STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICIA A. KEATON, Petitioner, vs. COUNCIL ON AGING OF WEST FLORIDA, Respondent.	)	Case No. 09-6129

RECOMMENDED ORDER

On March 5, 2010, a duly-noticed hearing was held by video teleconference with sites in Tallahassee and Pensacola, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patricia A. Keaton, pro se
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For Respondent: Russell F. Van Sickle, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner based on her age in violation of the Florida Civil Rights Act of 1992, as amended, Section 760.10, Florida Statutes (2009).

PRELIMINARY STATEMENT

On May 9, 2009, Petitioner Patricia A. Keaton (Petitioner) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The charge alleged that Respondent, Council on Aging of West Florida (Respondent), had discriminated against her based on her age.

On September 30, 2009, FCHR issued a Determination: No Cause. On November 3, 2009, Petitioner filed a Petition for Relief and Request for Administrative Hearing with FCHR. On November 6, 2009, FCHR referred the petition to the Division of Administrative Hearings.

On November 17, 2009, the undersigned issued a Notice of Hearing by Video-Teleconference. The notice scheduled the hearing for February 12, 2010.

On February 12, 2010, Petitioner filed a Consent Motion for Continuance of Final Hearing. The undersigned subsequently rescheduled the hearing for March 5, 2010.

At the hearing, Petitioner presented the testimony of Minnie Watkins and testified on her own behalf. Petitioner did not offer any exhibits as evidence. Respondent presented the testimony of Patricia Bryan, Judy Tatum, Jim Shaffer, Sandy Holtry, and Rosa Sakalarois. Respondent's Exhibits 2-11 were offered and admitted into evidence.

A Transcript of the proceedings was filed on March 10, 2010. Respondent timely submitted a Proposed Recommended Order that has been carefully considered in the preparation of this Recommended Order. As of the date that this Recommended Order was issued, Petitioner had not filed proposed findings of fact and conclusions of law.

All references hereinafter to Florida Statutes are to the 2009 codification unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner, a 62-year-old African-American female began working for Respondent on July 7, 1989. Petitioner initially worked in Respondent's Adult Day Care Center (the Center) as an on-call Activity Nursing Assistant. At the time of her termination on February 2, 2009, she was a full-time Activity Nursing Assistant.

2. Respondent is an employer as defined by the Florida Civil Rights Act of 1992, as amended, Sections 760.01-760.11 and 509.092, Florida Statutes (FCRA).

3. Respondent currently employs over 15 people. It provides services to elderly clients in the Center. The main purpose of the Center is to provide a structured day for the clients in a calm, soft-spoken and friendly environment.

4. At all times relevant here, Sandy Holtry was the Director of the Center. Ms. Holtry was Petitioner's supervisor.

5. Patricia Bryan is a volunteer at the Center. The record does not establish Ms. Bryan's exact age, but it appears that she is somewhat younger than Petitioner.

6. During Petitioner's 2008 birthday party at the Center, Ms. Bryan asked Petitioner how old she was. After Petitioner revealed her age, Ms. Bryan responded that she wished she looked as good as Petitioner did.

7. In another incident, Ms. Bryan asked Petitioner if “she felt the same today as the day before.” This question was in reference to Petitioner’s birthday the day before.

8. On another occasion, Ms. Bryan told Petitioner that when she retires, she could work for a florist shop. Ms. Bryan made this comment because Petitioner was really good at creating floral arrangements.

9. Judith Tatum is a 58-year-old nurse who has worked for the Center for five years. On one occasion, Ms. Tatum remarked that she could not have worked at the Center for as long as the Petitioner did. On other occasions, Ms. Tatum asked the Petitioner if she was planning to work until she turned 65 years of age.

10. Petitioner does not contend that her supervisor or anyone other than Ms. Bryan and Ms. Tatum has made any age-related comments to her while she was employed by Respondent. Petitioner's claim that Respondent always hired younger people

is not supported by specific evidence relating to the individuals hired and their date of hire.

11. Respondent has many employees who are older than Petitioner. Respondent has an 88-year-old employee and several employees who are in their seventies.

12. Petitioner was involved in an altercation with Tameka Mullins, a 33-year-old employee at the Center on January 28, 2009. During this altercation, Petitioner and Ms. Mullins were raising their voices during the Center's “quiet time.” The altercation was loud enough to be heard through the closed door of a nearby kitchen by another employee.

13. “Quiet Time,” usually takes place after lunch. It is a state-required rest period that lasts for about 35 to 45 minutes. During "quiet time," the clients rest with the lights turned off.

14. Ms. Tatum witnessed the loud altercation between Petitioner and Ms. Mullins. She saw Petitioner and Ms. Mullins “pushing” and “shoving” in an attempt to get into Ms. Holtry's office. The office was located off an open hallway between the activity room and the kitchen.

15. Ms. Holtry was in the nearby kitchen when she heard the loud commotion between Petitioner and Ms. Mullins. Ms. Holtry attempted to calm both parties down, to no avail, and then tried to get them into her office to discuss the incident.

16. After the incident, Ms. Holtry spoke to Ms. Rosa Sakalarois, Respondent's Vice President of Human Resources. Petitioner and Ms. Mullins were then sent home.

17. Several of the clients after the altercation were upset, pacing, and appeared disturbed.

18. Ms. Holtry and Ms. Sakalarois conducted an investigation. They interviewed every staff person working on the day of the incident, including Petitioner and Ms. Mullins.

19. After the investigation, John Clark, Respondent's President, Ms. Sakalarois, and Ms. Holtry met and reviewed Petitioner’s and Ms. Mullins’ past performance evaluations and prior disciplinary actions.

20. According to past evaluations, Petitioner received numerous warnings from different project directors about Petitioner's need to control her emotions when dealing with co-workers and clients. Additionally, Respondent suspended Petitioner on two prior occasions. Her first suspension was for using loud and harsh tones with a former employee. Her second suspension was for using loud and harsh tones towards two clients. Respondent required Petitioner to attend anger-management classes after the second suspension.

21. The Center requires that staff at all times behave in a calm and professional manner due to the purpose and nature of the program. Many of its daily clients have Alzheimer’s

disease. Therefore, any variation of the schedule is disruptive to the clients. Because the clients are emotionally frail, employees are encouraged to provide a calm, soft-spoken, and friendly environment.

22. The Center has an annual Alzheimer training on the different behaviors of Alzheimer patients and how to care for them. The Center also provides on-going in-service training on how to talk to the clients.

23. On February 2, 2009, Respondent decided to terminate the employment of Petitioner and Ms. Mullins.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to § 120.569, § 120.57(1) and § 760.11, Florida Statutes.

25. It is unlawful for an employer to discriminate against an individual based on the individual's age. See § 760.10(1)(a), Fla. Stat. (2009).

26. The Florida Civil Rights Act (FCRA), § 760.01 - § 760.11, Fla. Stat., as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C Section 2000e et seq. Federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Valenzuela v. Globeground North America, LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009).

27. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against her. See Valenzuela, 18 So. 3d at 22.

28. Petitioner can establish a case of discrimination alleging disparate treatment through direct, statistical, or circumstantial evidence. See Valenzuela, 18 So. 3d at 22.

29. Petitioner did not present any statistical evidence of age discrimination. She also failed to present direct evidence of intentional age discrimination under the FCRA.

30. Direct evidence of discrimination requires the existence of discriminatory intent behind an employment decision that can be established without any inference or presumption. See Akouri v. State of Florida Department of Transportation, 408 F.3d 1338, 1347 (11th Cir. 2005). "An example of direct evidence would be a management memorandum saying, Fire [defendant]- he is too old." See Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1358-9 (11th Cir. 1999).

31. Petitioner has not shown that the decision to terminate her employment was due to her age and no other motivating factors. Evidence that only suggests a discriminatory motive, or that is subject to interpretation, does not constitute direct evidence of discrimination. Id. Here, Petitioner only offered evidence of conversations with several employees with some reference to her age. However, none

of these conversations had any direct correlation to her termination of employment.

32. In the absence of direct evidence of intentional discrimination, an employee in a discrimination case has the initial burden of proving a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). If the employee proves a prima facie case, the burden shifts to the employer to proffer a legitimate non-discriminatory reason for the action it took. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The employer's burden is one of production, not persuasion, as it always remains the employee's burden to persuade the fact-finder that the proffered reason is a pretext and that the employer is guilty of intentional discrimination. See Burdine, 450 U.S. at 252-256.

33. In order to prove a prima facie case of age discrimination, Petitioner must show the following: (a) she is a member of a protected group; (b) she was qualified for the job; (c) she was subjected to an adverse employment action; and (d) Respondent treated similarly situated employees of a different age more favorably. See Turlington v. Atlanta Gas Light Company, 135 F.3d 1428, 1432 (11th Cir. 1998).

34. Petitioner has not met her initial burden as to age discrimination because she did not show that Respondent treated similarly-situated employees of a different age more favorably. To constitute a similarly-situated employee, the "quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." See Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

35. Similarly-situated employees must have "reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating conduct that would distinguish their conduct or the appropriate discipline for it." See Valenzuela, 18 So. 3d at 23, citing Gaston v. Home Depot USA, Inc., 129 F. Supp. 2d 1355, 1368 (S.D. Fla. 2001).

36. In this case, Petitioner and Ms. Mullins were involved in a verbal altercation. Even though Ms. Mullins was many years younger than Petitioner, Respondent terminated both of them. As a result, Petitioner has not proven her prima facie case of unlawful discharge due to age discrimination.

37. To the extent that Petitioner proved a prima facie case of age discrimination, Respondent had a legitimate non-discriminatory reason for discharging Petitioner from

employment. Petitioner's verbal altercation with Ms. Mullins constituted inappropriate behavior.

38. Petitioner and Ms. Mullins were discharged at the same time for the same incident. Moreover, prior to the event leading to her termination, Petitioner was disciplined on several occasions for her anger-management issues and warned about her behavior in the work place. Petitioner violated those standards again on January 28, 2009. Therefore, Respondent's decision to discharge her from employment does not constitute discrimination.

39. Petitioner also alleges that Respondent provided a hostile working environment. To prove a case of hostile work environment, Petitioner must establish: (1) that she belongs to a protected group; (2) that she has been subject to unwelcome harassment; (3) that the harassment was based on her age; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatory and abusive work environment; and (5) that the employer is responsible for such environment under either theory of vicarious or direct liability. See Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

40. Petitioner testified that the harassment was committed by a volunteer and a nurse at the Center. The Petitioner has not shown that the alleged conduct, if true, was so severe or

pervasive as to alter the terms and conditions of employment and create a discriminatory and abusive environment.

41. To be actionable, alleged behavior must result in both an environment "that a reasonable person would find hostile or abusive." See Miller, 277 F.3d at 1276, citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22, 114 S. Ct. 367, 370-71 (1993).

42. In determining whether harassment objectively alters an employee's terms and conditions of employment, the following factors must be considered: (a) the frequency of the conduct; (b) the severity of the conduct; (c) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (d) whether the conduct unreasonably interferes with the employee's job performance. See Miller, 277 F.3d at 1276, citing Harris v. Forklift Systems, Inc., 510 U.S. at 23, 114 S. Ct. at 371.

43. Here, the alleged harassment consisted of isolated statements which were not objectively offensive but rather favorable in nature. Isolated statements do not create a hostile working environment. See Miller, 277 F.3d at 1276-77. Furthermore, before Petitioner was discharged from her employment, she made no complaints to her supervisor about any of the age-related comments. Therefore, Petitioner has not

proven that her employer knew or should have known of these alleged comments.

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.

DONE AND ENTERED this 1st day of April, 2010, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
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this 1st day of April, 2010.

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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.