

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARTHA JANE KENNY,

Petitioner,

vs.

Case No. 13-4145

WESTSIDE REGIONAL MEDICAL
CENTER,

Respondent.

RECOMMENDED ORDER

On January 23, 2014, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

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For Respondent: Alexander D. del Russo, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner in employment based on age or disability as prohibited by section 760.10(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

By Charge of Discrimination filed on April 8, 2013, with the Florida Commission on Human Relations (FCHR), Petitioner alleged that Respondent discriminated against her in employment based on her age and perceived disability, as well as in retaliation for her complaints about discrimination. Petitioner alleged that she was born on August 4, 1953, and the employment discrimination consisted of termination on May 11, 2012.

On September 16, 2013, FCHR entered a Determination: No Cause.

On October 21, 2013, Petitioner filed with FCHR a Petition for Relief, which alleges that Respondent terminated Petitioner's employment on June 7, 2012, due to her age and perceived disability.

FCHR transmitted the file to DOAH on October 21, 2013. On the next day, DOAH issued an Initial Order asking the parties to offer dates available for the final hearing. Respondent responded by offering the entire month of January as available for the final hearing. Petitioner did not respond. By Notice of Hearing dated November 5, 2013, the Administrative Law Judge set the final hearing for January 23, 2014.

On December 26, 2013, Petitioner moved for a continuance of the final hearing. On the next day, the Administrative Law Judge denied the motion. On January 22, 2014, Petitioner again moved

for a continuance. On the same day, the Administrative Law Judge again denied the motion.

At the hearing, Petitioner called two witnesses and offered into evidence one exhibit: Petitioner Exhibit 1, which is Respondent Exhibit 14. Respondent called three witnesses and offered into evidence 12 exhibits: Respondent Exhibits 10-11, 15, 19-26, 28, and 31. All exhibits were admitted except Respondent Exhibit 26, which was proffered.

At the start of the hearing, Petitioner orally renewed its motions for a continuance. The Administrative Law Judge denied the motion, but offered to consider, after receiving all of the available evidence, Petitioner's claim of prejudice from not obtaining a continuance.

At the conclusion of the hearing, after the parties presented argument, the Administrative Law Judge ordered that the evidentiary record remain open for Respondent to answer two posthearing interrogatories, which were crafted from the fact issues that Petitioner had identified that it would have pursued if it had obtained a continuance.

On the following day, the Administrative Law Judge memorialized the rulings at the close of the hearing in an Order on Posthearing Activities.

On January 31, 2014, Respondent filed its Answers to Court-Ordered Interrogatories. On the same date, Petitioner filed a

Request for Additional Documents. On February 3, 2014, Respondent filed its response to the request. On the same date, the Administrative Law Judge issued an Order Requiring Respondent to Answer a Second Set of Interrogatories, which set forth three interrogatories. On February 17, 2014, Respondent filed its Answers to Second Set of Interrogatories. Petitioner did not file any requests for additional posthearing activities.

At the conclusion of the hearing, neither party ordered a transcript. The Order on Posthearing Activities set a deadline of February 24, 2014, for the parties to file proposed recommended orders. Respondent timely filed a proposed recommended order.

FINDINGS OF FACT

1. Petitioner was born on August 4, 1953. She has been licensed as a registered nurse (RN) in Florida since 1979. Previously, Petitioner was licensed as an RN in New York for four years.

2. Presently, Petitioner is employed as an RN with Hospice of Broward and Palm Beach. She has been so employed for about one and one-half years prior to the final hearing. Prior to this employment, she was employed for a couple of months at Hospice at Vitas. In both of these jobs, Petitioner earned about \$60,000 annually including benefits.

3. For at least 20 years preceding the employment at the hospices, Petitioner was employed by Respondent at Westside Regional Medical Center (Westside). Initially, Petitioner was employed as a staff nurse in the critical care unit. Eventually, Petitioner was promoted to charge nurse of the intensive care unit (ICU). A charge nurse provides immediate supervision of staff nurses. Petitioner served as a charge nurse for seven years and was earning \$95,000 annually plus benefits at the time of the incidents described below.

4. The Joint Commission requires hospitals to assess employee competency annually. Respondent employs a Director of Education partly to discharge this obligation. Among the classes of employees subject to annual testing, nurses are the most numerous.

5. To ensure that an annual test focuses on critical areas, the Director of Education annually meets with managers and representatives of quality, risk management, and infection control to learn what areas have posed problems for the hospital over the past 12 months. After identifying the problem areas, the Director of Education accesses available databases from which she obtains questions that will focus on these problem areas. The Director of Education transmits the proposed test to the relevant department head for review prior to finalization; the relevant department in this case is the ICU.

6. At least for nurses, the annual test is part of a larger annual competency process. After preparing the nurses' test, the Director of Education provides nurses with study materials so they can prepare to take and pass the test. After each nurse takes the test, the Director of Education consults with the nurse's department director and then reviews the test with the nurse, discussing the areas of weakness revealed by the test. For more serious weaknesses, the Director of Education may require the nurse to take an entire course. For less serious weaknesses, the Director of Education may require the nurse to perform some online work or perform some individual research.

7. The competency process concludes with a followup meeting between the Director of Education and the nurse, who discusses the remediation work that she has completed by the time of this meeting. The Director of Education then issues a final report to the relevant department director, which, for Petitioner, is the ICU department director. The ICU department director is an RN, who serves as the immediate supervisor of the ICU charge nurses, including Petitioner.

8. For 2012, the Director of Education provided a window of three months, from February 1, 2012, through May 1, 2012, for nurses to complete all phases of the annual competency process. For nurses, including charge nurses, the Chief Nursing Officer (CNO) determined that the consequence for noncompliance would be

suspension without pay until timely completion. The CNO did not address any additional consequence for noncompliance by a charge nurse because the charge nurse's department director had direct responsibility for this matter.

9. At least six times before and during the period provided for completing the competency assessment process, the Director of Education sent emails to the nurses reminding them of the deadline to complete the annual competency process and to the department directors identifying their nurses who had not yet completed the process.

10. Most of the nurses completed the annual competency process in March and April, 2012. Of the 68 ICU employees--all or a majority of whom are nurses--eight ICU staff nurses failed to timely complete the process, and they were suspended without pay until they completed the process.

11. Petitioner failed to timely complete the annual competency process. She took the test on May 7, 2012, and completed the process one week later. Accordingly, she was suspended without pay from May 3 to May 14. Petitioner was cleared to return to work starting May 15, although she never did so.

12. After learning that Petitioner had failed to timely complete the annual competency process, the ICU department director consulted with the CNO and decided to demote Petitioner

to staff nurse for two reasons: the charge nurse served as an important role model to the staff nurses whom she supervised, and Petitioner had failed to timely complete the annual competency process in 2009 and 2010, at which times she was counseled for these noncompliances.

13. There is no evidence that the CNO discriminated against Petitioner on any basis in the CNO's implementation of her preannounced decision to suspend without pay those nurses who failed timely to complete the annual competency process.

14. There is no evidence that the CNO or the ICU department director, who is ten months older than Petitioner, discriminated against Petitioner on the basis of age in demoting her to staff nurse for failing timely to complete the annual competency process. The ICU department director made a good faith effort to accommodate Petitioner in selecting a shift and obtaining training for her new duties as a staff nurse, but Petitioner elected to forego this opportunity. After a reasonable period of waiting for Petitioner to return to work at Westside, Respondent justifiably determined that she had voluntarily terminated her employment.

15. Petitioner has failed to prove that she had any disability, the CNO or ICU department director perceived that she had a disability, or the CNO or ICU department director discriminated against her on the basis of any real or perceived

disability. The issue of a disability emerged with a work-related injury that Petitioner suffered to her hip while helping a large patient on April 23, 2012. After the pain worsened overnight, Petitioner reported it the next day, but was able to work her entire shift.

16. Pursuant to Respondent's policy, a compensable injury necessitates a drug screen of the injured employee. Petitioner complains that a staffperson drew her blood in an employee lounge, where coworkers could witness the process, but the staffperson did so only after earlier attempts to have Petitioner report to the staffperson had failed. Although the location of the blood draw may have violated Respondent's confidentiality policy, it is unclear why a coworker would draw an adverse inference from witnessing a process routinely performed with every employee who is injured on the job. In any event, the circumstances of the taking of Petitioner's blood do not suggest any discrimination on the part of Respondent's representatives against Petitioner.

17. The drug screen revealed the presence of Valium. When informed of this fact, Petitioner advised Respondent that she had a prescription for Valium and identified the pharmacy that filled the prescription. Unfortunately, when contacted, a pharmacy representative misstated that no such prescription existed, which resulted in Petitioner's termination effective May 11, 2012.

However, a pharmacy representative later indicated that the pharmacy had a prescription for Valium, and Respondent rescinded the termination no later than May 15, 2012.

18. No evidence links this unfortunate incident, which occurred through no fault of Petitioner or Respondent, with the demotion that is the subject of Petitioner's present complaint. This incident may have played a role in Petitioner's ensuing decision not to return to work at Westside, although this decision appears to have been driven at least as much by Petitioner's discomfort at the prospect of working with staff nurses whom she had previously supervised, if not by other factors as well.

19. More importantly, though, no evidence links the "failed" drug screen or Petitioner's injury with the subject demotion. There is no doubt that the CNO and ICU department director demoted Petitioner, a charge nurse, for failing to timely complete the annual competency test three times in the preceding four years.

20. Petitioner cites the injury as justification for missing the May 1 deadline for completion of the annual competency process. There are two problems with this contention. First, Petitioner assumed the risk of noncompliance when she failed to take the test at anytime in the 11 weeks prior to the injury, waiting until the last week to take the test, attend the

conference with the Director of Education, complete any required remedial work, and attend the followup conference with the Director of Education.

21. Second, the injury did not prevent Petitioner from taking the test at any time. As noted above, Petitioner was able to work her entire shift on the day after the injury. The first physician, whom Petitioner saw the day after the injury, determined that Petitioner could work, but she had to be limited to 95% sitting; three days later, this physician cleared Petitioner to return to work without restrictions. Another physician, whom Petitioner later consulted, prescribed physical therapy, but only one hour daily. Regardless of when Petitioner was able to return to regular nursing duties, it is clear that the injury did not prevent her from taking the test at any time.

22. The posthearing interrogatories, which were devoted to producing evidence of Respondent's treatment of putative comparators, have proven unnecessary, given the findings set forth above. However, Respondent's answers to these interrogatories do not support Petitioner's claim of prejudice in any event.

23. These responses disclose that Respondent did not grant any RNs extensions of less than 14 days, due to injury or illness, to complete the annual competency process.

24. Of the 31 charge nurses employed at Westside at the time of the 2012 competency process, four, in addition to Petitioner, failed timely to complete the annual competency process. However, unlike Petitioner, none of these charge nurses had previously failed timely to complete an annual competency process. One received counseling, which is what Petitioner received for her first two noncompliances. One worked in another department which lacked, at the time, a director; as noted above, the department director is directly responsible for determining whether a charge nurse should undergo additional adverse employment action for missing the deadline. The other two worked in another department, which had a director who lacked a history of consistent written discipline of her employees; this director is no longer a Westside employee. The other four charge nurses are thus not comparators because of different immediate supervisors, in the form of department directors, and different circumstances, primarily in the form of no prior noncompliances by these four charge nurses.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 760.11(7), Fla. Stat.

26. Section 760.10(1)(a) provides that it is an unlawful employment practice for an employer "[t]o discharge . . . or otherwise to discriminate against any individual with respect to

compensation, terms, conditions, or privileges of employment, because of such individual's age [op] handicap"

27. Petitioner has failed to prove that she was disabled or that Respondent's representatives perceived her as disabled. Petitioner has also failed to prove that she was discharged. The sole issue is thus whether Respondent demoted Petitioner because of her age.

28. To prevail on this claim of disparate treatment because of age, Petitioner must prove by a preponderance of the evidence that age was the "but for" cause of her demotion. Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 177 (2009); Sunbeam TV Corp. v. Mitzel, 83 So. 3d 865, 870-71 (Fla. 3d DCA 2012).

29. The sole cause for Petitioner's demotion was not her age, but her failure to complete timely the 2012 competency process--for the third year of the preceding four. Petitioner was a supervising nurse. The competency process is an important device by which Respondent ensures quality patient care. Petitioner's immediate supervisor, the ICU department director, had ample reason to determine that a suspension without pay was insufficient under these circumstances, but that Petitioner merited a demotion to staff nurse.

RECOMMENDATION

It is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 4th day of March, 2014, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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this 4th day of March, 2014.

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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.