STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PEARL THOMPSON VOCE,

Petitioner,

vs. Case No. 13-1990

HOLY CROSS HOSPITAL,

Respondent.
_______________________________/

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing by video teleconference on December 16, 2014, with sites in Lauderdale Lakes and Tallahassee, Florida, and on March 19, 2015, in Plantation, Florida.

APPEARANCES

For Petitioner: Charles M. Eiss, Esquire
Law Offices of Charles Eiss, P.L.
8211 West Broward Boulevard, Suite 360
Plantation, Florida 33324

For Respondent: Jennifer T. Williams, Esquire
Akerman Senterfitt
1 Southeast Third Avenue
Miami, Florida 33131

STATEMENT OF THE ISSUES

Whether Respondent committed the unlawful employment practice alleged in the Charge of Discrimination filed with the

Florida Commission on Human Relations ("FCHR"), and if so, what relief should Petitioner be granted.

PRELIMINARY STATEMENT

On October 19, 2012, Petitioner, Pearl Thompson Voce ("Petitioner"), filed a Charge of Discrimination ("Complaint") with FCHR alleging that Respondent, Holy Cross Hospital ("Respondent"), terminated her employment as a registered dietician because of her age. Following its investigation of the Complaint, FCHR notified the parties that "no reasonable cause exists to believe that an unlawful employment practice occurred."

Petitioner elected to pursue administrative remedies, timely filing a Petition for Relief with FCHR on or about May 24, 2013. On May 29, 2013, FCHR referred the matter to the Division of Administrative Hearings ("DOAH") to assign an administrative law judge to conduct the final hearing. The case was initially assigned to Judge Cathy M. Sellers. On November 20, 2013, the case was transferred to the undersigned for all further proceedings. The final hearing was initially set for August 30, 2013, but was continued on multiple occasions for various reasons.

On October 11, 2013, counsel for the parties entered into a Pre-hearing Stipulation. In the Pre-hearing Stipulation, the parties agreed to certain facts and issues of law. The parties'

stipulations of fact and law have been incorporated into this Recommended Order to the extent they are relevant.

The final hearing commenced as scheduled on December 16, 2014, and concluded on March 19, 2015. Respondent was present at the final hearing. However, Petitioner did not appear at the final hearing. Petitioner was represented at the final hearing through her legal counsel. At the hearing, Petitioner's counsel presented the testimony of Mindy McClure and Dawn Outcalt. Respondent's counsel presented the testimony of Rachel Thompson. Respondent's Exhibits 1 through 20 and 23 through 27 were received into evidence based on the stipulation of the parties.

The two-volume final hearing Transcript was filed with DOAH on April 1, 2015, and the parties were granted two extensions of time to file their proposed recommended orders. The parties timely filed proposed recommended orders, which were given consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is a hospital located in Fort Lauderdale, Florida. Petitioner was employed by Respondent as a registered dietician in the Nutrition Services Department from February 1991 until her termination on October 24, 2011.

2. Petitioner was 50 years old when she was hired by Respondent.

3. In January 1999, Mindy McClure (age 61 as of the date of the hearing) was hired by Respondent as the assistant director of Nutritional Services. From January 1999 until October 24, 2011, Ms. McClure supervised Petitioner.

4. As a registered dietician, Petitioner's job duties required her to: (1) evaluate and assess hospital patients' nutritional needs; (2) formulate nutrition care plans according to nutritional assessments and standards of care; (3) assess the effects of nutrition intervention; (4) educate and counsel patients requiring nutrition intervention; (5) evaluate services and care provided to identify opportunities for improvement; and (6) communicate pertinent information to appropriate individuals.

5. Petitioner's job performance was satisfactory during much of her employment with Respondent. However, in early 2011, Petitioner's job performance significantly deteriorated.

6. Each patient's nutritional assessment is communicated to Respondent's health care team, which includes other dieticians, via the patient's chart. Providing complete and accurate information in a patient's chart and following a doctor's order is critical to the duties of a dietician and to formulating a proper nutritional care plan for the patient.

7. On June 30, 2011, Petitioner received a Notice of Disciplinary Action in the form of an oral warning for failing to meet her job standards.

8. This warning was given to Petitioner because she failed to provide complete information in a patient chart, and she failed to order any recommended tube feedings pursuant to a doctor's order. Petitioner was directed to complete assessments and make recommendations according to established protocols and procedures so that any dietician can easily discern a patient's needs. Petitioner was also warned that failure to do so will result in continued disciplinary action.

9. On July 17, 2011, Petitioner received her annual performance evaluation. She received an overall rating of "Partially Meets Standards." Accordingly, Petitioner was placed on a three-month work improvement plan from July 25, 2011, to October 24, 2011.

10. The improvement plan required Petitioner to improve her: (1) organizational skills; (2) timeliness when starting her shift; (3) promptness in clocking in and out of her shift; (4) tracking and communication with patients and patient information; and (5) computer skills. Petitioner was also required to keep a notebook where she maintained patient information. Petitioner and Ms. McClure met on a weekly or bi-weekly basis to monitor Petitioner's progress and ensure she was documenting patient information correctly.

11. On August 2, 2011, Petitioner received a written warning because she lost patient information, specifically a tube feeding card and calorie count sheet.

12. On August 24, 2011, Petitioner received a final written warning because she failed to monitor her e-mail messages and had continued inaccuracies in her patient charting.

13. Because Petitioner's job performance did not significantly improve after she was given the work improvement plan, her employment with Respondent was terminated on October 24, 2011.

14. Ms. McClure made the decision to terminate Petitioner. Dawn Outcalt, Respondent's executive director of Nutritional Services, and Rachel Thompson, Respondent's associate relations coordinator, also participated in the decision.

15. Respondent has policies and procedures in place regarding complaints of discrimination. At no time prior to her termination did Petitioner complain to Respondent that she was discriminated against because of her age.

16. Following Petitioner's termination, Respondent did not replace Petitioner.[1/]

17. The parties stipulated that: "Petitioner is not presently capable of recalling the events surrounding her termination from employment with Respondent nor providing testimony in this proceeding."

18. The persuasive and credible evidence adduced at hearing demonstrates that Petitioner was terminated for legitimate, non-discriminatory reasons having nothing to do with her age. Petitioner's charge of age discrimination is based on speculation and conjecture, and Petitioner failed to prove that she was terminated because of her age.

CONCLUSIONS OF LAW

19. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).[2/]

20. The Florida Civil Rights Act of 1992 ("FCRA"), chapter 760, Florida Statutes, prohibits discrimination in the workplace. Among other things, the FCRA makes it unlawful for an employer:

> To discharge or to fail or refuse to hire 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.

§ 760.10(1)(a), Fla. Stat.

21. The FCRA, as amended, is patterned after the Age Discrimination in Employment Act ("ADEA") and Title VII of the Civil Rights Act of 1964. Thus, federal decisional authority interpreting the ADEA is applicable to age discrimination cases arising under the FCRA. Petrik v. City of Pembroke Pines, 120

So. 3d 102 (Fla. 4th DCA 2013); Sunbeam TV Corp. v. Mitzel, 83 So. 3d 865, 877, n.3 (Fla. 3d DCA 2012); Woolsey v. Town of Hillsboro Beach, 2013 U.S. App. LEXIS 18569, *1, n.1 (11th Cir. 2013).

22. To ultimately prevail in an age discrimination case, Petitioner must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the "but-for" cause of the challenged employer decision. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177-78 (2009); Greene v. Sch. Bd. of Broward Cnty., 2014 U.S. Dist. LEXIS 111664, *13-14 (S.D. Fla. 2014).

23. 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 action against the complainant. Greene, 2014 U.S. Dist. LEXIS 111664, at *14. Only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of age, constitute direct evidence of age discrimination. Id.

24. When no direct evidence of age discrimination exists, the employee may attempt to establish a case circumstantially. To establish a prima facie case of age discrimination through circumstantial evidence, Petitioner must show that she: (1) is a member of a protected class; (2) was qualified for the position at issue; (3) was subjected to an adverse employment action; and (4) was replaced by someone outside her protected class, or that

her employer treated similarly-situated employees outside her protected class more favorably. Washington v. UPS, 567 Fed. Appx. 749, 751 (11th Cir. 2014); Horn v. UPS, 433 Fed. Appx. 788, 792 (11th Cir. 2011); Greene, 2014 U.S. Dist. LEXIS 111664, at *12. Failure to establish a prima facie case of discrimination ends the inquiry. Kidd v. Mando Am. Corp., 731 F.3d 1196, 1202 (11th Cir. 2013).

25. As to the fourth prong of the prima facie case, an adequate comparator must be "similarly situated" in all relevant respects. Greene, 2014 U.S. Dist. LEXIS 111664, at *16; Horn, 433 Fed. Appx. 788, at 792. To determine whether employees are similarly situated, courts evaluate whether the employees are involved in or accused of the same conduct or similar conduct and are disciplined in different ways. Burke-Fowler v. Orange Cnty., Fla., 447 F.3d 1319, 1323 (11th Cir. 2006); Horn, 433 Fed. Appx. 788, at 793. In making this determination, courts "require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions." Horn, 433 Fed. Appx. 788, at 793.

26. When the charging party, i.e., Petitioner, is able to establish a prima facie case, the burden to go forward with the evidence shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. Importantly, the employer has the burden of production, not

persuasion, and need only present the fact-finder with evidence that the decision was non-discriminatory. This intermediate burden is "exceedingly light." Bradley v. Pfizer, Inc., 440 Fed. Appx. 805, 807-808 (11th Cir. 2011).

27. Should the employer meet this burden, the presumption of discrimination created by the employee's prima facie case drops from the case. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000). At this juncture, the employee must then establish that the proffered reasons were not the true reason for the employment decision, but rather a mere pretext for intentional age discrimination. Woolsey, 2013 U.S. App. LEXIS 18569, at *6.

28. In this regard, Petitioner must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519, 1538 (11th Cir. 1997).

29. "Courts do not sit as a super-personnel department that reexamines an entity's business decisions." Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1244 (11th Cir. 2001). Whether an employment decision was prudent or fair is irrelevant because an employer "may fire [Petitioner] 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). Petitioner "is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute [her] business judgment for that of the employer." Chapman v. AI Transp., et. al., 229 F.3d 1012, 1030 (11th Cir. 2000). Provided that the proffered reasons are ones that might motivate a reasonable employer, an employee must meet those reasons head on and rebut them, and the employee cannot succeed by simply quarelling with the wisdom of those reasons. Id.

30. Turning to the instant case, Petitioner presented no direct evidence of discriminatory intent by Respondent.

31. Petitioner established the first three elements of a prima facie case based on circumstantial evidence. However, she failed to establish the fourth prong--that she was replaced by someone outside her protected class, or that the employer treated similarly-situated employees outside her protected class more favorably.

32. Having failed to establish a prima facie case, the inquiry need not go further, and the petition should be dismissed. However, even if Petitioner had met her initial burden of establishing a prima facie case, and the burden had shifted to Respondent to articulate a legitimate, nondiscriminatory reason for the termination, Respondent

successfully met its burden at the hearing which Petitioner failed to prove was a mere pretext for intentional age discrimination. The persuasive and credible evidence adduced at hearing showed that Petitioner was terminated because of poor job performance. Accordingly, 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 a final order dismissing the Petition for Relief.

DONE AND ENTERED this 29th day of June, 2015, in Tallahassee, Leon County, Florida.

DARREN A. SCHWARTZ
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 29th day of June, 2015.

ENDNOTES

[1/] Petitioner's contention that she was replaced by Jessica Weissman is without merit. Ms. Weissman was never a full-time employee. She was an intern in 2010 assigned to Respondent as

part of completing an educational clinical internship at Florida International University. After graduation, Ms. Weissman worked as a per diem dietician starting in January 2011. She generally worked between eight to 16 hours per week. However, there were some weeks during which Ms. Weissman did not work any hours at Respondent. Ms. Weissman was not available to work for Respondent full-time because she had another job. Per diem associates of Respondent are not eligible for employee health benefits, paid time off benefits, or educational assistance benefits. Per diem associates are not guaranteed any specific number of hours.

[2/] References to Florida Statutes are to the 2014 version, unless otherwise indicated.

COPIES FURNISHED:

Charles M. Eiss, Esquire
Law Offices of Charles Eiss, P.L.
8211 West Broward Boulevard, Suite 360
Plantation, Florida 33324
(eServed)

Jennifer T. Williams, Esquire
Akerman Senterfitt
1 Southeast Third Avenue
Miami, Florida 33131
(eServed)

Tammy Scott Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399

Cheyanne Michelle Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399

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.