

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JESSICA JAMES, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 05-1132  
 )  
 WINTER HAVEN HEALTH & )  
 REHABILITATION CENTER, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 2, 2005, in Winter Haven, Florida, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charlann Jackson Sanders, Esquire  
Charlann Jackson Sanders, P.A.  
Post Office Box 7203  
Lakeland, Florida 33860

For Respondent: Amy L. Christiansen, Esquire  
Spector, Gadon, and Rosen, LLP  
360 Central Avenue, Suite 1550  
St. Petersburg, Florida 33701

STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice by terminating Petitioner due to her race.

PRELIMINARY STATEMENT

Petitioner filed an Amended Charge of Employment Discrimination with the Florida Commission on Human Relations ("Commission") on March 31, 2003. The Commission entered a Notice of Determination: No Cause on or about February 17, 2005. Petitioner then filed a Petition for Relief, which was forwarded to the Division of Administrative Hearings (Division) on March 25, 2005, for assignment of an Administrative Law Judge to conduct a formal hearing.

The matter was initially set for hearing on May 6, 2005, but was continued at the request of Petitioner, and was rescheduled for June 28, 2005. Thereafter, the parties requested and were granted several continuances. The hearing was subsequently rescheduled and conducted on December 2, 2005.

Prior to the evidentiary portion of the hearing, Petitioner made an ore tenus motion for reconsideration of the undersigned's Order, issued November 29, 2005, which granted Respondent's Motion in Limine.<sup>1</sup> The motion for reconsideration was denied.

At the final hearing, Petitioner testified on her own behalf and presented the testimony of Nora Vrooman. Petitioner's Exhibits 1, 2, 3, 13, 14, 15, 17, 18, 46, and 47 were admitted into evidence. Petitioner also presented the post-hearing deposition testimony of Charles Bell, formerly the

regional director of operations for Senior Health Management, and Debra Harris, custodian of records for Respondent.<sup>2</sup> The depositions of Mr. Bell and Ms. Harris, and the exhibits attached thereto, are deemed a part of the record in this proceeding. On February 10, 2006, Petitioner filed a motion to admit into evidence Petitioner's Exhibits 7, 20 through 29, 34, 36, 40, and 44, which were proffered at hearing. The motion was granted, based on the documents' being authenticated by Respondent's custodian of records at a post-hearing deposition.

At hearing, Respondent presented the testimony of Patricia Andrews and the deposition testimony of Petitioner. Respondent's Exhibits 1 through 4 were admitted into evidence.

The Transcript of the proceeding was filed with the Division on January 6, 2006. The deposition transcripts of Mr. Bell and Ms. Harris were filed with the Division on February 8, 2006.<sup>3</sup> Both parties filed Proposed Recommended Orders, which have been considered in preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner, Jessica James ("Petitioner"), is a black female who was hired by Respondent, Winter Haven Health and Rehabilitation Center ("Winter Haven Center" or "facility"), as director of nursing on August 27, 2001.

2. Winter Haven Center is a nursing home facility located in Winter Haven, Florida. At all times relevant to this proceeding, Winter Haven Center was owned and operated by Senior Health Winter Haven, L.L.C., and managed by a regional entity known as Senior Health Management ("Senior Health").

3. Petitioner is a registered nurse and has a bachelor's degree in nursing. She also has a master's degree in health care administration.

4. Prior to Petitioner's being employed as director of nursing in August 2001, she had been employed as a unit manager at the Winter Haven Center in 1995. As a unit manager, Petitioner supervised nurses in one unit of the facility. In 1996, Petitioner resigned from her position as unit manager and left the facility.

5. Petitioner's previous employment included working as director of risk management, a staff development nurse, a private duty nurse, a visiting nurse, and a hospital nurse.

6. Prior to her employment as director of nursing in August 2001, Petitioner had never worked in such capacity.

7. At all times relevant to this proceeding, the director of nursing at Winter Haven Center was responsible for doing the following: overseeing the nursing department of the facility; directing all of the clinical programs at the facility, ensuring compliance with state guidelines; managing the quality of

patient care at the facility; generating state mandated reports; and supervising clinical personnel.

8. Recently hired directors of nursing are given a policies and procedures manual for the facility. The manual contains information regarding how the facility is to be run. Specifically, the manual describes all of the clinical programs of the facility and how to implement those programs. It also contains all of the forms used to implement the programs.

9. Regional nurse consultants are employed by Winter Haven Center's management entity, Senior Health. Persons working in those positions visit the facilities managed by Senior Health, conduct audits of those facilities, and provide support to directors of nursing in the various facilities. Such support includes reviewing the facility's policies and procedures.

10. Directors of nursing have the opportunity to consult with regional nurse consultants not only when they visit the facilities, but also, on a regular basis, via telephone and electronic mail.

11. At all times relevant to this proceeding, the procedures and practices described in paragraphs 8 through 10 were applicable to the director of nursing at Winter Haven Center.

12. Nora Vrooman was a regional nurse consultant assigned to Winter Haven Center when Petitioner was first employed as the

director of nursing at the facility. As part of her responsibilities, on September 11, 2002, Ms. Vrooman met with Petitioner at the facility and reviewed the facility's policies and procedures manual.

13. A copy of the facility's policies and procedures manual was available at Winter Haven Center and accessible to Petitioner any time she needed to consult or review it.

14. Ms. Vrooman was not aware of Petitioner's job performance. The only thing that Ms. Vrooman recalled was that when she reviewed the policies and procedures manual with Petitioner on September 11, 2001, Petitioner was very pleasant and nice.

15. At all times relevant to this proceeding, Patricia Andrews was a compliance specialist employed by Senior Health. During the same time period, Ms. Andrews also performed the duties of regional nurse consultant.

16. When Petitioner assumed her new position, Petitioner believed that Ms. Andrews was responsible for providing her with "job specific" orientation regarding her duties as director of nursing. Specifically, Petitioner thought that the orientation should have included orientation of the specifics of the job such as the day-to-day reports and clinical aspects of the job. Apparently, no such "job specific" orientation was provided to Petitioner.

17. Although Petitioner was never given a "job specific" orientation, during Ms. Andrews' visits to the facility, she talked to Petitioner about various issues related to her responsibilities as director of nursing. Also, Petitioner raised several job-related issues with Ms. Andrews. These issues were discussed and Ms. Andrews offered advice, suggestions, and recommendations to Petitioner.

18. During her visits to the facility, Ms. Andrews observed Petitioner having difficulty performing her job duties. Petitioner was unable to perform required tasks in a timely manner and to identify solution strategies to better run the nursing department. Petitioner also had problems keeping and transferring statistical data regarding the facility and its residents/patients. Such statistical data-keeping has a direct effect on the facility's ability to maintain its nursing license. Incomplete data-keeping can also subject a director of nursing to disciplinary action.

19. Given the number of tasks Petitioner was responsible for accomplishing, it was important that she delegate some responsibilities to her staff. Ms. Andrews discussed the necessity of Petitioner's assigning certain tasks to support staff in order to ensure that all tasks were timely completed. Despite this recommendation, Petitioner demonstrated difficulty

assigning tasks and developing clear roles for her support staff.

20. Petitioner was unaware of the status of the units in the facility. In Ms. Andrews' discussions with Petitioner, it became apparent that Petitioner was not always knowledgeable as to the facility's census (i.e., the number of residents/patients in her facility, the care they required, and where they were being placed in the facility). It was important that Petitioner always know the facility's census in order to ensure that the facility was properly staffed at all times. Proper staffing is necessarily and directly related to the quality of care received by residents in the facility.

21. Petitioner also had trouble processing incident reports in a timely fashion. These reports are required whenever there is an adverse event involving a resident. As director of nursing, Petitioner was responsible for reviewing the incident reports, discussing the incidents with staff, and investigating the incidents. The investigation of such adverse incidents is required by state guidelines.

22. Petitioner sometimes did not take appropriate disciplinary action against staff. For example, one evening or in the early morning hours, when Petitioner returned to the facility, she found two certified nursing assistants ("CNAs") braiding each other's hair while they were on duty. Petitioner



reported this incident to Ms. Andrews, but Petitioner indicated that she had not disciplined the CNAs when she observed this inappropriate activity occurring during work hours.

23. On two occasions, Ms. Andrews became aware of Petitioner's conduct only because Petitioner reported the conduct to her. During one of her visits to the facility, Petitioner told Ms. Andrews that a nurse at the facility told Petitioner that she had given a half dosage of a narcotic to a resident, as had been prescribed, leaving the remaining half in the vial. Petitioner also told Ms. Andrews that the nurse involved in the foregoing incident reported the incident to Petitioner and stated that she (the nurse) had destroyed the remaining narcotic. According to Petitioner, the nurse then asked Petitioner to sign the narcotic destruction form. Petitioner told Ms. Andrews that she complied with the nurse's request and signed the narcotics destruction form. Petitioner's signature on the document indicated that she had witnessed the destruction of the narcotic even though she had not observed such destruction.

24. With regard to the destruction of narcotics, the standard nurse practice is to have another person sign the destruction form to verify that the remaining narcotic was, in fact, destroyed. Petitioner's conduct, signing the destruction

form when she did not personally witness the destruction of the narcotic, violated the forgoing nurse standard.

25. After Petitioner told Ms. Andrews about the incident described in paragraphs 23 and 24, and confirmed that she signed the destruction form even though she had not witnessed the destruction of the narcotic, Ms. Andrews counseled Petitioner. Specifically, Ms. Andrews told Petitioner that because she had not witnessed the destruction, she should not have signed the destruction form.

26. Ms. Andrews memorialized the narcotics destruction form incident in a typed unsigned document, dated October 2, 2001. This document was never placed in Petitioner's personnel file or given to Petitioner.

27. Petitioner also told Ms. Andrews about another incident which involved information recorded on an incident report. According to Petitioner, after a staff member found a resident on the floor, Petitioner and a licensed practical nurse ("LPN") were called to the scene to determine if the resident was injured. At the time Petitioner and the LPN arrived at the scene, no incident report had been completed so it was necessary to complete one. The incident report form included a space to record the resident's vital signs at the time of the incident. Because Petitioner was not at the scene when the incident occurred, she was apparently unsure how to report the resident's

vital signs. Petitioner contacted a regional nurse, Nora Roberts, and asked what she should do. The regional nurse told her that she should review the resident's medical chart, average the vital signs reported on the chart, and then record that average on the incident report. Petitioner averaged the resident's vital signs and recorded the average on the incident report. This method did not accurately reflect the resident's vital signs at the time of the fall.

28. Immediately upon being informed of the incident by Petitioner, Ms. Andrews told Petitioner that the method that she used in recording the resident's vital signs constituted falsification of documentation, which is a violation of the Nurse Practice Act. Ms. Andrews explained to Petitioner that the information she recorded on the incident report was not accurate in that it did not report the resident's vital signs at the time the resident fell.

29. Ms. Andrews wrote a memo regarding the incident report described in paragraph 27, and the memo was placed in Petitioner's personnel file.

30. At hearing, Petitioner does not dispute that the incidents involving the narcotics destruction form or the reporting of vital signs on the incident report occurred. Neither does Petitioner dispute the fact that there were many

facets of her job that she had difficulty performing and did not adequately perform.

31. Petitioner does not deny or dispute any of the foregoing cited work-related deficiencies. Instead, she seeks to explain the reasons for such deficiencies. According to Petitioner, her failure to perform her duties as director of nursing was the result of Winter Haven Center's or Senior Health's failing to provide her with a "job specific orientation," failing to evaluate her, and failing to give her written notice of her deficiencies.

32. Notwithstanding her assertions, Petitioner was advised of her responsibilities as director of nursing during routine visits of Ms. Andrews. Nonetheless, Petitioner failed to comply with the reporting and scheduling requirements of the job. With regard to orientation, a regional nurse consultant reviewed the facility's policy and procedures manual with Petitioner. That manual was available for Petitioner to study and review. Finally, with regard to being evaluated, there was no requirement that Petitioner be evaluated during the eight months she worked as director of nursing. The usual practice at Winter Haven Center was to evaluate an employee's performance annually.

33. Throughout her eight-month tenure as director of nursing at Winter Haven Center, Petitioner was approached by

Ms. Andrews several times about her (Petitioner's) performance. Ms. Andrews also discussed many of those issues with Larry Potter, the facility administrator and Petitioner's direct supervisor, during the time period when most of Petitioner's deficiencies occurred.

34. As Petitioner's direct supervisor, it was Mr. Potter's responsibility to impose any disciplinary measures against Petitioner. However, even though Ms. Andrews talked to Mr. Potter about her observations of Petitioner and the incidents Petitioner discussed with her, there is no indication that Mr. Potter ever discussed any of those issues with Petitioner. Also, there is no evidence in the record that Mr. Potter took any disciplinary action against Petitioner for any of her performance deficiencies.

35. Mr. Potter resigned from the facility at some point during Petitioner's tenure as director of nursing at Winter Haven Center. In or about February or March 2002, Dale Sanders was employed as the administrator of the facility.

36. Soon after Mr. Sanders was employed as the facility's administrator, Petitioner was given an opportunity to resign, but she refused to do so.

37. After Petitioner refused to resign, on April 1, 2002, Mr. Sanders, Ms. Andrews, and Petitioner met in Mr. Sanders' office. During the meeting, Mr. Sanders told Petitioner that

she was being let go because, "We've decided we want to go in a different direction." Notwithstanding the foregoing statement Mr. Sanders made to Petitioner, the reason Winter Haven Center terminated Petitioner as director of nursing was that she failed to adequately perform many of the job duties for which she was responsible.

38. Although Mr. Sanders did not elaborate on what he meant when he told Petitioner the company/facility was going in a "different direction," Petitioner believed that Mr. Sanders meant he was not comfortable working with her. Petitioner made this assumption based on her recollection and interpretation of an incident which occurred shortly after Mr. Sanders became administrator of the facility.

39. According to Petitioner, the incident that caused her to question the reason for her termination occurred in Mr. Sanders' office a few weeks before April 1, 2001. Petitioner recalled that she entered Mr. Sanders' office while he and another employee were there. Petitioner testified that as soon as she entered the office, she heard Mr. Sanders say "something to the effect that, 'oh, it sure smells bad in here.'" Since she was the last person to enter the office, Petitioner thought that Mr. Sanders was talking about her. Petitioner responded by telling Mr. Sanders, "You couldn't be

talking about me because I bathe every morning before I come to work."

40. Based on the incident described in paragraph 39, and the fact that the incident occurred only about a month before she was terminated, Petitioner believed that she was terminated because Mr. Sanders did not want to work with her. Although Mr. Sanders never made any comments regarding Petitioner's race, Petitioner seemed to impute a racial connotation to Mr. Sanders' comments and unreasonably concluded that she was terminated because of her race.

41. Petitioner was ultimately terminated from her position on April 1, 2002, by the administrator of the facility for failure to adequately perform her job duties as director of nursing.

42. When Petitioner began her employment as director of nursing, Winter Haven Center issued to her an "Employee Handbook," which details the personnel policies/work rules of the facility. The Employee Handbook provides for progressive discipline in instances in which an employee has violated work rules, but also provides that for serious violations, an employee can be discharged without regard to the employee's prior conduct.

43. Petitioner's job performance deficiencies were serious in nature and could have had severe consequences for both the

residents and the facility. In light of deficiencies, Winter Haven Center was justified in terminating Petitioner's employment as director of nursing.

44. The person hired as director of nursing at Winter Haven Center after Petitioner was terminated was a white female.

45. There are currently at least three black persons working as directors of nursing at facilities managed by Senior Health.

#### CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2005).

47. Subsection 760.10(1), Florida Statutes (2001),<sup>4</sup> states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race.

48. In discrimination cases alleging disparate treatment, Petitioner generally bears the burden of proof established by the United States Supreme Court in McDonnell Douglass v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).<sup>5</sup> Under this burden of proof, Petitioner has the initial burden of establishing a prima facie case of discrimination. When Petitioner is able to establish a prima facie case, 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) (court discussed shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion and need only persuade the finder of fact that the decision was non-discriminatory. Id. See also Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. "The employee may satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." See Chandler, supra, at 1186.

49. To establish a prima facie case of discrimination, Petitioner must prove that (1) she is a member of a protected class (e.g., African-American or black); (2) she was subject to an adverse employment action; (3) her employer treated similarly situated employees, who are not members of the protected class, more favorably; and (4) she was qualified for the job at issue.

50. Petitioner has not proven all of the elements to establish a prima facie case of discrimination.

51. Petitioner proved that she is an African-American, and, thus, a member of a protected class. Petitioner established that she was subject to an adverse employment action in that she was terminated from her job as director of nursing. Petitioner also proved that she was qualified for the position of director of nursing.

52. Petitioner failed to establish that other similarly situated employees, who were not members of the protected class, were treated more favorably. With regard to the latter element, Petitioner presented no evidence that any other director of nursing had the job-related deficiencies that she had and that such individual was retained in his or her position.

53. Assuming arguendo that Petitioner established a prima facie case of discrimination, Winter Haven Center presented persuasive evidence that Petitioner was terminated because of her failure to adequately perform her job responsibilities.

54. Petitioner did not present any credible evidence that Winter Haven Center's reasons for the adverse employment action were a pretext for race discrimination.

#### RECOMMENDATION

Based upon 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.

DONE AND ENTERED this 27th day of April, 2006, in  
Tallahassee, Leon County, Florida.

*Carolyn S. Holifield*

---

CAROLYN S. HOLIFIELD  
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 27th day of April, 2006.

ENDNOTES

1/ The Motion in Limine, filed on November 7, 2005, and to which Petitioner did not respond, sought to limit the evidence at hearing only to such evidence that related to the allegations of discrimination raised in the Amended Charge of Employment Discrimination filed with the Commission. Based on this ruling, the issue in this proceeding was limited to Petitioner's original allegation of discrimination based on race.

2/ At the hearing, the Administrative Law Judge granted Petitioner's request to allow the record to remain open to allow her to take the depositions of Mr. Bell and Ms. Harris. Mr. Bell had been properly subpoenaed, but was unavailable to appear at the final hearing. Petitioner indicated that Ms. Harris' testimony was necessary after Respondent objected to its various records being admitted into evidence because the records were not properly authenticated. The depositions were taken on December 15 and 21, 2005, and, pursuant to an order issued December 21, 2005, the record in the case remained open until the deposition transcripts were filed with the Division.

3/ The record indicates that the court reporters completed the deposition transcripts of Mr. Bell and Ms. Harris on December 20, 2005, and January 9, 2006, respectively.

4/ This statutory provision is identical to the 2005 version.

5/ The Florida Commission on Human Relations and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994).

COPIES FURNISHED:

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

Charlann Jackson Sanders, Esquire  
Charlann Jackson Sanders, P.A.  
Post Office Box 7203  
Lakeland, Florida 33860

Amy L. Christiansen, Esquire  
Spector, Gadon, and Rosen, LLP  
360 Central Avenue, Suite 1550  
St. Petersburg, Florida 33701

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.