STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHERYL GLOVETTE COBB,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-0538
	)	
BAYSIDE MANOR NURSING HOME,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Diane Cleavinger, Administrative Law Judge of the Division of Administrative Hearings, on May 2, 2012, in Pensacola, Florida.

APPEARANCES

For Petitioner: Cheryl Glovette Cobb, pro se
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For Respondent: David P. Steffen, Esquire
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether Respondent discriminated against Petitioner because of her race in violation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

On August 29, 2011, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). In her Complaint, Petitioner asserted that she was discriminated against based upon her race, color, and sex, and that she was retaliated against for engaging in protected activity. The Complaint was investigated by FCHR. On January 13, 2012, FCHR issued a Notice of Determination of no cause. The Notice also advised Petitioner of her right to file a Petition for Relief.

On February 9, 2012, Petitioner filed a Petition for Relief with FCHR. In her Petition, Petitioner asserted that she had been discriminated against based on her race and retaliated against for complaining about the mistreatment she suffered.

At the hearing, Petitioner testified on her own behalf and called three witnesses to testify. Petitioner also offered 17 Exhibits into evidence, 13 of which were admitted. Respondent called five witnesses to testify and offered 11 Exhibits into evidence.

After the hearing, Petitioner filed a Proposed Recommended Order in letter form on June 18, 2012. Similarly, Respondent filed a Proposed Recommended Order on June 18, 2012.

FINDINGS OF FACT

1. FL Hud Bayside, LLC, is a limited liability company doing business as Bayside Manor (Bayside Manor or Respondent). The company is also known as Bayside Manor Nursing Home, the named Respondent in this action.

2. Respondent is a long-term nursing-care facility. As such it provides nursing care and health-care services to its residents.

3. Petitioner, Cheryl Glovette Cobb, is an African-American female. As such, she is a member of a protected class under chapter 760, Florida Statutes.

4. Sometime in November 2009, Petitioner was employed by Respondent as a Certified Nursing Assistant (CNA). Upon being hired, Petitioner received a copy of Respondent's employee handbook. The handbook contained Respondent's policies and procedures, including its progressive discipline policy.

5. Respondent's discipline policy applies progressive discipline for conduct that it does not consider to be grounds for immediate termination. Such offenses are classified as Category II violations.

6. Category II violations include violations of the tardiness or absenteeism policy and poor work quality. Category II violations, also, include failure to take lunch breaks at scheduled times and failure to return from lunch breaks within

the 30-minute time allotted for such breaks. Additionally, Category II violations include any use of a cell phone in residential care areas.

7. Due to the fact that the quality of nursing and health care services depends on consistent maintenance of routine schedules, Respondent maintains strict attendance and tardiness requirements. For example, CNAs are expected to start their lunch breaks at their scheduled times and return from those breaks within the 30 minutes allotted for such breaks. A CNA's failure to start the lunch break on time or return within 30 minutes can create problems because it causes delays in resident care and results in other CNAs not being able to take their breaks as scheduled. Similar care problems occur when a CNA is late for work. CNAs from the earlier shift must stay past the end of their shift until the late employee arrives.

8. For these reasons, Respondent's tardiness policy requires employees to appear at work at their scheduled starting time and maintain their scheduled break times. There is no grace period allowed and repeated tardiness subjects an employee to discipline. Similarly, Respondent's attendance policy subjects employees to discipline for excessive absences. Excessive absences are defined as two absences in 30 days. Further, a doctor's note indicating that an associate was not able to appear for work does not prevent Respondent from considering an absence

as excessive. None of these policies were shown to be a pretext for discrimination.

9. Under the discipline policy, a first Category II violation subjects an employee to a written warning. A second written warning is optional for a second Category II violation. However, a third Category II violation within a 12-month period subjects an employee to suspension pending an investigation followed by termination, if the investigation confirms the policy violations.

10. In addition, Respondent maintains a "Counseling Reports" policy. This policy allows supervisors to informally counsel employees when they commit their first policy violation without having to issue a more formal associate memorandum. It is intended to be used in situations where an employee has not previously received any formal disciplinary action.

11. At some unknown time prior to February, Petitioner overheard Amber Jordan, LPN, who is white, tell someone she was talking to that she thought blacks were ignorant and slow to learn. Nurse Jordan denies making such a statement. However, the context of the statement was not established and no other evidence regarding the statement was introduced. Importantly, this isolated statement, while inappropriate, was not reported to any supervisor or management personnel, and was not shown to

relate to any later actions taken by the employer at issue in this proceeding.

12. On February 2, 3, 4, and 7, 2011, Petitioner was late for work. Petitioner was late because of issues pertaining to her children boarding the school bus in the morning. However, such personal issues did not excuse the fact that she failed to appear for work as scheduled.

13. On February 19, 2011, Assistant Director of Nursing (ADON), Regine Malebrenche Smith, who is black, issued Petitioner an informal Counseling Report due to excessive tardies in a 30-day period. Petitioner was counseled instead of formally disciplined because Respondent's Director of Nursing (DON), Heidi Duncan, who is white, wanted to work with Petitioner informally to improve her attendance without issuing written discipline in order to give Petitioner time to solve the bus issues regarding her children. There was no evidence that demonstrated Respondent's actions were discriminatory.

14. While Petitioner's tardiness did improve, unfortunately, she continued to be late and absent from work due to her children. In fact, during a 30-day period in March and April, Petitioner was absent three times and tardy five times. Given these violations of Respondent's absence and tardiness policy, on April 15, 2011, Petitioner received a first written warning for these violations. Again, there was no evidence that

Respondent's actions were discriminatory or a pretext to cover discrimination.

15. Sometime thereafter, the evidence showed that Petitioner failed to reposition a patient who became soaked in her own urine as a result of not being monitored and repositioned appropriately.

16. At hearing, Petitioner denied that the resident was soaked in her own urine or that Petitioner had any responsibility for the resident becoming soaked. Petitioner admitted the resident was very wet. She claimed the fluid was not urine but saline solution from an inappropriately inserted IV completed by Amber Jordan. However, the better evidence demonstrated that it was not possible for the resident to have been soaked when Nurse Jordan inserted an IV into the resident as Petitioner alleged. There simply is not enough liquid involved in the process of inserting an IV to have soaked a resident in fluid.

17. On April 22, 2011, Petitioner received a second written warning for poor work quality regarding this incident from the DON. Again there was no evidence that Respondent's actions were discriminatory or a pretext to cover discrimination.

18. On April 23, 2011, Lauren Lauletta, Respondent’s risk manager, was working as the nurse on duty. While conducting rounds throughout the facility, Ms. Lauletta observed Petitioner’s cell phone in her lap when she was supposed to be

feeding a resident that suffered from dementia. Having the cell phone out in a patient area violated Respondent's cell phone policy. However, even though Petitioner was subject to formal discipline pursuant to Respondent's progressive discipline policy, Ms. Lauletta elected to informally counsel Petitioner. She reminded Petitioner that she needed to comply with the cell phone policy and notified Petitioner that future violations could result in more severe disciplinary action.

19. On another occasion, the ADON verbally counseled Petitioner regarding her use of a cell phone when she observed Petitioner with her cell phone out while she was feeding a resident in the dining room. The date of this incident was not clear from the evidence. However, it occurred after the incident with Ms. Lauletta.

20. Additionally, on May 27, 2011, the ADON hosted a Team Talk that discussed multiple issues. The Team Talk included a reminder to the employees that they must avoid using their cell phones in resident-care areas.

21. During May and June 2011, Petitioner failed to leave for her lunch breaks as scheduled and failed to return from her lunch breaks in a timely manner. Petitioner admitted she did not always maintain her lunch schedule and the evidence demonstrated that such failure had occurred more than 20 times in a 30-day period.

22. On June 28, 2011, Respondent issued Petitioner her "second written warning" based upon her failure to comply with the Respondent's lunch break policy. However, Respondent elected not to terminate Petitioner. Petitioner was notified that any additional policy violations could result in her suspension and possible termination. Again, there was no evidence that Respondent's actions were discriminatory or a pretext for discrimination.

23. On July 4, 2011, Nurse Jordan observed Petitioner sitting in a resident's room while using her cell phone. The resident's room was considered a resident-care area. At the time Ms. Jordan saw Petitioner using her cell phone, the DON was walking behind Ms. Jordan and also observed Petitioner standing up and placing the cell phone in her pocket.

24. On July 5, 2011, Petitioner was suspended pending an investigation into her use of the cell phone since this was her fourth Category II violation in a 12-month period.

25. Prior to making a final decision regarding Petitioner's employment, the DON spoke with the ADON regarding the appropriate discipline. The two considered Petitioner's disciplinary history and the previous warnings Petitioner had received as a result of her prior violations of the cell-phone-use policy. The DON also spoke with multiple individuals, including Ms. Lauletta, about Petitioner's prior use of a cell phone in resident-care areas.

At the conclusion of her investigation, the DON determined that Petitioner had violated company policies by using her cell phone in a resident-care area and that she was subject to termination because she had progressed through the company's disciplinary policy. There was no evidence that Respondent's actions were discriminatory or a pretext for discrimination.

26. Prior to her termination, Petitioner appeared at the facility to speak with Mary Reid, Respondent's administrator. During the meeting, Petitioner asked to keep her job. At no point during the meeting did Petitioner notify Ms. Reid that she thought her discipline was discriminatory, report that she was being discriminated against because of her race, or assert that she was being retaliated against because of her race. Similarly, prior to her termination, Petitioner never notified any supervisor or manager that Nurse Jordan made any allegedly discriminatory statements or that Nurse Jordan discriminated against her in any way. Moreover, there was no evidence that the one statement alleged to have been made by Nurse Jordan related in any way to Petitioner's disciplinary issues. Instead, Petitioner simply claimed that her discipline was unfair.

27. Likewise, Petitioner never complained to the DON, ADON or any other management personnel about being treated differently than other similarly situated employees because of her race. Indeed, Petitioner failed to identify any other CNAs who were not

terminated after progressing through Respondent's progressive discipline policy. Given these facts, Petitioner has failed to demonstrate that she was discriminated or retaliated against by Respondent. Therefore, the Petition For Relief should be dismissed.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569, 120.57(1), and 760.11(4)(b), Fla. Stat. (2011).

29. Section 760.10(1)(a), Florida Statutes, states as follows:

> (1) It is an unlawful employment practice for an employer: (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

30. Additionally, it is unlawful for an employer to retaliate against any person because that person has opposed any practice that is an unlawful practice. § 760.10(7), Fla. Stat. (2011).

31. Under chapter 760, Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated or retaliated against her through an adverse employment action.

See Fla. Dep't of Transp. v. J.W.C., Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

32. In order to carry her burden of proof, Petitioner can establish a case of discrimination or retaliation through direct or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1561-1562 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of some impermissible factor. Evidence that only suggests discrimination, or that is subject to more than one interpretation, is not direct evidence. See Carter v. Three Springs Residential Treatment, 132 F.3d 635, 462 (11th Cir. 1998). Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption and must in some way relate to the adverse actions of the employer. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001). See Jones v. BE&K Eng'g, Inc., 146 Fed. Appx. 356, 358-359 (11th Cir. 2005)("In order to constitute direct evidence, the evidence must directly relate in time and subject to the adverse employment action at issue."); see also Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1223, 1227-28 (11th Cir. 2002)(concluding that the statement "we'll burn his black a**" was not direct evidence where it was made two and a half years prior to the employee's termination).

33. In this case, Petitioner has not shown any direct evidence of discriminatory intent. Her claims that Ms. Jordan made a derogatory remark about African-Americans is not direct evidence of discrimination as it does not relate to the decision to terminate Petitioner's employment and was unknown to anyone involved in the decision to terminate nor temporally related to that decision.

34. On the other hand, McDonnnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973), established that an employment discrimination or retaliation case based on circumstantial evidence involves the following burden-shifting analysis: (a) the employee must first establish a prima facie case of discrimination; (b) the employer may then rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for the employment action in question; and (c) the employee then bears the ultimate burden of persuasion to establish that the employer's proffered reason for this action is merely pretext for discrimination. See also Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); and Scott v. Fla. Dep't of Child. & Fam. Servs., 19 Fla. L. Weekly Fed. D 268, 2005 U.S. Dist. LEXIS 19261 (N.D. Fla. 2005).

35. Petitioner must establish a prima facie case of discrimination by demonstrating that: (1) she is a member of a

protected class; (2) she was subjected to an adverse employment action; (3) employees outside of her protected class were treated more favorably by her employer; and (4) she was qualified for her job as a CNA. See Rice-Lamar v. City of Ft. Lauderdale, 232 F.3d 842-843 (11th Cir. 2000).

36. In this case, Petitioner is able to establish that she is a member of a protected class and was subject to an adverse employment action based upon her termination. Additionally, Petitioner was qualified for her position as a CNA.

37. However, Petitioner did not present any evidence establishing that any similarly situated CNAs, outside of her protected class, received less discipline than she did for similar work policy violations. Given this lack of evidence, Petitioner cannot demonstrate that she received less favorable treatment than any other CNA.

38. On the other hand, the evidence established that Petitioner received multiple opportunities to improve her performance but failed to meet the company's expectations. Given these facts, Petitioner has failed to establish a prima facie case of discrimination and her discrimination claim should be dismissed.

39. However, even if Petitioner could have established a prima facie case of discrimination, she cannot prevail. In this case, Respondent has a legitimate nondiscriminatory reason for

taking the adverse employment action of termination. See McDonnell Douglas Corp., 411 U.S. at 802, and Walker v. Nationsbank of Fla., N.A., 53 F.3d 1548, 1556 (11th Cir. 1995).

40. The failure to comply with company policies is a legitimate business reason to terminate an employee. See Aldabblan v. Festive Pizza, Ltd., 380 F. Supp. 2d 1345, 1353 (S.D. Fla. 2005)(generally, a violation of a company's policy or disregard for a company's directive are legitimate business reasons for termination); see also Cooper v. Southern Co., 390 F.3d 695, 740-41 (11th Cir. 2004).

41. Petitioner progressed through Respondent's discipline policy and was eventually terminated after more than three Category II violations within a 12-month period. In fact, upon receipt of her second "second written warning" on June 28, 2011, Respondent notified Petitioner that she could be suspended and would be subject to termination if she committed any additional policy violations. Nonetheless, Petitioner violated the cell phone policy one week after this warning. There was no evidence that Respondent's reason for terminating Petitioner was pretextual. See Chapman v. AI Transp., 229 F.3d 1012, 1024-1025 (11th Cir. 2000).

42. To prove pretext, Petitioner must present evidence which will create an issue of fact as to whether the reason offered by Respondent for its action is pretextual and whether

race discrimination was the true reason. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 146-147 (2000)(quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993)(stating that "[i]t is not enough . . . to dis-believe the employer; the fact finder must believe the employee's explanation of intentional discrimination")(emphasis in original)).

43. To be actionable, the decision maker must have purposefully taken action against Plaintiff based on membership in a protected group. See Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1262 (11th Cir. 2001)(stating that "[r]acial discrimination is an intentional wrong. An empty head means no discrimination.").

44. Further, Petitioner cannot succeed by simply quarreling with the wisdom of the employer's decision to terminate her. Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997) and Blackmon v. Wal-Mart Stores East, L.P., 358 Fed.Appx. 101 (11th Cir. 2009). A court does not "sit as a super-personnel department that reexamines an entity's business decisions." Elrod v. Sears Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991); see also Combs v. Plantation Patterns, 106 F.3d 1519, 1543 (11th Cir. 1997)(stressing that "federal courts do not sit to second-guess the business judgment of employers."). The judge "need only determine that the [respondent] in good faith believed" that Petitioner committed the act for which he was

terminated. Elrod, 939 F.2d at 1470. If Respondent terminated Petitioner "because it honestly believed that [Petitioner] had violated a company policy even if it was mistaken in such belief, the discharge is not "because of race." See id.

45. As indicated, Petitioner failed to present any evidence that demonstrated Respondent's reasons for termination were pretextual. Specifically, she failed to establish by a preponderance of the evidence that Respondent disciplined her and ultimately terminated her for any other reason than its good faith belief that she repeatedly violated company policies. Therefore, Petitioner's race discrimination claim should be dismissed.

46. A similar analysis applies to Petitioner's retaliation claim. In order to state a prima facie case of retaliation, Petitioner must show (1) that she engaged in protected activity; (2) that she suffered an adverse employment action; and (3) that there was a causal connection between the protected activity and adverse action. See Gupta v. Fla. Bd. of Regents, 212 F.3d 571,590 (11th Cir. 2000).

47. Petitioner cannot prevail in her retaliation claim because she is unable to establish that she engaged in any protected activity. Specifically, Petitioner failed to present any evidence that she objected to any unlawful employment practices. § 760.10(7), Fla. Stat. Instead she merely asserted

that she thought her termination was unfair. As a result, Petitioner has not presented a prima facie case of retaliation.

48. In addition, Petitioner cannot establish any relationship between her alleged protected activity and the adverse action. To establish this causation, Petitioner must show that: (1) the decision makers were aware of her protected activity, and (2) the protected activity and the adverse action were not wholly unrelated. Gupta, 212 F.3d at 590. In the present case, Petitioner failed to present any evidence demonstrating that any of the decision makers who disciplined her had any knowledge of Petitioner engaging in any protected activity.

49. Petitioner's ongoing policy violations also eliminate any causal connection between any potential protected activity and the adverse action. See Henderson v. FedEx Express, 442 Fed.Appx. 502, 506 (2011)("Intervening acts of misconduct can break any causal link between the protected conduct and the adverse employment action.")(internal citations omitted); see also Fleming v. Boeing Co., F.3d 242, 248(11th Cir. 1997).

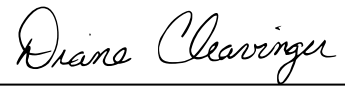
50. In this case, based upon Petitioner's failure to demonstrate that the decision-makers knew about any alleged protected activity, she cannot establish the necessary causal connection to present a prima facie case of retaliation.

51. Moreover, even if Petitioner presented a prima facie case of retaliation, for the same reasons Respondent established that it had a legitimate business reason to terminate Petitioner with regard to her discrimination claim, it can satisfy its burden with regard to the retaliation claim. Given these facts, the Petition for Relief should be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter an order dismissing the Petition for Relief.

DONE AND ENTERED this 20th day of July, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 20th day of July, 2012.

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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.