

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHERRY MALTER,)
)
 Petitioner,)
)
 vs.) Case No. 08-5371
)
 ORCHARD RIDGE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on February 4, 2009, in New Port Richey, Florida.

APPEARANCES

For Petitioner: Sherry Malter, pro se
9415 Palm Avenue
Port Richey, Florida 34668

For Respondent: Benjamin D. Sharkey, Esquire
Jackson Lewis
St. Joe Building
245 Riverside Avenue, Suite 450
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue is whether Respondent violated Subsection 760.10(1), Florida Statutes (2006), by discriminating against Petitioner on the basis of her age or disability when Respondent terminated Petitioner from her employment.

PRELIMINARY STATEMENT

On June 26, 2008, Petitioner filed a Charge of Discrimination against Respondent with the Florida Commission on Human Relations (the Commission). On September 17, 2008, the Commission issued a Notice of Determination finding no reasonable cause exists to believe that Respondent unlawfully discriminated against Petitioner based upon an actual or perceived disability or upon her age. Petitioner requested an administrative hearing by timely filing a Petition for Relief with the Commission, and the Commission referred the matter to DOAH to conduct the final hearing.

At the hearing, Petitioner testified and presented the testimony of another witness. Petitioner submitted no exhibits for admission into evidence. Respondent called three witnesses and submitted 13 exhibits.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the record of the hearing. Neither party requested a transcript of the hearing.

Petitioner did not file a proposed recommended order (PRO) with DOAH. Respondent timely filed its PRO on February 13, 2009.

FINDINGS OF FACT

1. Respondent is a rehabilitation and nursing center located in Port Richey, Florida. Petitioner began her employment with Respondent on August 2, 2004, as a dietary aide and remained employed as a dietary aide until the date of termination from employment on June 26, 2007.

2. As a dietary aide, Petitioner provided assistance in the kitchen area before, during, and after meals. Petitioner cleaned tables, assisted with food carts, removed garbage, and performed other physical duties to assist with the meal service.

3. Petitioner sustained a fractured wrist in an accident at her home on March 27, 2007. Respondent provided unpaid leave for Petitioner, pursuant to Family and Medical Leave Policy (the FMLA Policy). The leave to which Petitioner was entitled as a job benefit began on March 27, 2007. Petitioner was eligible for up to 12 weeks of unpaid leave under the FMLA Policy.

4. On April 20, 2007, the treating physician for Petitioner at the Center for Bone & Joint Disease provided a note to Respondent stating that Petitioner was unable to return to work for eight weeks. Respondent correctly excused Petitioner from work until June 15, 2007.

5. On April 24, 2007, the treating physician for Petitioner completed a Certification for Health Care Provider

Form and presented the form to Respondent. The form indicated that Petitioner's leave would expire on June 15, 2007.

6. Petitioner completed, signed, and provided to Respondent a Request for Leave of Absence Form, indicating her anticipated return date to be June 15, 2007. Respondent provided leave for Petitioner until June 19, 2007.

7. It is undisputed that, seven days before returning to work, the FMLA Policy required Petitioner to provide a medical clearance or a doctor's statement that she was physically able to resume the normal duties of her employment. Shortly after May 1, 2007, Petitioner received a memo from the administrator for Respondent reminding Petitioner that her "FMLA leave EXPIRES on: 6/19/2007." In late May 2007, Ms. Joann Robinson, a co-worker and former cook for Respondent, spoke to Petitioner by telephone and requested that Petitioner contact the supervisor about Petitioner's return to work. Petitioner acknowledged to Ms. Robinson that Petitioner would contact the supervisor. Ms. Robinson informed the supervisor that she spoke with Petitioner and that Petitioner stated she would contact the supervisor.

8. When the supervisor did not hear from Petitioner, the supervisor and Ms. Laura Gilbreath, payroll administrator for Respondent, attempted to contact Petitioner by telephone approximately one week prior to the expiration of the FMLA

leave. The purpose of the telephone call was to confirm that Petitioner was able to return to work upon expiration of her FMLA leave. The supervisor and Ms. Gilbreath were unable to reach Petitioner because her telephone service was disconnected.

9. Petitioner never contacted Respondent prior to the expiration of the FMLA leave on June 19, 2007. Petitioner never contacted her supervisor about returning to work and never presented a medical clearance or doctor's statement that she was physically able to resume her normal duties.

10. Respondent terminated Petitioner from her employment on June 26, 2007, for exceeding the leave allocated under the FMLA Policy and failing to contact the facility or report back to work with proper documentation prior to the expiration of her FMLA leave. Respondent has terminated other employees who failed to contact the facility or return to work upon exhaustion of leave under the FMLA Policy, and there is no evidence to suggest Respondent treated Petitioner any differently.

CONCLUSIONS OF LAW

11. DOAH has jurisdiction of the parties and subject matter of this proceeding. § 120.57(1), Fla. Stat. (2008). DOAH provided the parties with adequate notice of the final hearing.

12. Petitioner has the burden of proof. Petitioner must show by a preponderance of the evidence that Respondent

committed the acts and violations alleged in the Charge of Discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973). For reasons stated in the Findings of Fact, Petitioner failed to make a prima facie showing of discrimination.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order finding Respondent not guilty of the alleged discrimination and dismissing the Petition for Relief.

DONE AND ENTERED this 4th day of March, 2009, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2009.

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.