STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DORETHA PEARSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-1702
	)	
MRMC-MUNROE REGIONAL HEALTH SYSTEMS, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A hearing was held pursuant to notice, on October 9, 2012, in Ocala, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Doretha Pearson, pro se
3001 Southeast Lakewood Avenue
Number 904
Ocala, Florida 34471

For Respondent: Kenneth A. Knox, Esquire
Fisher and Phillips, LLP
Suite 800
450 East Las Olas Boulevard
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Complaint of Discrimination filed by Petitioner.

PRELIMINARY STATEMENT

On or about January 23, 2012, Petitioner, Doretha Pearson, filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR), which alleged that Respondent violated section 760.10, Florida Statutes, by discriminating against her on the basis of race, color, disability, and retaliation, which resulted in her wrongful termination.

The allegations were investigated, and on May 10, 2012, FCHR issued its Determination: No Cause. A Petition for Relief was filed by Petitioner on May 14, 2012.

FCHR transmitted the case to the Division of Administrative Hearings on or about May 15, 2012. A Notice of Hearing was issued setting the case for formal hearing on July 17, 2012. Respondent filed a Motion for Continuance of Final Hearing which, following a telephone hearing on the motion, was granted for good cause. The hearing was rescheduled for October 9, 2012, and was heard as scheduled.

At hearing, Petitioner testified on her own behalf, and presented the testimony of Milton Smith and Michael Pearson. Petitioner did not present any documents into evidence. Respondent presented the testimony of Melinda Monteith, Elizabeth DeMatto, and Vicky Nelson. Respondent's Exhibits 1

through 7 were admitted into evidence. Official Recognition was taken of a calendar showing the month of December 2010.

A two-volume Transcript was filed on November 8, 2012. Respondent timely filed a Proposed Recommended Order and Petitioner timely filed a post-hearing submission, 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 Respondent from October 16, 2000, until her termination on January 4, 2011. When she began her employment with Respondent, she was hired as a Food Service Specialist.

2. Respondent, MRMC-Munroe Regional Health Systems, Inc. (Munroe or Respondent), is an employer within the meaning of the Florida Civil Rights Act. Munroe is a not-for-profit hospital located in Ocala, Florida, and comprises numerous departments, including the Nutritional Services Department. Petitioner worked for this department the entirety of her employment with Respondent.

3. On or about October 23, 2000, Petitioner received a copy of Munroe's Employee handbook. The Employee Handbook includes an Equal Opportunity policy, an anti-harassment policy, a complaint procedure, and an open door policy. Petitioner was aware from the beginning of her employment that Respondent had written policies prohibiting unlawful discrimination and that

there were procedures in place to report work-related problems, in particular unlawful discrimination.

4. Petitioner acknowledged in October 2000, that she received copies of these policies. She also signed an acknowledgment that she was an "at-will" employee, meaning that either the employee or Munroe has the right to terminate the employment relationship at any time with or without notice or reason. As early as 2000, Petitioner was aware that one way to report unlawful discrimination was to contact the Human Resources Department.

5. In early 2004, Petitioner sought a promotion to the position of Team Leader. Melinda Monteith was one of Petitioner's immediate supervisors at that time.

6. Ms. Monteith recommended Petitioner for the promotion to Team Leader. Petitioner was promoted to the position of Team Leader in February 2004, and received a pay raise commensurate with that position.

7. Ms. Monteith continued to be Petitioner's immediate supervisor until January 4, 2011, when Petitioner was discharged. Petitioner received pay increases every year from 2004 through 2010.

8. Petitioner's former husband, Michael Pearson, believes that Petitioner's supervisor is racist because he claims she once called him a "thug" and saw her look at another black male

"like she don't like black folks."[1/] Mr. Pearson has never worked for Respondent and bases his personal belief that Petitioner's supervisor is racist on interactions he had with Petitioner's supervisor(s) at holiday parties.

9. On February 6, 2009, Petitioner was disciplined in the form of a written Counseling Agreement for conduct which Respondent considered "workplace bullying."

10. Petitioner, along with other team leaders, was asked to learn to use a computer system referred to as the C-Board System, in order to fill in when necessary for employees whose assigned duties were to use that system to correctly prepare patient meals.

11. Petitioner was never able to operate the C-Board system. She was never disciplined by Respondent for her inability to use the C-Board system.

12. During the time that Petitioner held the position of Team Leader, some employees complained to Ms. Monteith about the way Petitioner interacted with them.

13. On December 20, 2010, Stephanie Smith, another Team Leader, told Ms. Monteith that Petitioner was not speaking to people and being very "sharp" with them.

14. The next morning, Ms. Monteith asked to speak with Petitioner about what Ms. Smith had told her about Petitioner's

behavior the previous day. When Petitioner responded curtly, "Is it business?," Ms. Monteith decided to speak with her later.

15. Later that morning, Ms. Monteith was approached by Pam Knight, one of Petitioner's subordinates, who was in tears regarding Petitioner's behavior and the resulting tense atmosphere. Ms. Knight was particularly concerned with the way Petitioner was treating Ms. Smith.

16. Ms. Monteith and Clinical Nutrition Manager Betsy DeMatto met with Ms. Knight and confirmed what Ms. Knight had told Ms. Monteith earlier regarding Petitioner's behavior: that Petitioner was not speaking to Ms. Knight or Ms. Smith at all, and that she was not responding to work-related questions.

17. Ms. Monteith and Ms. DeMatto decided that Petitioner should be counseled in writing for her unprofessional behavior toward coworkers.

18. On December 21, 2010, Petitioner was disciplined, again in the form of a written Counseling Agreement, for "behaving in an unprofessional manner [which] creates an environment of tension and discomfort."

19. When presented with the counseling agreement, Petitioner became very angry, remarked that everything she was accused of were lies, and refused to sign the counseling agreement.

20. Later that day, Ms. Monteith was approached by Ms. Smith who was "very pale" and who advised that Petitioner spoke with her (Ms. Smith) following the counseling meeting, and appeared to be angry. Ms. Smith informed Ms. Monteith that Petitioner stated that she was "going postal" and that if she was "going out" she was taking Ms. Monteith with her. Ms. Monteith believed what Ms. Smith told her, and relayed it to Ms. DeMatto. Ms. Monteith and Ms. DeMatto decided to report this to Human Resources (HR) Manager Vicky Nelson.

21. Ms. Nelson has been employed by Respondent for 33 years, five of which as HR Manager. In her capacity as HR Manager, Ms. Nelson has conducted approximately 300 investigations into workplace issues, including allegations of unlawful discrimination, harassment, threatening behavior, workplace violence, and bullying.

22. These investigations included reviewing applicable policies and procedures, referring to any prior events of a similar nature, interviewing the complaining employee and the individual against whom the complaint has been made, and reviewing the personnel files of the individual making the complaint and the individual who is accused of inappropriate behavior. In some cases, a decision is made to remove the accused from the workplace during the pendency of the investigation.

23. Ms. Nelson interviewed Ms. Monteith and Ms. DeMatto in her office. She observed that Ms. Monteith appeared to be "visibly shaken."

24. On the afternoon of December 21, 2010, Petitioner was called into the office of Ms. Nelson to discuss the allegations that Petitioner made this threatening comment regarding Ms. Monteith.

25. During the December 21, 2012, meeting, Petitioner initially denied making the statement about going postal and taking Ms. Monteith with her. She later admitted that she used the word "postal," but was just joking and was not serious.

26. At hearing, Petitioner acknowledged that she used the word "postal," but in the context that they had her in the office "trying to make me postal" and reiterated that she was just kidding in using that word. Petitioner believes that she was being accused of acting "crazy."

27. While there is some dispute as to the context of Petitioner's use of the word "postal," it is not disputed that she did use the word "postal" in the workplace, and that employees of Respondent were extremely concerned because of it.

28. At the conclusion of the December 21, 2010, meeting, Ms. Nelson told Petitioner not to return to work until after she (Ms. Nelson) had finished the investigation if this matter.

29. Ms. Nelson also asked Petitioner to submit a written statement setting forth her position as to the events of December 21, 2010. Petitioner did not submit a written statement at that time, but said she would do so later.

30. On December 22, 2010, Ms. Nelson interviewed Ms. Smith and Ms. Knight, each of whom confirmed what Ms. Monteith previously told Ms. Nelson. Based on the information available to her, Ms. Nelson determined that Petitioner's employment should be terminated. Whether or not Petitioner was just joking when she used the word "postal," it was taken seriously by her employer.

31. Ms. Nelson based the termination decision on Petitioner's use of the word "postal" and considered it inflammatory in nature. She based her decision in part on the comment itself; the credibility of Ms. Smith, Ms. Knight, Ms. DeMatto, and Ms. Monteith; her personal observations of Petitioner's behavior and demeanor in the December 21, 2010, meeting; and the context in which the comment was made, i.e., the information she received regarding Petitioner's interaction with co-workers on December 20 and 21, and her angry reaction to being presented with the counseling agreement on December 20.

32. Ms. Nelson contacted Petitioner on January 3, 2011, and asked to meet with her the following day. On January 4, 2011, Ms. Nelson informed Petitioner of the results of her

investigation and of the decision to terminate her employment, effective that day.

33. At the January 4, 2011, meeting, Ms. Nelson again asked Petitioner for a written statement. Petitioner did not give one to her.

34. On January 13, 2012, Petitioner filed a written request, pursuant to Respondent's Conflict Management Program, for peer review of the circumstances surrounding her termination from Munroe. The Panel Review Request Form lists several factors for the employee making the request to "check off" as to the nature of the dispute. Petitioner checked the boxes for "race" and for "retaliation, but did not check the box for "disability." At no time during the December 21 meeting with Ms. Nelson or the time between that meeting and the January 4, 2011, meeting, did Petitioner advise Ms. Nelson that she believed that she was being discriminated against on the basis of race, color, or disability.

35. On February 23, 2011, the Peer Review Panel recommended that Petitioner's termination be upheld and that she not be eligible for rehire.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2012).

37. Section 760.10(1) and (7), Florida Statutes (2011),[2/] states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race, color, or handicap, or to discriminate against a person who has made a charge of an unlawful employment practice.

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

39. In her Employment Complaint of Discrimination, Petitioner alleged that she was discriminated against by Respondent based upon race, color, disability, and retaliation.

40. 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 interference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

41. Petitioner did not produce competent direct evidence of racial discrimination. Therefore, Petitioner may attempt to establish her case through inferential and circumstantial proof. Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997). Petitioner bears the burden of proof established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981). 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 Dep't of Corr. 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 Cnty., Ga., 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." Dep't. of Corr. v. Chandler, supra at 1186; Alexander v. Fulton Cnty., Ga., supra. Petitioner has not met this burden.

42. "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.").

43. To establish a prima facie case of race discrimination, 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. Ga. Dep't of Corr., 400 F.3d 883 (11th Cir. 2005).

44. Petitioner has met the first and second elements to establish a prima facie case of discrimination in that she is a

member of a protected class and was subject to an adverse employment action.

45. However, she has not proven the third element, that her employer treated similarly situated employees who are not members of the protected class more favorably. No evidence was presented to establish that there were similarly situated individuals of other races treated more favorably for the same conduct. See McCann v. Tillman, 526 F.3d 1370, 1373 (11th Cir. 2008) ("In order to determine whether other employees were similarly situated to [Petitioner], we evaluate 'whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.' (citation omitted)").

46. As for the fourth element, the preponderance of the evidence establishes that Petitioner was qualified for the job. Ms. Monteiff recommended Petitioner for a promotion, and Petitioner received annual pay raises.

47. Applying the McDonnell analysis, Petitioner did not meet her burden of establishing a prima facie case of discriminatory treatment because she did not prove the third element. Assuming that Petitioner had demonstrated a prima facie case of discriminatory conduct, Respondent demonstrated a legitimate, non-discriminatory reason for Petitioner's termination. That is, Petitioner was fired because of

inappropriate behavior, including behavior that was considered threatening, toward co-workers.

48. Even if it were necessary to go to the next level of the McDonnell analysis, Petitioner did not produce any evidence that Respondent's legitimate reasons were pretext for discrimination. "The inquiry into pretext centers upon the employer's beliefs, and not the employee's perceptions of his performance." Therefore, Petitioner has not met her burden of showing that a discriminatory reason more likely than not motivated the actions of Respondent toward Petitioner or by showing that the proffered reason for the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, supra, Alexander v. Fulton Cnty., Ga., supra. "Would the proffered evidence allow a reasonable factfinder to conclude that the articulated reason for the decision was not the real one." Walker v. Prudential, 286 F.3d 1270 (11th Cir. 2002). Consequently, Petitioner has not met her burden of showing pretext.

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

50. In her Employment Complaint of Discrimination, Petitioner also alleges that she was discriminated against on the basis of disability. The record does not establish that

Petitioner had a disability. This allegation appears to be based on Petitioner's belief that her co-workers were referring to her as "acting crazy." However, this falls far short of what is necessary to establish that Petitioner is a person with disabilities entitled to protection under the law.

51. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, prohibits discrimination against persons with disabilities in employment and other facets of life, such as public accommodations. Federal case law interpreting the ADA applies to claims of disability-based discrimination arising under the Florida Civil Rights Act. See Fromm-Vane v. Lawnwood Med. Ctr., Inc., 871 So. 2d 312 (Fla. 2d DCA 2004).

52. To establish a prima facie case of disability discrimination, Petitioner must prove by a preponderance of the evidence that she is a handicapped person within the meaning of subsection 760.10(1)(a), that she is a qualified individual, and that she was discriminated against because of her disability. Pritchard v. Southern Co. Servs., 92 F.3d 1130 (11th Cir. 1996); Byrd v. BT Foods, Inc., 948 So. 2d 921 (Fla. 4th DCA 2007).

53. The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment." 42 U.S.C. § 12102(1). "Major life activities" include, but are

not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630(2)(i). In light of Petitioner's assertion that co-workers commented that she was acting "crazy," it is presumed that Petitioner believes that she was perceived as having a disability. There is no competent evidence in the record that supports this assertion.

54. Petitioner failed to establish that she has any statutorily covered disability, or that her co-workers perceived her as having a covered disability. Petitioner was not subjected to any unlawful employment practice based on disability.

55. Finally, Petitioner also alleged that she was discharged in retaliation for something. To make a prima facie case of retaliation, Petitioner must show that she engaged in protected activity, that she suffered adverse employment action, and that there is some causal relation between the protected activity and the adverse employment action. Casiano v. Gonzales, 2006 U.S. Dist. Lexis 3593 (N.D. Fla. 2006); Jeronimus v. Polk Cnty. Opportunity Council, Inc., 2005 U.S. App. Lexis 17016 (11th Cir. 2005).

56. Petitioner failed to establish that she engaged in any statutorily protected activity to substantiate a claim of illegal retaliation. The decision to terminate Petitioner had

nothing to do with race, color, disability, or retaliation, but was rather based on a series of issues regarding Petitioner's office demeanor and behavior.

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 dismissing the Employment Charge of Discrimination and Petition for Relief.

DONE AND ENTERED this 11th day of December, 2012, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of December, 2012.

ENDNOTES

[1/] Mr. Pearson's was apparently referring to Ms. Monteith but identified her as "Belinda."

[2/] All future references to Florida Statutes will be to 2011.

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.