STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LA`TOYA MILLS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-0516
	)	
BAY ST. JOSEPH CARE AND REHABILITATION CENTER,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this matter, before Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings on July 8, 2010, in Port Saint Joe, Florida.

APPEARANCES

For Petitioner: Cecile M. Scoon, Esquire
25 East 8th Street
Panama City, Florida 32401

For Respondent: Ashley N. Richardson, Esquire
Brian Duffy, Esquire
Post Office Drawer 229
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioner was the subject of an unlawful employment practice by Respondent based on her sex.

PRELIMINARY STATEMENT

On May 8, 2008, Petitioner, La'Toya Mills, (Petitioner), filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The Complaint alleged that Respondent, Bay St. Joseph Care and Rehabilitation Center (Respondent or Bay), discriminated against her on the basis of her sex in violation of Section 760.10, Florida Statutes. Specifically, the Complaint alleged that Petitioner was discriminated against and suffered an adverse employment action when Respondent terminated her employment due to her pregnancy. The Complaint did not raise any issue in regards to retaliation or handicap.

FCHR investigated Petitioner's Complaint. On October 30, 2008, FCHR issued a determination of Cause and notified Petitioner of her right to file a Petition for Relief. Although Petitioner told the investigator about alleged retaliation by Bay, she did not formally amend her Employment Complaint of Discrimination to include retaliation and FCHR did not investigate or make any determination based on retaliation or handicap.

Thereafter, Petitioner filed a Petition for Relief with FCHR on June 1, 2009. The Petition was based on the same allegations as the earlier Complaint and attempted to raise the issue of retaliation. FCHR forwarded the matter to the Division

of Administrative Hearings. However, since the issue of retaliation was not investigated by FCHR and did not result in any agency action by FCHR, the Division of Administrative Hearings has no jurisdiction over the issue of retaliation.

At the hearing, Petitioner testified in her own behalf and presented the testimony of one witness. Petitioner also offered twenty-one exhibits into evidence, of which Exhibits one through twenty were admitted. Respondent presented the testimony of one witness and offered three exhibits into evidence of which Exhibits one and two were admitted.

After the hearing, Petitioner submitted a Proposed Recommended Order and a Response on August 16 and 27, 2010, respectively. Respondent filed a Proposed Recommended Order on August 17, 2010.

FINDINGS OF FACT

1. Bay is a nursing home and rehabilitation center for those in medical need of such services. It is located in Port. St. Joe, Florida. The facility has a number of residents staying at the facility who require help with mobility, standing and walking. The payroll services for Bay are performed by Signature Payroll Services, LLC, which is affiliated with Bay through a parent company.

2. Bay offers all employees a package of employment benefits, including disability benefits. Section 7.2 of the Stakeholder Handbook states:

> **Short & Long Term Disability**
>
> In the event Stakeholders become disabled due to sickness, pregnancy or accidental injury, the company offers disability insurance . . .
>
> Short Term Disability provides for 60% of the Stakeholder's gross weekly wages up to a maximum of twenty four (24) weeks post fourteen (14) days of accident/injury.
>
> Long Term Disability provides for 60% of the Stakeholder's monthly wages up to one hundred eight[sic] (180) days after exhausting the Short Term Disability benefit.
>
> Please see Human Resources to review detailed summary plan documents for maximums.

3. All new employees are offered the opportunity to enroll in Bay's employment benefit package for 90 days after their employment date. Each employee must affirmatively elect the employment benefits they wish to have and must pay any premiums for those benefits. After 90 days, an employee can only make changes to his or her benefit plan during the employee's annual enrollment period.

4. In addition to the benefit plan, Bay also offers all employees Family Medical Leave for up to 12 weeks and/or a personal leave of absence when the employee is not eligible for

leave under other company policies. Leave is addressed in section 8 of the Stakeholder Handbook.

5. Petitioner is a Certified Nurse Assistant (CNA). She was employed by Bay on August 25, 2007. As a CNA, Petitioner was responsible for the direct care of residents at Bay. Her duties included lifting and moving residents as needed. Because of her duties, Petitioner was required to be able to lift a minimum of 50 pounds. Over that amount of weight, Petitioner had extra help and devices to assist with lifting. Throughout her employment, Petitioner was considered a diligent employee that performed her duties well.

6. When Petitioner was hired, Bay offered her the opportunity to enroll in all of the benefits in its employment benefit plan, including disability insurance. Petitioner elected to enroll in life, health, dental and vision insurance.

7. At the time of her hire, the only disability insurance offered to any employee by Bay was insurance under a MetLife group policy for Disability Income Insurance: Long Term Benefits issued to Signature Payroll. There was no evidence of any short-term disability insurance benefit offered to any of Bay's employees other than the MetLife policy described above. Given that there was no short-term disability insurance available to Bay's employees, it was not a discriminatory act for Respondent to not offer Petitioner short-term disability insurance. The

insurance was simply not part of the benefit package offered by Bay at the time Petitioner was hired and Petitioner did not elect to enroll in either short term or long-term disability insurance. Petitioner did not change her enrollment elections during the 90-day period after her employment. She was therefore not eligible to add disability insurance to her benefit plan until late 2008.

8. In November or December 2007, Ms. Mills sometimes worked with another CNA named Courtney Preston. At the time, Ms. Preston was pregnant. When Petitioner asked for some help lifting a resident, Ms. Preston told Petitioner that she was on light-duty due to her pregnancy. The charge nurse for the unit, who is the unit supervisor for any given shift, confirmed that Ms. Preston was on light-duty. However, the charge nurse had no authority to place an employee on light-duty. Additionally, there was no evidence in Ms. Preston's personnel file that she had officially been placed on light-duty by anyone with the authority to do so. At best, it appears that Ms. Preston was simply being treated kindly by her fellow employees and was not officially placed on light-duty by a person with authority to do so.

9. Ms. Preston eventually lost her baby while Petitioner was employed at Bay. The evidence was not clear as to the cause of Ms. Preston's miscarriage. However, the evidence established

that Ms. Preston had a risky pregnancy of which the staff at Bay was aware. Later, Ms. Preston again became pregnant and again had a risky pregnancy. She was counseled on several occasions for her excessive absenteeism. In order to help Ms. Preston with her absenteeism, she was offered on-call status with less duty hours if she wanted it. Eventually, sometime after April 30, 2008, Bay terminated Ms. Preston for excessive absences caused, in part, by her pregnancy. On the other hand, Ms. Preston was clearly accommodated during both of her pregnancies while she was employed at Bay.

10. In January or February 2008, Petitioner became pregnant. On February 15, 2008, Petitioner visited her doctor and was given a doctor's note to limit her lifting to no more than 20 pounds even though she was not having any difficulty performing her job duties. The evidence was unclear as to why the doctor placed Petitioner under lifting restrictions since the doctor, within one to two weeks, raised those restrictions to not over a minimum of 50 pounds after Petitioner told him about the impact the lower-weight restrictions had on her job with Bay.

11. On February 16, 2008, Petitioner gave a copy of the doctor's note with the 20-pound lifting restrictions to the personnel department. On February 18, 2008, she discussed the lifting restrictions with her supervisors, Cathy Epps and

Shannon Guy. They thought light-duty work could be arranged. On February 20, 2008, she discussed the lifting restrictions with David Kendrick, the corporate director of human resources, who was visiting Bay that day. He also thought that some light-duty work might be arranged. However, all of these supervisors wanted other higher-level corporate officials to have input on whether light-duty work was available. Eventually, the corporate legal counsel and the corporate risk manager were consulted on the issue of whether light-duty work was available.

12. Petitioner did not receive light-duty work. Instead, on February 21, 2008, Petitioner was called into a meeting with Cathy Epps and Shannon Guy. Ms. Guy was very upset and tearfully told Petitioner that no light-duty was available and that Petitioner was terminated. Ms. Guy was upset because Petitioner was a good employee that she did not want to lose. Ms. Epps also wanted to keep Petitioner as an employee. Ms. Guy explained that someone from the corporate office decided Petitioner was terminated because they were afraid Petitioner was too much of a risk to employ since she could not meet the minimum-lifting requirements and "as a CNA she would be expected to assist residents, and . . . if we had a resident who was falling and she would be presented with a choice of either go to help the resident or run the risk of hurting herself or, . . . not helping the resident and, . . . allowing something to

happen." Ms. Guy told Ms. Mills that she could return to work once her pregnancy was over.

13. Importantly, Petitioner had been performing her normal duties without any problems or need for assistance throughout the several days that the corporate office was making a decision about whether light-duty work was available to Petitioner. This activity alone shows Petitioner was still qualified for her job since she continued to perform her job duties. During this period, no one from the corporate office or on the facility's premises expressed any concern that Petitioner continued to perform her regular job duties. Clearly, no one was relying on the restrictions in the doctor's note. There was no evidence to suggest that Petitioner would ignore any resident's needs while she was pregnant or would try to protect herself more than any other employee at the facility did.

14. As indicated, Petitioner was simply terminated. There was no consideration given to whether she could still perform her duties as she clearly could do. She was not offered any leave time or even allowed to request leave as mentioned in Section 8 of the Stakeholder Handbook. The abruptness of the termination when Petitioner could still perform her job duties and the failure to offer leave were discriminatory acts on the part of Bay against Petitioner based on her pregnancy.

15. Around February 29, 2008, eight days after her termination, Petitioner called David Kendrick to ask him about receiving light-duty. He told her that light-duty was available only for employees injured on the job. This policy is neutral on its face and there was no evidence that demonstrated the restriction of light-duty work to employees who are injured on the job had a disparate impact on pregnant women. Petitioner told Mr. Kendrick that her doctor had raised her lifting restrictions to 50 pounds. However, the new restriction did not satisfy the corporate perception that she was too much of a risk and could not perform her required duties even though she met the minimum job qualifications and had been a good employee. In ignoring the fact that she was qualified to perform her duties, Mr. Kendrick's reasoning is further evidence of Respondent's earlier intent to discriminate against Petitioner based solely on her pregnancy.

16. Mr. Kendrick also advised Petitioner that she could not obtain the disability insurance employee benefit because she had not been an employee for more than a year and had not elected to enroll in the coverage during the 90-day period from when she was hired. There was no evidence that demonstrated Bay's denial of disability insurance coverage to Petitioner was a discriminatory act since Petitioner, like all of Bay's employees, had been offered the insurance when she was hired,

had not selected the insurance as a benefit within 90 days after her hire date, and could not make changes to her benefit plan until sometime in late 2008.

17. On or about April 28, 2008, Ms. Mills filed a complaint with FCHR/EEOC alleging gender discrimination based on sex due to her pregnancy.

18. In early May 2008, Ms. Mills suffered a miscarriage and lost her baby. Sometime around June 1, 2008, a few weeks after her miscarriage, Ms. Mills returned to Bay and met with Cathy Epps and Gayle Scarborough. She asked to be rehired since she was no longer pregnant. Both were aware of the Petitioner's pending EEOC/FCHR complaint. Ms. Scarborough told Petitioner that she could possibly be rehired if she dropped her EEOC claim. Later, Ms. Scarborough called Ms Guy and spoke with her about rehiring Petitioner. Ms. Guy asked David Kendrick, who inquired further in the corporation. Ms. Guy does not recall receiving a response to her inquiry. However, she later called Petitioner asking if she would display a negative attitude if she were rehired and asking if she had dropped her EEOC claim. Petitioner was so discouraged by the phone call that she did not pursue getting rehired further.

19. Because she was not rehired by Bay, Petitioner was out of work for an extended period of time. She eventually was hired and has continued her employment with a variety of

employers. She was and is required to travel some distance to maintain her employment at greater expense than if she were employed in Port St. Joe. Because she lives in Port St. Joe, she wants to be reinstated to her earlier position. Petitioner is entitled to reinstatement as a CNA and to back wages and benefits until she is reinstated, less any unemployment compensation, wages and benefits earned during said period.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. See §§ 120.569 and 120.57(1), Fla. Stat (2010).

21. Section 760.10, Florida Statutes, provides that it is an unlawful employment practice for an employer

> [t]o discharge or to fail to refuse to hire any individual, or otherwise, discriminate against any individual with respect to compensations, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, national origin, age, handicap or marital status.

§ 760.10(1)(a), Fla. Stat. (2009).

22. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes (2008). See Albra v. Advan, Inc., 490 F.3d 826 (11th Cir. 2007); Winn Dixie Stores v. Reddick, 954 So. 2d 723 (Fla. 1st

DCA 2007); Brand vs. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); and Scott v. Fla. Dept. of Children & Family Services, 19 Fla. L. Weekly Fed. D.268, 2005 U.S. Dist. LEXIS 19261 (N.D. Fla. 2005).

23. Additionally, Congress passed the Pregnancy Disability Act of 1978, 42 USCA Section 2000e(k) which amended the definition of sex discrimination to include pregnancy. The Act states in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits . . . as other persons . . . . similar in their ability or inability to work . . . .

As with earlier case law, FCHR and Florida courts have determined that Section 760.10, Florida Statutes, includes the definitions established by the 1978 Pregnancy Discrimination Act. Carsillo v. City of Lake Worth, 995 So. 2d (Fla. 2009). Therefore, discrimination based on sex includes discrimination based on pregnancy and federal court decisions are applicable on the issue. Id.

24. The Supreme Court of the United States established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas

Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). See also Zappa v. Wal-Mart Stores, Inc., 1 F. Supp. 2d 1354, 1356 (M.D. Fla. 1998); Standard v. A.B.E.L. Svcs., Inc., 161 F.3d 1318 (11th Cir. 1998); and Walker v. Prudential Property & Casualty Insurance, Co., 286 F.3d 1270 (11th Cir 2002).

25. Under McDonnell Douglas, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for the action taken against Petitioner. Once this non-discriminatory reason is offered by Respondent, the burden of production then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "the fact finder must believe the plaintiff's explanation of intentional discrimination." Hicks, 509 U.S. at 519. Additionally, "Defendant's burden . . . is exceedingly light" and "'is merely one of production, not proof'." Perryman v. Johnson Products, Co., 698 F.2d 1138 (11th Cir. 1983).

26. In Hicks, the Court stressed that even if the fact-finder does not believe the proffered reason given by the employer, the burden remains with Petitioner to demonstrate a discriminatory motive for the adverse employment action. Id. See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

27. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption." King v. La Playa-De Varadero Restaurant, No. 02-2502, 2003 WL 435084 (Fla. DOAH 2003)(Recommended Order).

28. However, "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997).

29. In order to establish a prima facie case of discrimination, Petitioner must demonstrate that:

a. Petitioner is a member of a protected class;

b. Petitioner is qualified for the position;

c. Petitioner was subject to an adverse employment decision; and,

> d. Petitioner was treated less favorably than similarly situated persons outside the protected class.

Maniccia v. Brown, 171 F.3d 1364 (11th Cir. 1999); Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983); Smith v. Georgia, 684 F.2d 729 (11th Cir. 1982); Lee v. Russell County School Board, 684 F.2d 769 (11th Cir. 1984); and Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir 1997).

30. In this case, Petitioner has alleged that Respondent unlawfully discriminated against her on the basis of her sex due to her pregnancy. She did not allege that she was discriminated against on the basis of a perceived handicap. As a pregnant female, Petitioner is a member of a protected class.

31. Petitioner contends that after she brought the doctor's note limiting her lifting, Respondent perceived Petitioner as having a disability that altered a major life function, i.e. her ability to stand or lift moderately heavy objects, and based on that perception, Respondent treated Petitioner as if she were disabled and fired her without providing any reasonable accommodations. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 314 (3rd Cir. 1999); (en banc). However, Petitioner did not allege in either her Complaint of Employment Discrimination or Petition for Relief that she was discriminated against based on a handicap/disability or

perceived handicap/disability. Therefore, the issue of handicap and whether reasonable accommodations should have been provided to Petitioner is not decided here and the cases cited by Petitioner in that regard are inapplicable to the issue in this case.

32. In this case, the fact that Respondent did not provide Petitioner with light-duty work because such work is restricted to employees who are injured on the job is not indicative of discrimination based on pregnancy. The Pregnancy Discrimination Act does not require preferential treatment to pregnant employees. McQueen v. Airtran Airways, Inc., 2005 U.S. Dist. LEXIS 37461 (N.D. Fla. Dec. 29, 2005). Under Bay's policy, light-duty work was restricted to employees injured on the job. Non-work-related injured employees were not entitled to light-duty work. Since Petitioner was not injured at work, she was treated the same as Bay's other non-work-related injured employees and was not entitled to light-duty accommodation for her pregnancy. Id.

33. In McQueen, the federal court granted a Motion for Summary Judgment against the Plaintiff and dismissed her claim of discrimination based on pregnancy. The court, prior to trial, concluded that the lifting restrictions imposed by a doctor on the Plaintiff during the term of her pregnancy disqualified her for her job; and that she therefore, could not

establish a prima facie case of discrimination. However, unlike McQueen, Petitioner in this case continued to perform her normal job duties and neither party significantly relied on the doctor's note to immediately limit Petitioner's job duties. Additionally, unlike McQueen, the restrictions in this case were changed so that Petitioner met the minimum requirements for her job. Finally, unlike McQueen, Petitioner was not offered the option of leave as provided in the Stakeholders Handbook.

34. Moreover, the evidence was direct that Petitioner was terminated because of her pregnancy. The fact that she was permitted to perform her regular job duties while the corporate office tried to decide what to do clearly establishes that Petitioner could perform those duties. Additionally, the evidence was clear that neither party relied on the doctor's note as either mandatory or immediate. In fact, the restrictions were raised within two weeks after the doctor had written his note. Respondent's assertion that Petitioner was not qualified per se for her job is simply not borne-out by the facts of this case. Those same facts demonstrate that Petitioner was discriminated against based on her pregnancy and that Respondent's assertion that Petitioner was too much of a risk was not credible.

35. Finally, Petitioner contends that Respondent also discriminated against her due to her pregnancy when it failed to

comply with its own policy manual and provide short-term disability insurance. However, the evidence did not establish such discrimination. As with all of its employees, Respondent followed its benefit enrollment rules in determining Petitioner's eligibility for disability insurance. Under those rules, Petitioner was not entitled to enroll in the disability insurance plan. Without more, the application of neutral benefit enrollment rules is not discriminatory.

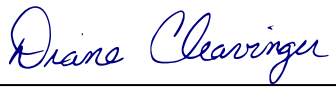
RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a Final Order requiring:

1. Reinstatement of Petitioner's employment with Respondent with all seniority and benefits as if she had not been terminated; and

2. Payment of lost wages to Petitioner from the date of termination to reinstatement less any unemployment compensation, wages and benefits she received during the same period.

DONE AND ENTERED this 7th day of October, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.