STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIA PFEIFFER,

Petitioner,

vs. Case No. 13-1102

HCA RAULERSON HOSPITAL,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case before Jessica E. Varn, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), on June 13 and 14, 2013, by video teleconference at sites in Port St. Lucie and Tallahassee, Florida.

APPEARANCES

For Petitioner: Peggy A. Underbrink, Esquire
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For Respondent: Allison Oasis Kahn, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent committed an unfair labor practice by discriminating against Petitioner on the basis of race, national

origin, color, or age; and by retaliating against Petitioner by terminating her employment.

PRELIMINARY STATEMENT

On or about June 20, 2012, Petitioner Maria Pfieffer (Ms. Pfeiffer) filed a Charge of Discrimination with the Florida Commission on Human Relations ("FCHR"). On or about February 21, 2013, after conducting an investigation into Ms. Pfeiffer's allegations, the FCHR issued a "no cause" determination, finding there was no reasonable cause to believe that an unlawful employment practice occurred. Ms. Pfeiffer elected to pursue administrative remedies, timely filing a Petition for Relief with the FCHR on or about March 25, 2013. The FCHR transmitted the Petition for Relief to the Division of Administrative Hearings ("DOAH") on March 27, 2013. The final hearing was scheduled for May 13 and 14, 2013. On Respondent's motion, the final hearing was continued and rescheduled for June 13 and 14, 2013.

At the hearing, Ms. Pfeiffer testified on her own behalf, and presented the testimony of Joe Corripio, Monica Beckham, Titus Henderson, and Sherree Macy. During its case, Respondent called four witnesses: Christine Goolsby, Shawn Poland, Connie Kooper, and Cynthia Jackson. Petitioner's Exhibits 7, 15, 17, and 31 were received into evidence. Respondent's Exhibits 1-7, 9 and 29-35 were received into evidence.

No transcript of the final hearing was filed with DOAH. Respondent filed a Proposed Recommended Order, which was considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2012 Florida Statutes.

FINDINGS OF FACT

1. Ms. Pfeiffer began her employment at Raulerson Hospital in December, 2007. She worked as a full-time Registered Respiratory Therapist (RRT) in the Cardiopulmonary Department. She was born in 1961, and according to her, she comes from German, Filipino, Hispanic, and Native American descent.

2. Shawn Poland served as the director of the Cardiopulmonary Department; Titus Henderson and Sherree Macy served as supervisors, directly supervising Ms. Pfieffer. Robert Lee was the Chief Executive Officer of Raulerson Hospital in 2012.

3. Full-time respiratory therapists generally work three shifts per week, and may have many days between shifts. They assist patients with airway management, by dispensing medication. Some patients are on ventilators, some are in the intensive care unit, and some are on life support. Therapies include comfort measures; that is, patients receive therapies in order to breathe easier.

4. Once physician orders are received for respiratory therapy, patients are divided equally between the therapists on duty during a particular shift; therapists then go to each patient to provide respiratory treatment.

5. Christine Goolsby was a respiratory therapist who worked alongside Ms. Pfeiffer. Sometime in March 2012, Ms. Goolsby and Ms. Pfeiffer were working the same shift. Ms. Gooslby noticed that some patients assigned to Ms. Pfeiffer were showing up in the computer system in red text, which meant that the patients had not yet received a treatment. She asked Ms. Pfieffer about those patients, with the intention of helping Ms. Pfieffer administer medication to the patients. Ms. Pfieffer indicated that she did not provide treatment to "DNR" (do not resuscitate) patients.

6. Ms. Goolsby, who had been feeling like she had been helping other therapists quite a bit and running around more than usual, was upset to hear that Ms. Pfeiffer chose to not provide treatments to DNR patients. Ms. Goolsby told Mr. Poland about Ms. Pfieffer's position on DNR patients.

7. Mr. Poland, Ms. Goolsby, and the Human Resources Director met. During the meeting, Ms. Goolsby reported other personnel issues she had with Ms. Pfeiffer and with another therapist, Monica Beckham. Ms. Goolsby was asked to write an

email with details regarding her conversation with Ms. Pfeiffer, and the other issues she had raised about her colleagues.

8. Ms. Goolsby sent an email to Mr. Poland and the Human Resources Director on March 9, 2012. In her email, she explained: "Maria also made a comment this past weekend that she was not going to do DNR treatments on four of her patients. She stated 'DNRs do not need treatments.' I replied if it's a doctor's order it has to be followed."

9. Mr. Poland was concerned about patient safety, and decided to suspend Ms. Pfieffer pending an investigation into the allegations that had been made. The Human Resources Department contacted Ms. Pfeiffer by telephone, informing her that an investigation was going to be conducted, focusing on whether she was failing to provide treatment to DNR patients.

10. During the telephone conversation with the Human Resources Department, Ms. Pfeiffer denied the allegations, insisting that it was against her "moral code" to refuse giving respiratory treatments to any patient.

11. Mr. Poland asked Connie Kooper, a senior clinical analyst who is in charge of Meditech (a uniform computer system for charting medical records), to run a report on Ms. Pfeiffer, isolating every DNR patient who was not given treatment.

12. Ms. Kooper was unable to comply with this request because DNRs are difficult to track on the computer system.

Given that a patient or family can change the patient's DNR status on a daily or even an hourly basis, it becomes onerous to track DNR status through Meditech.

13. Instead, Ms. Kooper was able to run a report on treatments that had been given and had not been given during a 45-day period, which might show a trend of some kind. The report also showed any comments provided by the therapist; if a treatment had been skipped, it would show the reason it was skipped, if the reason had been recorded by the therapist.

14. There are numerous reasons why a therapist might skip giving a treatment to a patient; the patient could feel nauseous, a patient might have a rapid heart rate at the time of the visit, the patient might not be in the room when the therapist arrives, or the patient or the patient's family might refuse the treatment for a variety of reasons. The therapist must provide a reason for not providing a treatment in Meditech, or in a written chart.

15. Mr. Poland asked Ms. Kooper to run the same report on three other respiratory therapists in addition to Ms. Pfieffer. Ms. Pfeiffer's report reveals numerous treatments that were not provided to patients, with no documented reason for not giving the treatment. The other three therapists had very few instances of treatments that were not provided, and for those instances where treatment was not provided, reasons were documented in Meditech for almost all of them.

16. Mr. Poland also accessed each patient's electronic Meditech process intervention notes to see if Ms. Pfeiffer had documented the reason why she had not provided a respiratory treatment to the patient. Ms. Pfeiffer had failed to document the reasons there, too.

17. During the investigation, Mr. Poland also found discrepancies in Ms. Pfieffer's documentation of medications that had been given to patients. This caused Mr. Poland to believe that Ms. Pfeiffer had falsified medical records.

18. Finding that Ms. Pfeiffer's conduct was deliberate and purposeful, Mr. Poland met with Ms. Pfeiffer and explained what he had discovered through the course of the investigation.

19. Ms. Pfeiffer gave no explanation for why she had failed to provide the treatments, and why she had failed to document the reason for not giving the treatments.

20. Mr. Poland decided to terminate Ms. Pfeiffer based on the results of the investigation. At that time, Mr. Poland did not know Ms. Pfeiffer's race, national origin, or age.

21. No new employees were hired to replace Ms. Pfeiffer. No credible evidence was presented establishing the age, race, or national origin of the employees who replaced Ms. Pfeiffer.

22. Ms. Pfeiffer never appealed the decision to terminate her through the employee dispute resolution program. She also

never complained of any type of discrimination during the course of her employment.[1/]

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

24. The Florida Civil Rights Act of 1992 ("FCRA") is codified in sections 760.01 through 760.11, Florida Statutes. When "a Florida statute [such as the FCRA] 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). Therefore, the FCRA should be interpreted, where possible, to conform to Title VII of the Civil Rights Act of 1964, which contains the principal federal anti-discrimination laws.

25. Section 760.10, Florida Statutes, provides, in relevant 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.

26. Complainants alleging unlawful discrimination may prove their case using direct evidence of discriminatory intent. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "only the most blatant remarks, whose intent could be nothing other than to discriminate," satisfy this definition. Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(internal quotations omitted), cert. denied, 529 U.S. 1109 (2000). Often, such evidence is unavailable, and in this case, Ms. Pfeiffer presented none.

27. In the absence of direct evidence, the law permits an inference of discriminatory intent, if complainants can produce sufficient circumstantial evidence of discriminatory animus, such as proof that the charged party treated persons outside of the protected class (who were otherwise similarly situated) more favorably than the complainant was treated. Such circumstantial evidence constitutes a prima facie case.

28. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court explained that the complainant has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful

discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (Fla. 1996). If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. This intermediate burden of production, not persuasion, is "exceedingly light." Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 516-518 (1993). At all times, the "ultimate burden of persuading the trier of fact that the [charged party] intentionally discriminated against" him remains with the complainant. Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1258 (11th Cir. 2001).

29. To establish a prima facie case of employment discrimination, Ms. Pfeiffer is required to show that she "(1) is a member of a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, shows that other similarly situated employees were treated more favorably." Taylor v. On Tap

Unlimited, Inc., 282 Fed. Appx. 801, 803 (11th Cir. 2008) ("Taylor established a prima facie case for racial discrimination. She was a qualified member of a protected class; she was terminated; and she was replaced by an individual outside of her protected class").

30. It is undisputed that Ms. Pfeiffer belongs to a protected class. As such, Petitioner satisfied the first prong of a prima facie case of employment discrimination.

31. With respect to the second prong, it is undisputed that Ms. Pfeiffer was qualified for her position. Because Ms. Pfeiffer possessed the basic skills necessary to perform the position of a respiratory therapist, she has established the second prong of a prima facie case.

32. Ms. Pfeiffer has also established the third element of a prima facie case, as her termination constitutes an adverse employment action.

33. Finally, with respect to the fourth prong of the test, Ms. Pfeiffer presented no credible evidence that she was replaced by someone younger, or anyone of a different race or national origin. Accordingly, Ms. Pfeiffer did not establish a prima facie case of employment discrimination, and the burden of production never shifted to Respondent to articulate a legitimate, non-discriminatory reason for the termination.

34. However, if the burden had shifted, Respondent proffered a legitimate non-discriminatory reason for Ms. Pfeiffer's termination: Respondent believed that Ms. Pfeiffer deliberately and purposefully failed to provide prescribed treatments to patients, without providing reasons for not providing the treatments, and that she falsified medical records.

35. As Respondent articulated a legitimate non-discriminatory reason for the termination, Ms. Pfeiffer would then be required to establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 516-518 (1993). To show pretext, Petitioner must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997) (citation omitted).

36. Throughout the proceedings, Ms. Pfeiffer attempted to show that she was innocent of the alleged misconduct. Significantly, however, whether Ms. Pfeiffer was innocent of the alleged misconduct is not the correct inquiry. Instead, the relevant question is whether Respondent actually believed, at the time Ms. Pfeiffer was terminated, that she had committed the misconduct. Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470

(11th Cir. 1991) (inquiry is limited to whether employer believed employee was guilty of misconduct, and if so, whether that was the reason behind discharge; that employee did not actually engage in misconduct is irrelevant); Nix v. WLCY Radio, 738 F.2d 1181, 1187 (11th Cir. 1984) (holding that "an 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").

37. Ms. Pfeiffer failed to establish a prima facie case of discrimination. Even if she had met that initial burden, she also failed to demonstrate that the proffered reason for her termination was a pretext for discrimination. Accordingly, Ms. Pfeiffer did not satisfy her ultimate burden of persuading the undersigned that Respondent intentionally discriminated against her.

38. Turning to Ms. Pfeiffer's retaliation claim, she alleges that she was terminated as a result of her complaint regarding having to help clean the employee area.

39. Subsection 760.10(7), Florida Statutes, provides, in pertinent part:

> 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, or because that person has made a charge, testified, assisted, or participated in any manner in an

> investigation, proceeding, or hearing under this section.

40. Ms. Pfeiffer's retaliation claim under the Florida Civil Rights Act must also be appropriately analyzed with the same framework as used in analyzing retaliation claims under Title VII. Gant v. Kash N' Karry Food Stores, 2010 U.S. App. LEXIS 16504, *4 (11th Cir. August 4, 2010). Pursuant to this framework, an employee must first establish a prima facie case of retaliation. Bryant v. Jones, 575 F.3d 1281, 1307-08 (11th Cir. 2009). If a prima facie case is shown, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. Id. at 1308. If the employer articulates a legitimate, non-discriminatory reason, the burden of production shifts to the employee to offer evidence that the alleged reason of the employer is a pretext for illegal discrimination. Id.

41. To establish a prima facie case of retaliation, Ms. Pfeiffer must demonstrate that: (1) she participated in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the participation in the protected activity and the adverse employment action. Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008). To satisfy the third prong of the test, which requires a causal connection between the protected activity and the adverse decision, Ms. Pfeiffer "must show that the

decision-makers were aware of the protected conduct, and that the protected activity and adverse actions were not wholly unrelated." Shannon v. BellSouth Telecomms., Inc., 292 F.3d 712, 716 (11th Cir. 2002).

42. There is no question that Ms. Pfeiffer's termination constitutes an adverse employment action. Even assuming, however, that Ms. Pfeiffer's informal complaint regarding cleaning the break room constituted protected conduct, the evidence demonstrates that the decision-maker who terminated Ms. Pfeiffer's employment, Mr. Poland, did not base his decision on the brief exchange between Ms. Pfeiffer and Mr. Lee. Accordingly, the third prong of the test was not satisfied, and Ms. Pfeiffer failed to establish a prima facie case of retaliation.

43. Furthermore, even if Ms. Pfeiffer could establish a prima facie case of retaliation, she has failed to present any evidence that Respondent's proffered reason for her termination was mere pretext.

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 adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. Further,

it is RECOMMENDED that the final order dismiss the Petition for Relief.

DONE AND ENTERED this 22nd day of July, 2013, in Tallahassee, Leon County, Florida.

JESSICA E. VARN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 2013.

ENDNOTE

[1/] At the hearing, Ms. Pfeiffer testified that she felt discriminated and "retaliated" against as a result of an encounter in the employee break room with Mr. Lee, the CEO of the hospital. According to Ms. Pfeiffer, Mr. Lee had come into the break room and had seen Ms. Pfeiffer and Ms. Beckham relaxing in the area, despite the fact that the room was dirty, and it was the responsibility of the employees to keep employee areas tidy. During an exchange regarding the cleanliness of the room, Ms. Pfeiffer told Mr. Lee that she had not gone to school to be a housekeeper. Later, a housekeeping staff member brought a mop to the break room, and handed it to Ms. Pfeiffer. Mr. Poland was aware that Mr. Lee had seen the break room in a dirty state, and he was upset that his department break room was not clean when Mr. Lee had stopped by. Mr. Poland credibly testified that the exchange between Mr. Lee and Ms. Pfieffer had no role in Ms. Pfeiffer's discipline.

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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.