions.

21. It was admitted that the Respondent counseled the Petitioner for soliciting contributions to a political campaign based upon its non-solicitation policy. The Petitioner did solicit contributions, and the Respondent differentiated those solicitations from those for schools (candy sales), cosmetic

sales, etc. Political activities are distinguishable from the other forms of solicitation. No disciplinary action was taken against the Petitioner.

22. Evidence was received that employees of all races and backgrounds were routinely discharged for time record violations.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to Section 760.11, Florida Statutes.

24. The Petitioner filed a timely Petition for Relief and a timely Charge of Discrimination with the FCHR. The FCHR referred the matter to the Division of Administrative Hearings to conduct the formal hearing in the case. After delays associated with the hurricane, the matter was heard in late November of 2004. Both parties filed proposed findings that were read and considered.

25. The Petitioner had the burden of proof in this case. She demonstrated that she was a member of a protected group, African-American, and that she was discharged. Under the principles stated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), the burden shifted to the Respondent to state a non-discriminatory rationale for discharging the Petitioner.

26. Although the evidence presented indicates that the Petitioner's supervisor, Ms. Orcutt, may have jumped to the conclusion that the Petitioner left the campus on April 3, 2002, and should have signed out; and although Orcutt may have set the Petitioner up by asking her about her time records, given that the Petitioner, according to Orcutt, had worked through some lunch periods during the pay period, the fact remains that the employer had a basis for discharge. The Petitioner appeared to have left the campus on April 3, and did leave the campus on the April 10 without signing out. The head of human relations testified credibly that persons, both black and white, were discharged all the time for falsifying time records.

27. Although Orcutt may have set up the Respondent, Orcutt's motivation in doing so was her prior confrontation with the Petitioner, which was unrelated to the Petitioner's race. The Respondent's discharge of the Petitioner had a basis in fact and policy, and, to the extent, Orcutt may have been motivated by a negative animus towards the Petitioner, the discharge was not based upon the Petitioner's race. The Petitioner offered no evidence that the grounds asserted by the Respondent were pretextual.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter its final order dismissing the Petition for Relief filed by the Petitioner.

DONE AND ENTERED this 30th day of December, 2004, in Tallahassee, Leon County, Florida.



STEPHEN F. DEAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of December, 2004.

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.