STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANTIONETTE MACK, Petitioner, vs. AGENCY FOR PERSONS WITH DISABILITIES, Respondent.	)	Case No. 10-7914

RECOMMENDED ORDER

A hearing was held pursuant to notice, on November 8, 2010, via video teleconference with sites in Gainesville and Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Antoinette Mack
1322 Northeast 31st Avenue
Gainesville, Florida 32609

For Respondent: Julie Waldman, Esquire
Agency for persons with Disabilities
1621 Northeast Waldo Road
Gainesville, Florida 32609

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Charge of Discrimination filed by Petitioner on January 26, 2010.

PRELIMINARY STATEMENT

On or about January 26, 2010, Petitioner, Antoinette Mack, filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR), which alleged that the Agency for Persons with Disabilities violated Section 760.10, Florida Statutes, by discriminating against her on the basis of race, which resulted in her termination.

The allegations were investigated and on July 15, 2010, FCHR issued its Determination: No Cause. A Petition for Relief was filed by Petitioner on August 12, 2010. In the Petition for Relief, Petitioner also alleges that she was discriminated against on the basis of her age, which was not alleged in her Employment Charge of Discrimination.[1/]

FCHR transmitted the case to the Division of Administrative Hearings on or about August 18, 2010. A Notice of Hearing by Video Teleconference was issued setting the case for formal hearing on November 8, 2010. The hearing proceeded as scheduled.

At hearing, Petitioner testified on her own behalf and presented the testimony of Gloria Burkett. Petitioner did not offer any exhibits into evidence. Respondent made an ore tenus motion to dismiss which was denied. Respondent presented the testimony of Bernice Huff and Sharon Taber. Respondent's Exhibits lettered A through C were admitted into evidence.

The hearing was not transcribed. Petitioner filed a post-hearing written submission and Respondent filed a Proposed Recommended Order, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American female who was employed by APD from July 2005 until her termination on or about June 5, 2009. At all times relevant to this proceeding, Petitioner was a member of the Select Exempt Service (SES), a category of employment with the State of Florida.

2. Respondent, Agency for Persons with Disabilities (APD), is an employer within the meaning of the Florida Civil Rights Act. APD is a state agency responsible for, among other things, providing residential treatment, training, and behavioral care to vulnerable, developmentally disabled individuals in an institutional setting.

3. Tacachale is an Intermediate Care facility for mentally retarded persons and it is located in Gainesville, Florida. Jasmine Home at Tacachale is a group home for nine developmentally disabled women with significant behavioral problems. The staff who work at Jasmine Home are expected to provide monitoring of the residents/clients to ensure their safety and well-being.

4. Petitioner worked for Respondent as a Behavior Program Specialist Supervisor in Jasmine Home. As a supervisor, Ms. Mack's duties were to oversee the direct care of the residents in the group home. Part of a supervisor's duties is to ensure that proper behavioral techniques are followed. When a resident engages in a behavioral episode, certain behavioral intervention techniques are used to calm the resident. These techniques range from verbal redirection to physical management techniques. These may include techniques that safely place the resident in a prone position to ensure that the resident does not hurt herself or others. Staff members are trained in techniques to do this type of intervention safely without causing injury to the residents.

5. On December 13, 2008, a resident in Jasmine Home engaged in behavior that required staff intervention. A staff person, Gloria Burkett, and a co-worker initiated a "take-down" of this resident. Petitioner came into the room to assist in this intervention.

6. A staff member who observed this intervention called the Florida Abuse Hotline alleging the use of inappropriate intervention techniques by Petitioner and Ms. Burkett. This commenced an external investigation into these allegations. Concurrently, Tacachale began an internal investigation.

7. During the pendency of the dual investigations, both Petitioner and Ms. Burkett were reassigned away from direct client contact. This reassignment is standard practice at Tacachale when a staff member is named as a possible perpetrator of abuse toward a resident.

8. Sharon Taber is the Programs Operations Administrator who oversees the facility of which Jasmine House is a part. While Ms. Taber did not participate in the investigations, she reviewed the findings of both.

9. According to Ms. Taber, there is no set time for the length of staff reassignments in these circumstances. The length of the staff reassignment is based upon the safety of the residents. The investigation took a long time and, consequently, Petitioner remained reassigned for a long time.

10. The internal investigative report concluded that the resident was mistreated by Petitioner. Ms. Taber reviewed the investigative report and concurred with the report's conclusion that Petitioner participated in an inappropriate restraint on the Jasmine resident, and, therefore, mistreated the resident.

11. Ms. Taber was also aware that the Florida Abuse Hotline concluded its investigation finding that there were "some indicators" of abuse.

12. As a result of the findings of both investigations, Ms. Taber determined that Petitioner had implemented inappropriate intervention techniques which put the client/resident at risk in violation of APD policies and procedures. In reaching her determination and recommendation for disciplinary action, Ms. Taber also considered that Petitioner was a supervisor and that the agency "expects more" from supervisors.

13. Ms. Taber made a referral to the Human Resources Department for disciplinary action. Her recommendation was termination of Petitioner's employment.

14. By letter dated June 3, 2010, APD notified Petitioner that she was being dismissed from her position. The letter further informed Petitioner that as a Select Exempt Service employee, she served at the pleasure of the agency and was subject to termination at the discretion of the agency head. Consequently, Petitioner was not entitled to an employment hearing or grievance proceeding.

15. Petitioner believes that her subordinates were hostile to her and that they were prejudiced in their viewpoints. By relying on the staff's statements regarding the incident, Petitioner believes that APD did not handle the investigation professionally.

16. Although Petitioner was given the opportunity to write a statement to APD regarding the incident and did write a statement, Petitioner believes she should have been interviewed during the investigation. Petitioner concluded that because APD did not handle the investigation the way Petitioner believes it should have been handled, that she was discriminated against because of her race.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2010).

18. Section 760.10(1), Florida Statutes (2010), states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race.

19. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Valenzuela v. GlobeGround North America, LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

20. In the instant case, Petitioner alleged in her Charge of Discrimination which she filed with FCHR that APD

discriminated against her on the basis of race when it terminated her employment.

21. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Board of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

22. "Direct evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." Schoenfeld v. Babbitt, supra. Petitioner presented no direct evidence (e.g., racial slurs) of race discrimination.

23. "[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 intentional 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).

24. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), is applied. Under this well established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to make out 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 discusses 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. 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. Schoenfeld v. Babbitt, supra at 1267. The employee must 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. Department of Corrections v. Chandler, supra at 1186; Alexander v. Fulton County, Georgia, supra. Petitioner has not met this burden.

25. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of

fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

26. To establish a prima facie case, Petitioner must prove that (1) she is a member of a protected class (e.g., African-American); (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 or benefit at issue. See McDonnell, supra; Gillis v. Georgia Department of Corrections, 400 F.3d 883 (11th Cir. 2005).

27. At hearing, Respondent moved to dismiss the case arguing that Petitioner had not established a prima facie case. Where the administrative law judge does not halt the proceedings for "lack of a prima facie case and the action has been fully tried, it is no longer relevant whether the [Petitioner] actually established a prima facie case. At that point, the only relevant inquiry is the ultimate, factual issue of intentional discrimination. . . . [W]hether or not [the Petitioner] actually established a prima facie case is relevant

only in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination." Green v. School Board of Hillsborough County, 25 F.3d 974, 978 (11th Cir. 1994); Beaver v. Rayonier, Inc., 200 F. 3d 723, 727. (11th Cir. 1999). See also United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-715 ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question of whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non. . . .[W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.'").

28. After Petitioner presented her case, Respondent's witnesses testified that she was terminated for legitimate non-discriminatory reasons. That is, APD conducted an investigation which resulted in a conclusion that Petitioner mistreated a

resident by using inappropriate behavioral intervention techniques.

29. While Petitioner believes that APD's actions were intentionally discriminatory, the evidence does not support this conclusion. Byers v. Dallas Morning News, Inc., 209 F.3d 419, 427 (5th Cir. 2000) ("Byers has failed to produce any direct evidence of discriminatory intent by Brown or TDMN or sufficient evidence indirectly demonstrating discriminatory intent. Instead, Byers urges this Court to rely on his subjective belief that Brown discriminated against him because he was white. This Court will not do so."). The evidence contains no persuasive proof to support a finding that APD's actions were racially motivated.

30. Petitioner asserts that APD did not follow its procedures regarding the discipline of employees. She has not proven that APD's actions were in violation of any procedures. Moreover, even if there were errors in how APD conducted its investigation, there is no evidence that APD manipulated those investigations for the purpose of discriminating against Petitioner because of her race or age. See Department of Corrections v. Chandler, supra at 1187, quoting Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) ("The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason

at all, as long as its action is not for a discriminatory reason.").

31. Finally, whether or not APD followed its internal procedures regarding Petitioner's termination is not relevant unless its actions are based upon unlawful discrimination. There is no competent evidence that Respondent based its actions regarding Petitioner on discriminatory reasons.

32. In summary, Petitioner has failed to carry her burden of proof that Respondent engaged in racial discrimination toward Petitioner when it terminated her.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order finding that the Agency for Persons with Disabilities is not guilty of the unlawful employment practice alleged by Petitioner and dismissing Petitioner's Charge of Discrimination.

DONE AND ENTERED this 28th day of December, 2010, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of December, 2010.

ENDNOTE

1/ [T]o prevent circumvention of the [FCHR's] investigatory and conciliatory role, only those claims that are fairly encompassed within [an FCHR charge] can be the subject of [an administrative hearing]" and any subsequent FCHR award of relief to the complainant. Chambers v. American Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994).

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.