

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TYSHOAN WILCOX,)
)
 Petitioner,)
)
 vs.) Case No. 12-2302
)
 COASTAL HEALTHCARE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

An administrative hearing was conducted in this case on September 19, 2012, by video conference in Daytona Beach and Tallahassee, Florida, before Suzanne Van Wyk, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Tyshoan Wilcox, pro se
836 Birkshire Road
Daytona Beach, Florida 32117

For Respondent: David P. Steffen, Esquire
Constangy Brooks & Smith, LLC
100 North Tampa Street
Suite 3350
Tampa, Florida 33601-1840

STATEMENT OF THE ISSUE

Whether Respondent, Coastal Health,^{1/} discriminated against Petitioner, Tyshoan Wilcox, in violation of the Florida Civil Rights Act of 1992, sections 760.01-760.11 and 509.092, Florida Statutes, by disciplining and then suspending her, in

retaliation for her participation in an investigation of a co-worker's sexual harassment complaint against Coastal Health.

PRELIMINARY STATEMENT

On November 28, 2011, Petitioner filed a complaint (Discrimination Complaint) with the Florida Commission on Human Relations (Commission), alleging that Coastal Health had discriminated against her in employment in retaliation for her participation in the investigation of a sexual harassment complaint by a co-worker. On June 8, 2012, following investigation of Petitioner's Discrimination Complaint, the Commission issued a Determination of No Cause finding that no reasonable cause exists to believe that an unlawful employment discrimination practice occurred. A notice of the Commission's determination (Notice) was sent to Petitioner on the same date which notified Petitioner of her right to file a Petition for Relief for a formal administrative proceeding within 35 days of the Notice. Petitioner timely filed a Petition for Relief with the Commission, which was forwarded to the Division of Administrative Hearings on July 3, 2012, for the assignment of an administrative law judge to conduct an administrative hearing.

At the administrative hearing held on September 19, 2012, Petitioner testified on her own behalf and offered two exhibits which were received into evidence. Coastal Health presented the

testimony of Jacklene Wolf, Christy Teater, Michelle Carroll, Michael Militello, Heather Jackson, and Dana Wood, and offered eight exhibits which were received into evidence.

The proceedings were recorded and a Transcript was ordered. The parties were initially given 10 days from the filing of the Transcript within which to submit their proposed recommended orders. A copy of the Transcript, consisting of one volume, was filed on October 16, 2012. On October 24, 2012, Petitioner requested an extension of time to file a proposed recommended order, which was granted in part, and the deadline to file proposed recommended orders was extended to November 7, 2012. Respondent timely filed a Proposed Recommended Order which has been considered in preparation of this Recommended Order. On November 7, 2012, counsel retained by Petitioner following the final hearing requested an additional seven days to file a proposed recommended order, which was granted, in part, and the deadline set for November 9, 2012. Petitioner filed an untimely Proposed Recommended Order on November 13, 2012.

FINDINGS OF FACT

1. Coastal is a 120-bed skilled nursing facility located in Daytona Beach, Florida, operated by MF Halifax, LLC, d/b/a Coastal Health and Rehabilitative Center (Coastal Health).

2. Coastal Health is an employer within the meaning of the Florida Civil Rights Act of 1992, as amended (chapter 760,

Florida Statutes), and Title VII of the Civil Rights Act of 1964, as amended.

3. Petitioner is a female Licensed Practical Nurse (LPN) who was employed by Coastal Health from sometime in 2005 until her resignation on September 27, 2011. Her first position with Coastal Health was as a floor nurse. She was promoted to "Wounds and Restorative," then to Unit Manager in March 2011.

4. The Unit Manager's job description is "to assist the Director of Nursing (DON) in leading and directing the overall nursing operation of a unit in the facility in accordance with residents' needs, government regulations and company policies so as to maintain excellent care for the residents while achieving the facility's business objective." Among the Unit Manager's essential job functions is the responsibility to "ensure practices that maintain high morale and staff retention to include effective communication, prompt problem resolution, positive supervisory practices and maintaining a positive work environment."

5. Petitioner worked the seven o'clock a.m. to three o'clock p.m. (7 to 3) shift and supervised six or seven Certified Nursing Assistants (CNAs) and three nurses.

6. As reflected in the Discrimination Complaint, the claim asserted by Petitioner against Coastal Health in this proceeding is unlawful retaliation by Coastal Health allegedly based upon

Petitioner's involvement in an internal investigation into a co-worker's complaint of sexual harassment.

Sexual Harassment Complaint

7. One of the CNAs under Petitioner's supervision at the time in question was Evelyn Clark. Petitioner is hostile toward Ms. Clark. Petitioner believes Ms. Clark had a relationship with the facility Administrator, Michelle Carroll, which undermined Petitioner's ability to supervise Ms. Clark.

8. Petitioner testified that Ms. Clark made inappropriate comments of a sexual nature to her and that she observed Ms. Clark making inappropriate comments and sexual innuendos to other employees. She testified that she reported these incidents to Ms. Carroll and to then-Director of Nursing, Jeanie Mendoza. Petitioner maintains that no action was taken against Ms. Clark.

9. Petitioner was friendly with another CNA, Chad Johnson. Mr. Johnson was not supervised by Petitioner; in fact, he worked the three o'clock p.m. to eleven o'clock p.m. shift (3 to 11), and their shifts rarely overlapped.

10. Sometime in the third week of August, 2011, Mr. Johnson lodged a complaint with Coastal Health, claiming Ms. Clark touched him inappropriately and made sexual comments to him.

11. Petitioner testified that Mr. Johnson reported Ms. Clark's alleged sexually inappropriate conduct to her prior to complaining to management, and she directed him to go to management with his complaint. She also testified that she brought Mr. Johnson's complaint to the attention of Ms. Mendoza the same day he reported it to Petitioner.

The Investigation

12. Christy Teater, Director of Operations for Coastal Health, initiated an investigation in response to Mr. Johnson's sexual harassment complaint. The investigation entailed interviews of over 30 employees at Coastal, including the Petitioner. During the interviews, employees were asked whether they had witnessed inappropriate conduct at the facility, and if so, the nature of the conduct and the names of the individuals involved.

13. Petitioner was interviewed in connection with the investigation on August 23, 2011, by Ms. Teater and Jacklene Wolf, Nurse Consultant for Coastal Health. During the interview, Petitioner reported that she had witnessed Ms. Clark engage in inappropriate behavior in the workplace. She described Ms. Clark's derogatory comments to her, such as calling her a "T-back" (which is a reference to Petitioner's underwear), and making grabbing motions at her buttocks.

Petitioner did not name any other employee as having engaged in inappropriate behavior at the facility.

14. The investigation was an internal corporate investigation and was not triggered by a complaint to either the Florida Commission on Human Relations or the Equal Employment Opportunity Commission. While Mr. Johnson apparently did file such a complaint, he did so only after his employment with Coastal Health was terminated by his own resignation.

15. Petitioner was not a target of the investigation and was only interviewed in connection with Mr. Johnson's sexual harassment complaint. However, during the investigatory interviews, Petitioner was identified by other employees as engaging in inappropriate behavior, gossiping and "stirring the pot" among other employees.

Petitioner's Behavior

16. Petitioner admitted to having repeated gossip about other employees in June 2011. The gossip related to LaTonya Graham, who had previously worked with Petitioner in Wounds and Restorative. While the testimony on the specific gossip was mostly hearsay, it is clear that Ms. Graham had a relationship with a male employee at the facility that was disruptive and created tension between Petitioner and Ms. Graham.

17. Petitioner complained that Ms. Graham and her boyfriend at the time, Freddy Sampson, would fight in the

parking lot - usually about him paying attention to other females at the facility, including Petitioner. At some point, Mr. Sampson's relationship with Ms. Graham ended and he took up with another employee, Wanda.^{2/}

18. The testimony was not dispositive of who first initiated gossip about Ms. Graham, whether Petitioner; Mr. Sampson, the ex-boyfriend; or Wanda, the new girlfriend; but that is irrelevant. Petitioner admitted to participating in and repeating gossip regarding Ms. Graham.

19. Ms. Carroll testified that unprofessional workplace behavior was pervasive at the facility when she began as Administrator on August 9, 2010. In July 2011, all employees were ordered to attend a mandatory in-service training on appropriate workplace behavior.^{3/}

20. Petitioner testified that she refrained from additional gossip after the July 2011, in-service training.

Post-Investigation Actions

21. Following investigation, Coastal Health management concluded that Ms. Clark did engage in inappropriate behavior with Mr. Johnson; however, they found that Ms. Clark's behavior was not unwelcome and she did not harass Mr. Johnson. Ms. Carroll described Mr. Johnson and Ms. Clark as having a "consensual" relationship.

22. After the investigation, Ms. Carroll instructed Ms. Clark and Mr. Johnson to stay away from each other.

23. At the conclusion of the investigation Ms. Teater made the decision to discipline Petitioner, Ms. Clark, and Mr. Johnson.

24. According to the Coastal Health Human Resources Policies and Procedures Manual, disciplinary action may be imposed for both Category I and Category II offenses. Petitioner was cited for Category I, no. 11 - "conduct that would be widely regarded as improper or inappropriate in a work group (to include, but not limited to resident abuse or neglect) or serious violations of Corporate Compliance Policies and Privacy Rule Policies."

25. Petitioner and Ms. Clark were both cited for "inappropriate behavior in the workplace" and received a disciplinary counseling. Category I offenses may subject the employee to discharge, but Ms. Teater exercised her discretion in this case to enter a written counseling rather than discharge, or even suspend, both employees. The record is silent as to discipline received by Mr. Johnson.

26. In addition to written discipline, the company further disciplined Ms. Clark by removing her as "culture coordinator" at the facility.

27. With regard to written discipline, company policy GCHC 701, Disciplinary Action, provides:

A. An associate memorandum is to be used for progressive discipline. On each occurrence, it should be noted:

1. The violation number; and

2. The event which will next take place should further policy violation occur.

B. The associate's immediate supervisor should explain in full the reason for the disciplinary action. The associate may respond in writing if he/she so desires on the associate memorandum.

C. The associate is to sign the memorandum to acknowledge that he/she has seen it. It does not imply agreement. The associate may comment in writing if desired.

D. If the associate refuses to sign the memorandum, the supervisor should have a manager witness that the associate refused to sign.

E. The associate will receive a copy of the memorandum.

F. All disciplinary actions that have reached their anniversary date should be pulled from the personnel files and kept in an alphabetical file for the time period regarding retention of the personnel files.

G. Gulf Coast Health Care reserves the right, in its sole discretion, to vary from these policies and take disciplinary action without any written warnings.

28. On August 24, 2011, Petitioner was called into Ms. Carroll's office and given a disciplinary counseling. The

associate memorandum cites her for violation number 11, Category I, "inappropriate behavior." The memorandum explained that Petitioner was identified by other employees during interviews as having made inappropriate comments, that such behavior was unacceptable practice for a supervisor, and that any future occurrences would result in further disciplinary action, up to and including termination.

29. Petitioner responded in writing on the associate memorandum, consistent with Policy 701. She denied having had any inappropriate conversation with anyone at the facility.

30. Also on August 24, 2011, all employees were required to attend an in-service training on harassment in the workplace. Each employee was given a copy of company policy 704, Sexual and Other Unlawful Harassment Policy Statement. Petitioner acknowledged receipt of the policy by her signature dated August 24, 2011.

31. During the August 24, 2011, in-service training, all employees were also given a copy of Policy GHCH 718, Problem Resolution. Petitioner acknowledged receipt of the policy by her signature dated August 24, 2011, on the Sexual Harassment Policy statement.

32. Policy 718 lays out the procedures for an employee to present a problem, complaint, suggestion, or question to Coastal Health and the procedures for resolving issues presented.

Generally, the procedure requires the employee to take issues first to their supervisor, unless the supervisor is the problem, then "up the ladder" to successively higher managers if the problem is not resolved to the satisfaction of the employee. The policy requires the complaint or problem be reduced to writing, and sets forth specific timeframes in which actions must be taken. The policy includes a Problem Resolution form to be used by the employee. The form provides space for the written complaint or problem, as well as the written responses by each level of management, as applicable.

33. Petitioner did not use the company's problem resolution policy to address her problem supervising Ms. Clark or any other CNAs under her supervision. Nor did she use the company's policy to address her concern with perceived "special treatment" of Ms. Clark based on a relationship with Ms. Carroll. Nor did Petitioner use the problem resolution policy to address Mr. Johnson's report of sexual harassment to her. In fact, Petitioner never followed the company's Problem Resolution policy and, at hearing, denied knowledge of any such policy.

34. Michael Militello, Director of Nursing, made the decision to suspend Petitioner pending an investigation into additional complaints of her unprofessional conduct reported after the August 24, 2011, written counseling.

35. On September 16, 2011, Mr. Militello and Heather Jackson, Risk Manager, telephoned the Petitioner to notify her of her suspension. They were unable to reach Petitioner and left a message on her voicemail to please call the facility.

36. Petitioner returned the telephone call the same day and spoke to Ms. Jackson, who informed Petitioner of her suspension.

37. Shortly after her first conversation with Ms. Jackson, Petitioner called the facility again and inquired into the basis of her suspension. She spoke with Ms. Jackson, who reported that Petitioner was being disciplined for violation number 11, Category I, "inappropriate conduct."

38. On September 26, 2011, Ms. Carroll left a message on Petitioner's answering machine asking Petitioner to come to the facility to meet with Ms. Teeter from Coastal Health, but did not state what the meeting was about.

39. Petitioner submitted her resignation letter to Ms. Carroll and Mr. Militello on September 27, 2011. She testified that she assumed she was being fired and did not want that on her resume. Petitioner resigned before Coastal Health completed its investigation into the allegations of additional inappropriate behavior.

ULTIMATE FINDINGS

40. Petitioner was disciplined twice by her employer, Coastal Health, receiving a written counseling on August 24, 2011, and a suspension on September 16, 2011.

41. Petitioner did engage in unprofessional behavior, at least in June 2011, by her own admission. At the final hearing, Petitioner expressed disbelief that her discipline on August 24, 2011, could be for actions taken in July 2011, and argued that the "write-up" must have been based on her cooperation in the investigation the preceding day. However, there is no evidence that the company was prohibited from delaying discipline. Indeed, it appears that the employer only gained specific knowledge of the behavior after the investigation in August.

42. There appears to be no causal link between Petitioner's participation in the investigation into Mr. Johnson's sexual harassment claim and Petitioner's discipline. While the two occurred only one day apart, other employees were also disciplined, including the alleged harasser. If Ms. Carroll had some special relationship with Ms. Clark by which she received special treatment, it was not demonstrated at final hearing. On the contrary, Ms. Clark received the same, if not greater, discipline as Petitioner.

43. The second discipline, suspension on September 16, 2011, was based on reports of Petitioner's continued

unprofessional behavior. Petitioner's resignation on September 27, 2011, occurred before Coastal Health completed its investigation into the reports.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011),^{4/} and Florida Administrative Code Rule 60Y-4.016(1).

45. The State of Florida, under the legislative scheme contained in sections 760.01-760.11 and 509.092, Florida Statutes, known as the Florida Civil Rights Act of 1992 (the Act), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq.

46. Pursuant to subsection 760.10(1), it is an unlawful employment practice for an employer to discriminate against a person because that person has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section." This provision is known as the "participation clause" of the Act.

47. Florida courts have held that because the Act is patterned after Title VII of the Civil Rights Act of 1964, as

amended, federal case law dealing with Title VII is applicable. See, e.g., Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

48. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by statistical proof of a pattern of discrimination, or on the basis of direct evidence which, if believed, would prove the existence of discrimination without inference or presumption. Usually, however, direct evidence is lacking and one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the shifting burden of proof pattern established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

49. Under the shifting burden pattern developed in McDonnell Douglas:

First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

U.S. Dep't of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990) (housing discrimination claim); accord Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009) (gender discrimination claim) ("Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination.").

50. Therefore, in order to prevail in her claim against Coastal Health, Petitioner must first establish a prima facie case by a preponderance of the evidence. Id.; § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.").

51. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); cf. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000) ("A preponderance of the evidence is 'the greater weight of the evidence,' [citation omitted] or evidence that 'more likely than not' tends to prove a certain proposition.").

52. In order to demonstrate a prima facie case of retaliation, Petitioner must show: (1) that she was engaged in statutorily protected expression or conduct; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Holifield, 115 F.3d at 1566.

53. There can be no doubt that Petitioner suffered an adverse employment action. She was both "written up" on August 24, 2011, and suspended on September 16, 2011.

54. However, in the case at hand, Petitioner did not prove that she was engaged in statutorily protected conduct. The participation clause of section 760.10(1) only protects "activities that occur 'in conjunction with or after the filing of a formal charge with the EEOC . . . [A]t a minimum, some employee must file a charge with the EEOC (or its designated representative) or otherwise instigate proceedings under the statute for conduct to come under the participation clause'." Guess v. City of Miramar, 889 So. 2d 840 (Fla. 4th DCA 2004) (quoting E.E.O.C. v. Total System Services, 221 FD.3d 1171 (11th Cir. 2000)). Here, as in Guess, Petitioner's activity -- participating in the investigation of Mr. Johnson's sexual harassment complaint against Ms. Clark -- predated the filing of a formal charge with the EEOC and relief under the Act is not available.

55. Having failed to prove the first prong of the three-part test, Petitioner has not made a prima facie case for retaliation. When a Petitioner fails to present a prima facie case the inquiry ends and the case should be dismissed. Ratliff v. State, 666 So. 2d 1008, 1013 n.6 (Fla. 1st DCA 1996).

56. Even if Petitioner had established a prima facie case, that would not end the inquiry. Once a prima facie case is established, the burden shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its action. U.S. Dep't of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990).

57. Coastal Health advanced legitimate, non-retaliatory reasons for Petitioner's discipline. Petitioner violated company policy by gossiping about other employees and failing to follow company Problem Resolution policies. Her conduct fell short of the qualifications for unit manager, which included prompt problem resolution and positive supervisory practices.

58. Once an employer offers a legitimate, non-discriminatory reason to explain the adverse employment action, a Petitioner must prove that the proffered reason was pretext for what actually amounted to discrimination. Id.

59. The only support Petitioner has for Coastal Health's alleged discriminatory motives is Petitioner's unsupported opinion which, standing alone, is insufficient. Cf. Lizardo v.

Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001) ("Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been [based upon discrimination]. This is not sufficient.").

60. In sum, Petitioner failed to prove her Charge of Discrimination and it is otherwise concluded, based upon the evidence, that Coastal Health did not violate the Florida Civil Rights Act of 1992, and is not liable to Petitioner for discrimination in employment for retaliation.

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 dismissing Petitioner's Discrimination Complaint and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 26th day of November, 2012, in Tallahassee, Leon County, Florida.



Suzanne Van Wyk
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of November, 2012.

ENDNOTES

^{1/} At hearing, Respondent clarified that Petitioner's employer is MF Halifax, LLC, d/b/a Coastal Health Care and Rehabilitative Center, which operates several health care facilities. For purposes of clarity, the employer is referred to herein as "Coastal Health," while the particular facility at which Petitioner was employed is referred to alternately as "Coastal" or "the facility."

^{2/} The record contains no information on which to base a finding of Wanda's last name.

^{3/} It is unclear what steps, if any, were taken by the company to correct inappropriate behavior by employees at Coastal between August 2010, and July 2011.

^{4/} Unless otherwise indicated, all references to the Florida Statutes are to the 2011 version. All references to Florida Administrative Code or federal statutes and rules are to their current, effective versions.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
Suite 100
2009 Apalachee Parkway
Tallahassee, Florida 32301

David Patrick Steffen, Esquire
Constangy, Brooks and Smith, LLP
100 North Tampa Street
Tampa, Florida 33601

David W. Glasser, Esquire
Law Office of David W. Glasser
116 Orange Avenue
Daytona Beach, Florida 32114

Cheyenne Costilla, Interim General Counsel
Florida Commission on Human Relations
Suite 100
2009 Apalachee Parkway
Tallahassee, Florida 32301

Michelle Wilson, Executive Director
Florida Commission on Human Relations
Suite 100
2009 Apalachee Parkway
Tallahassee, Florida 32301

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.