STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEBORAH ALEXANDER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-6215
	)	
HEALTH CENTRAL HOSPITAL,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference between Orlando and Tallahassee, Florida, on December 9, 2010, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Larry H. Colleton, Esquire
The Colleton Law Firm, P.A.
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Orlando, Florida 32867

For Respondent: Wayne L. Helsby, Esquire
Allen, Norton & Blue, P.A.
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STATEMENT OF THE ISSUE

Whether Respondent committed the unlawful employment practice alleged in the Petition for Relief filed by Petitioner

with the Florida Commission on Human Relations (FCHR) and, if so, the relief, if any, that should be granted.

PRELIMINARY STATEMENT

At the times relevant to this proceeding, Respondent employed Petitioner. On or about November 9, 2009, Petitioner filed a Charge of Discrimination (Charge) with FCHR, alleging that Respondent had unlawfully discriminated against her based on her age and her disability. FCHR investigated the charge and on June 16, 2010, issued its "Determination: No Cause." Thereafter, on July 21, 2010, Petitioner filed a Petition for Relief from an unlawful employment practice (Petition). On July 22, 2010, FCHR transmitted the Petition to DOAH to "conduct all necessary proceedings required under the law and submit recommended findings to the [FCHR]."

The Petition alleged that Respondent violated the Florida Civil Rights Act of 1992, as Amended, by discriminating against her based on her disability and based on her age. At the formal hearing, counsel for Petitioner stipulated that Petitioner does not meet the criteria of being a disabled person and withdrew that claim.[1] Consequently, the only allegation that remains unresolved is whether Respondent discriminated against Petitioner based on Petitioner's age.

Unless otherwise noted, each reference to a statute is to Florida Statutes (2010). There has been no material change to

any statute cited in this Recommended Order from the date the events occurred to the date of this Recommended Order.

At the final hearing, Petitioner testified on her own behalf and offered the following pre-marked exhibits, each of which was admitted into evidence: Exhibits 1-8 and 10(a), 10(b), and 10(c).

Respondent presented the testimony of Margie Weissgerber (the director of Respondent's lab) and offered nine sequentially-numbered exhibits, each of which was admitted into evidence.

The parties filed a Pre-hearing Stipulation that contained certain factual stipulations. Those factual stipulations have been incorporated into the Findings of Fact section of this Recommended Order.

A Transcript of the proceedings, consisting of one volume, was filed on January 5, 2011. Respondent filed a Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner is a female, born January 10, 1961. At the time of the formal hearing, Petitioner was 49 years of age. At all relevant times Petitioner was over the age of 40 years.

2. Respondent is a healthcare facility located in Ocoee, Florida. Respondent's facilities include a lab that processes blood-work for inpatients of the facility and for outpatients.

3. At all relevant times, Respondent worked under the supervision of the lab management team.

4. Petitioner was hired by Respondent as a Lab Assistant I in October of 2004, as a pool status employee.

5. Pool status employees are not regular, full-time employees. A pool status employee is a part-time employee who works days and hours based on Respondent's needs. Some pool status employees have regularly assigned shifts that they work on a weekly basis, while others are called in sporadically as the need arises.

6. Respondent's pool status employees are paid an hourly wage based on the position the pool status employee fills. The hourly wage is consistent with the hourly wage for a full-time employee for the position. In addition, the hourly wage is augmented by a "differential" for being a pool employee.

7. In October 2005, Petitioner transferred from pool status to full-time, but remained a Lab Assistant I.

8. In February 2006, Respondent promoted Petitioner to Lab Assistant II; a full-time position.

9. In early 2007, Petitioner applied for an Outpatient Attendant position.[2] The Outpatient Attendant position is the

same grade position as the Lab Assistant II position and is not considered a promotion.

10. Petitioner was not hired for the Outpatient Attendent position in 2007.

11. Ms. Weissgerber notified Petitioner that she was not selected for the Outpatient Attendant because of Petitioner's poor attendance record.

12. In January 2008, at her request, Petitioner was transferred back to pool status, remaining a Lab Assistant II. Petitioner made that move because she did not want to work full-time.

13. While employed by Respondent, Petitioner took several medical leaves of absence for a variety of conditions. Those medical leaves of absence were necessary. Mrs. Weissgeber did not consider those medical leaves of absence to be part of Petitioner's attendance and tardiness problem in 2007 or in 2009.

14. Throughout her employment with Respondent, Petitioner experienced issues regarding absenteeism and tardiness that were not related to her medical problems.

15. On July 28, 2009, Respondent posted in the lab a notice of an opening for a full-time position of Outpatient Attendant. Interested applicants were instructed to "notify Margie in writing."

16. On August 17, 2009, Respondent posted in the lab a notice of an opening for a full-time position of Outpatient Attendant. Interested applicants were instructed to "notify Margie in writing."

17. The "Margie" referenced in these notices was Ms. Weissgerber.

18. Petitioner timely advised Ms. Weissgerber of her interest in each position.

19. Ms. Weissgerber did not hire Petitioner for either job. Two other females who worked for Respondent at the time the hiring decision was made were selected for the positions. There was no credible evidence as to the age of either of the employees who filled these positions.

20. Ms. Weissgerber and Emma Green (Petitioner's direct supervisor) informed Petitioner in person on September 14, 2009, that she was not selected for either of the positions because of her attendance/tardiness problems.

21. Attendance and punctuality are essential to the functioning of an Outpatient Attendant because the position has constant dealings with the public. The lab cannot afford to be short-staffed.

22. Petitioner asserts that Ms. Weissgerber discriminated against her based on her age by not hiring Petitioner for either

of these two positions. Petitioner's assertions are not supported by the record in this proceeding.

23. Lab employees are required to call in and inform his or her supervisor if the employee is going to take an unscheduled absence or is going to be tardy to work. The employee is required to provide a reason for the absence or tardiness. The person who takes the call completes a form, which is signed by Ms. Weissgerber and kept in the regular course of business.

24. Respondent's attendance records for Petitioner establish that Petitioner's absenteeism and tardiness issues continued during 2009. Those records for 2009 reflect that Petitioner was absent from work for non-medical reasons on the following dates January 23, May 26, June 29, September 28, and October 11. Each of these absences was unscheduled.

25. Respondent's attendance records for Petitioner for 2009 reflect that on April 10 and May 12 Petitioner did not arrive at work in a timely matter for non-medical reasons.

26. Petitioner either could not recall or she denied most of the unscheduled absences and tardiness reflected by Respondent's time records. Petitioner's testimony lacks credibility and is insufficient to impeach the integrity of the contemporaneous attendance records introduced by Respondent.

27. On October 12, 2009, Ms. Weissgerber issued a verbal warning to Petitioner based on four absences during the calendar year (there had actually been five absences during the calendar year). The warning was consistent with Respondent's policies.

28. Ms. Weissgerber testified, credibly, that she did not select Petitioner for either position because Petitioner has a poor attendance record consisting of unscheduled absences and tardiness. Ms. Weissgerber testified, credibly, that Petitioner's age had no bearing on the hiring decision.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 760.11.

30. The Florida Civil Rights Act of 1992 (FCRA) is codified in sections 760.01 through 760.11, Florida Statutes.

31. Pursuant to section 760.10(1)(a), it is unlawful for an employer to discriminate against an individual by failing or refusing to hire the individual based on the individual's age.

32. The FCRA was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C Sections 2000 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) and Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

33. Petitioner bears the burden of proving by a preponderance of the evidence that Respondent discriminated against her based on her age. See Valenzuela, 18 So. 3d at 22.

34. Discriminatory intent may be established through direct, circumstantial, or statistical evidence. See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983), Valenzuela, 18 So. 3d at 21.

35. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. See Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004)("Direct evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.'").

36. Petitioner offered no direct evidence that Respondent, acting through Ms. Weissgerber, discriminated against her based on her age.

37. Petitioner offered no statistical evidence that Respondent, acting through Ms. Weissgerber, discriminated against her based on her age.

38. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden framework established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed .2d 668 (1973) and Texas Dep't of Cmty Affairs v.

Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) is applied. "In order to establish a prima facie case of disparate treatment based on gender discrimination, a plaintiff must prove that: (1) the employee is a member of a protected class; (2) the employee was qualified for her position; (3) the employee suffered an adverse employment action; and (4) similarly situated employees outside the employee's protected class were treated more favorably." Valenzuela, 18 So. 3d at 21.

39. Petitioner established prongs 1 and 2 of the analysis.

40. Respondent asserts that Petitioner did not establish prong 3 because she did not suffer an adverse employment action. Respondent argues that the Outpatient Attendant position would have, at best, been a lateral transfer for Petitioner. Respondent argues that she would have received less compensation since she would have lost the "differential" that augments the salary of a pool employee. For the purpose of this analysis, the undersigned rejects Respondent's argument and concludes that prong 3 has been met. This conclusion is reached because Petitioner had valid reasons for wanting an Outpatient Attendant position.

41. Petitioner introduced no competent evidence as to the age of the two persons who filled the two Outpatient Attendant positions at issue in this proceeding. Without such proof, it

cannot be concluded that "similarly situated employees outside the employee's protected class were treated more favorably," thereby satisfying prong 4 of the analysis. Petitioner failed to satisfy prong 4 of the analysis.

42. Petitioner did not present a prima facie case that Respondent, through Ms. Weissgerber, discriminated against her.[3]

43. Petitioner has not met her burden of proof in this proceeding.

44. In its Proposed Recommended Order, Respondent asserts that it is entitled to an award of costs and reasonable attorney's fees pursuant to section 120.659, Florida Statutes, because Petitioner's Petition for Relief is frivolous and unsupported by material facts. Section 120.595(1) relates to proceedings brought pursuant to section 120.57(1) and provides as follows:

> (a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.
>
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
>
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine

whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:
1. "Improper purpose" means participation in a proceeding pursuant to s. 120,57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. . . . .

45. There is insufficient evidence that Petitioner participated in this proceeding for an improper purpose. Consequently, Respondent's request for costs and attorney's fees should be denied.

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 that dismisses Petitioner's claims of discrimination based on disability and on age. It is further recommended that the final order deny Respondent's request for costs and attorney's fees.

DONE AND ENTERED this 1st day of February, 2011, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2011.

ENDNOTES

[1/] On page 108, beginning on Line 15, Petitioner's counsel made the concession that Petitioner does not meet the definition of a disabled person. On page 151, the undersigned made the following statement, beginning at line 6: "I want to make clear that my order is going to reflect that Petitioner has withdrawn the disability claim. The only claim that is left is the age claim." Immediately thereafter Mr. Helsby (on behalf of Respondent) stated "correct" and Mr. Colleton (on behalf of Petitioner) stated "that's correct."

[2/] This position has been referred to by certain exhibits as "Out Patient Attendant". The undersigned has used the job title of "Outpatient Attendant" as used in the position description (Respondent's exhibit 9).

[3/] Even if Petitioner had been able to establish a prima facie case of discrimination, Respondent proved that it had a legitimate, non-discriminatory reason for the action it took. There was no evidence that Respondent's reason was a pretext. Compare, Valenzuela, 18 So. 3d at 24-25.

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.