STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EUNICE DARLENE FLOYD-TRINOWSKI, Petitioner, vs. NORTHEAST FLORIDA HEALTH SERVICES, Respondent.	)	Case No. 12-1523

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 12 and 13, 2012, by video teleconference at sites in Tallahassee, Florida and Daytona Beach, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Eunice Darlene Floyd-Trinowski, pro se
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For Respondent: Benton N. Wood, Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner demonstrated that she was terminated from employment by Respondent as the result of an unlawful

employment practice based on her race, or as retaliation for Petitioner's opposition to a practice which is an unlawful employment practice.

PRELIMINARY STATEMENT

This case was initiated through the issuance of a "Notice of Determination: No Cause" by the Florida Commission on Human Relations, by which the Commission determined that no reasonable cause existed to believe that Respondent engaged in an unlawful employment practice involving Petitioner. Petitioner filed a Petition for Relief, which was referred to the Division of Administrative Hearings for disposition, and assigned to the undersigned. The final hearing was scheduled for hearing on September 12-14, 2012, by video teleconference in Tallahassee, Florida and Daytona Beach, Florida. The hearing proceeded as scheduled.

During the course of the hearing, Petitioner stated, without equivocation, that the basis for the Employment Complaint of Discrimination regarding her termination from employment with Respondent was that she had gone outside of the normal chain of command to complain about patient care issues to a commissioner of the West Volusia Hospital Authority (WVHA), Respondent's funding agency. The undersigned, after having questioned Petitioner regarding the basis for her complaint, determined that the stated reason did not, as a matter of law,

constitute a basis for relief under the Florida Civil Rights Act, sections 760.01-760.10. The failure to allege that the employment action was taken on the basis of Petitioner's identity as a member of a protected class, or in retaliation for Petitioner's opposition to an unlawful employment practice, constitutes a failure to meet the most basic jurisdictional element of an unlawful employment practice complaint, and was deemed by the undersigned to obviate the necessity of proceeding with further evidence of discriminatory acts. Thus, the hearing was concluded at that point, and the parties were provided with the opportunity to file post-hearing submittals.

Prior to the conclusion of the hearing, Petitioner presented the testimony of Lisa Billups, Elizabeth Torres, Sharon Warriner, Kelli Graham, Kathy Wilkes, and Juanita McNeil, and offered Petitioner's Exhibits 1, 2, 4, 5A, 5B, 6, 7, 7A, 13-15, 20, 21, 26, 28, 29, 31, 35, 38-40, and 49, each of which was admitted into evidence. Petitioner's Exhibit 30 was offered but not received in evidence, and Petitioner's Exhibits 11 and 19 were marked for identification but not offered into evidence.

A one-volume Transcript consisting of the testimony of Juanita McNeil and the discussions leading to the decision to terminate the proceeding was filed on September 21, 2012. The parties timely filed their Proposed Recommended Orders, which

have been considered in the preparation of this Recommended Order.

For the reasons set forth herein, the Florida Commission on Human Relations should, as a matter of law, enter a Final Order dismissing this case.

FINDINGS OF FACT

1. Respondent is a provider of health-care services that receives funding from the West Volusia Hospital Authority (WVHA). Respondent operates health clinics in Pierson, DeLand, and Deltona, Florida.

2. Petitioner was employed by Respondent as a Certified Medical Assistant on September 25, 2009. After a period of time in Respondent's Pierson office, Petitioner was transferred to Respondent's DeLand office. Petitioner's duties included those as a referral clerk. In that capacity, Petitioner arranged, scheduled, and coordinated referrals from Respondent's medical providers to outside physicians and laboratories. Petitioner also performed blood-draws, Pap smears, and related services.

3. Petitioner was frequently behind in her referrals. Petitioner sought assistance with her referrals. Taken in the light most favorable to Petitioner, an employee of Respondent with some apparent supervisory authority denied her requests, and advised other employees that they were not to assist Petitioner in catching up.

4. In October 2010, Petitioner was assigned to Respondent's newly created Emergency Room Diversion (ERD) program. That assignment caused a change in Petitioner's shift from the 9:00 a.m. to 5:00 p.m. shift, to the 12:00 p.m. to 8:30 p.m. shift. She was returned to her normal day shift in mid-November. The disruption in her standard shift caused Petitioner to fall further behind in her referrals. To minimize the problem, nurses began to make referrals for their doctors when they had the time.

5. On November 19, 2010, Petitioner called Juanita McNeil, an elected commissioner of the WVHA, to discuss what Petitioner perceived to be sub-standard patient care that, in some cases, related to referrals that were not being timely completed, and for which Petitioner was receiving no assistance. Petitioner asked Ms. McNeil to keep their conversation confidential because she feared that she would be terminated for going outside of the chain of command.

6. Later in the day on November 19, 2010, Petitioner was presented with a separation notice by which she was terminated from employment. The separation notice listed four reasons for her termination. The reasons were "employee not doing job in a timely manner, being rude with patients, being rude with other employees, [and] insubordination (calling the WVHA) instead of talking with appropriate supervisors."

7. During the hearing, Petitioner admitted that "100% of the reason that I was fired is because of me calling the WVHA." Upon follow up inquiry, Petitioner reiterated that she was terminated for insubordination in bypassing her supervisors to contact a WVHA commissioner, and that reason formed the basis for her complaint that she had been the subject of discrimination or retaliation.

8. Petitioner knew of no other employee that ever communicated directly with a WVHA commissioner, or that ever escaped disciplinary sanctions for having done so. Thus, there was no comparator upon which to measure whether Petitioner was treated differently under like circumstances as a result of her race.

9. Petitioner's admission of the basis for her termination is dispositive of this case. Being terminated for insubordination, in the absence of evidence that persons outside of her protected class were treated differently, is not related to Petitioner's race. Petitioner's admission demonstrates that her claim is not founded on an unlawful employment practice based on her race, or retaliation for Petitioner's opposition to a practice which is an unlawful employment practice.

10. Based on Petitioner's admission, the undersigned concluded that there was no legal basis upon which relief could

be ordered under the Florida Civil Rights Act. Thus, the final hearing was adjourned.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).

12. Unless specifically stated otherwise herein, all references to the Florida Statutes will be to the 2010 codification which was that in effect when the unlawful employment practice that forms the basis for Petitioner's claim occurred.

13. Section 760.11(1) provides that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [FCHR] within 365 days of the alleged violation . . . ." Petitioner timely filed her complaint.

14. Section 760.11(7) provides that upon a determination by the FCHR that there is no probable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause. . . ." Following the FCHR determination of no cause, Petitioner timely filed her Petition for Relief requesting this hearing.

15. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround North America, LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

16. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3rd DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

17. With regard to Petitioner's claim of discrimination, section 760.10 provides, in pertinent part:

> (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.

18. With regard to Petitioner's claim of retaliation, section 760.10(7), provides, in pertinent part:

> (7) It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, . . . (emphasis added).

Thus, the alleged retaliation must be for a reason that is subject to protection under the Act, i.e. race, color, religion, sex, national origin, age, handicap, or marital status.

19. The only basis for Petitioner's claim of discrimination or retaliation is, by her admission, that Respondent terminated her for insubordination by going outside of the normal chain of authority and taking her complaints regarding allegedly poor patient service and lack of assistance in completing referrals to a WVHA commissioner.

20. Petitioner admitted that the basis for her termination was not the result of her race, but that "100% of the reason that I was fired is because of me calling the WVHA."

21. Respondent's patients may have been ill served as a result of the delays in their referrals. Respondent may have been misguided, or even acting contrary to its policies, by refusing to allow other employees to assist Petitioner in getting caught up with her referrals. It may have been unfair and unjust for Respondent to fire Petitioner for bringing her concerns with the referrals to a member of the WVHA.[1/] However, none of those issues, even if true, suggest that Petitioner was fired due to

her race or that she was the subject of retaliation as a result of her opposition to an unlawful employment practice as defined in section 760.10.

22. An action pursuant to the Florida Civil Rights Act may not be predicated on whether an employment decision is fair or reasonable, but only on whether it was motivated by unlawful discriminatory intent. As set forth by the Eleventh Circuit Court of Appeals, "[t]he 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." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). In a proceeding under the Civil Rights Act, "[w]e are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999). Moreover, "[t]he employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve." Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1187 (Fla. 1st DCA 1991).

23. In addition to Petitioner's admission regarding the basis for her claim of discrimination, Petitioner also admitted that she knew of no person outside of her protected class that

was treated differently in a comparable situation. As established by the Fifth District Court of Appeal:

> ". . . it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." The employee must show that she and the employees outside her protected class are similarly situated "in all relevant respects." Thus, "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."
>
> 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." If a plaintiff fails to present sufficient evidence that a non-protected, similarly situated employee was treated more favorably by the employer, the defendant is entitled to summary judgment. (citations omitted).

Valenzuela v. GlobeGround North America, LLC., 18 So. 3d at 22-23.

24. Petitioner admitted that she knew of no other employee, regardless of their race, color, religion, sex, national origin, age, handicap, or marital status, that acted in a similar manner to that of Petitioner but escaped discipline. Therefore, Petitioner's complaint of discrimination must be dismissed.

25. Petitioner's admissions are dispositive. Termination of an employee for violating the chain of command to air complaints and grievances, without some evidence of disparate treatment for like conduct, is not a basis for relief under the Florida Civil Rights Act.

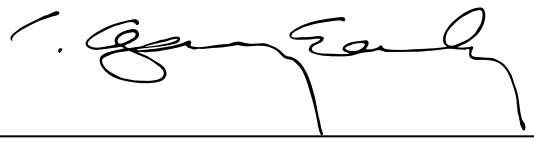
26. Based on the foregoing, it is concluded that Petitioner failed to state a basis for her termination from employment that falls within the ambit of the Florida Civil Rights Act. Therefore, the Petition for Relief should be dismissed.

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 dismissing Petitioner's Petition for Relief.

DONE AND ENTERED this 10th day of October, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of October, 2012.

ENDNOTE

[1/] Each of the assertions were disputed, and no finding is made that patients were not receiving care, that Respondent actually refused assistance, violated its policies, or disregarded Petitioner's interactions with patients and other employees or her work performance in its termination decision, or that consideration of Petitioner's interaction with the WVHA was inappropriate. Rather, as is necessary in a disposition of this nature, all allegations and assertions expressed by Petitioner have been accepted.

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 of Dismissal. Any exceptions to this Recommended Order of Dismissal should be filed with the agency that will issue the Final Order in this case.