

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLOTTE A. PINKERTON,

Petitioner,

vs.

Case No. 14-2526

FLORIDA DEPARTMENT OF
CORRECTIONS,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 6, 2015, in Clermont, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Jamison Jessup
Qualified Representative
557 Noremac Avenue
Deltona, Florida 32738

For Respondent: Todd Evan Studley, Esquire
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Respondent, Department of Corrections, discriminated against Petitioner, Charlotte Pinkerton, on the basis of her age,

race, disability, or in retaliation, and, if so, what remedy should be ordered.

PRELIMINARY STATEMENT

On November 18, 2013, Petitioner filed a Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (Commission), alleging unlawful employment discrimination by Respondent on the basis of her age, race, disability, and in retaliation. The Commission investigated the Complaint. On May 5, 2014, the Commission issued its "Notice of Determination: No Cause" and "Determination: No Cause" regarding the alleged discriminatory practices.

On May 27, 2014, Petitioner timely filed a Petition for Relief which was forwarded to the Division for assignment of an administrative law judge. The final hearing was initially set for July 23, but was rescheduled to February 5 and 6, 2015, following Petitioner's requests for continuance. On January 22, Petitioner filed a motion to amend the petition for relief. A telephone conference hearing was held and the motion was granted. During the telephone conference hearing, the parties agreed that only one hearing day was necessary. The hearing was re-scheduled for February 6, and concluded on that date.

Petitioner testified on her own behalf and presented the testimony of Lou Armentrout, Regional Warden Jennifer Folsom, Diana Gadacz, Theresa Williams, Assistant Warden Tommy Young, and

Virginia Mesa, M.D. Respondent's witness list included three of the same witnesses as Petitioner (Jennifer Folsom, Tommy Young, and Virginia Mesa). In order to provide an orderly hearing flow and allow each party the opportunity to elicit the direct testimony of these three witnesses, the undersigned allowed great leeway in their examination. Petitioner's Exhibits 1 through 8 were admitted into evidence. Respondent's Exhibits 1, 2, and 5 were admitted into evidence. At hearing, Respondent's Exhibit 6 was taken under advisement, and is now admitted.^{1/} Additionally, the parties stipulated to three facts that are found in the Findings of Fact below.

A court reporter was present for the hearing; however, the parties did not order a transcript. The parties were advised to submit their proposed recommended orders (PROs) within 10 days of the conclusion of the hearing. Respondent timely submitted its PRO, and it has been considered in the preparation of this Recommended Order. To date, Petitioner has not filed a PRO.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2014 codification.

FINDINGS OF FACT

1. Respondent is the state agency whose purpose is to protect the public through the incarceration and supervision of offenders, and to rehabilitate offenders through the application

of work programs and services. See § 20.315, Fla. Stat.
Respondent employs more than 15 persons.

Stipulated Facts

2. Petitioner was hired by Respondent and employed at Lake Correctional Institution (Lake C.I.) as a senior registered nurse (RN), OPS^{2/} employee, effective October 29, 2010. On October 14, 2011, Petitioner was promoted to senior RN, career service employee, at Lake C.I. Petitioner resigned from employment with Respondent at Lake C.I. on February 1, 2013, effective February 15, 2013.

Age and Race

3. Petitioner is a 67-year-old Caucasian female. Petitioner was 63 years old when she started work at Lake C.I. There was no evidence presented that a new employee or employees were hired to replace Petitioner.

Disability

4. At hearing, Petitioner provided a February 7, 1990, letter from Gene Watson, Ph.D., of The Learning Place, which reflected Petitioner had a diagnosis of developmental dyslexia. Petitioner's claim that this February 7 letter was attached to her employment application cannot serve as a blanket notification to everyone working for Respondent or Lake C.I.

5. Petitioner admitted she had dyslexia and declared "I can do my job." Although Petitioner's former supervisor, senior RN

Lou Armentrout, testified she was aware of Petitioner's dyslexia, the exact timing of this knowledge was not disclosed.

Ms. Armentrout also testified that Petitioner did not need an accommodation to perform her nursing duties.

6. Petitioner's statement that "they knew of my disability" is insufficient to substantiate that fact. Warden Folsom and Dr. Mesa were not employed at Lake C.I. when Petitioner was hired to work there, and they were unaware of Petitioner's disability.

Retaliation Background

7. Prior to the arrival of Dr. Mesa at Lake C.I., Petitioner worked under the direction of the Chief Health Officer (CHO). Petitioner did anything she could to assist the prior CHOs (Dr. Meredith or Dr. Marino). Petitioner worked as a floor nurse and would sometimes be the charge nurse.

8. Petitioner worked in the medical building at Lake C.I. Petitioner's immediate supervisor was Ms. Armentrout. Petitioner's six-month performance planning and evaluation by Ms. Armentrout, dated April 16, 2012, reflected a rating of 3.36 on a 5.0 scale. In September 2012, Ms. Armentrout left Lake C.I.

9. Between August 2012 and October 2013,^{3/} Dr. Mesa served as Respondent's CHO at Lake C.I. As the CHO, Dr. Mesa oversaw everything in the medical section regarding inmate patient care and services. There are two medical buildings at Lake C.I.: one houses those inmates needing medical care; and a second building

houses other inmates needing mental health services. Dr. Mesa would usually start her work day in the medical building and then go to the second building. On a daily basis, Dr. Mesa would treat inmate patients, write orders, interact with staff, attend meetings, and administer Lake C.I.'s entire medical section. Dr. Mesa is a Spanish-speaking female physician who talks with her hands as she speaks.

10. At the start of Dr. Mesa's tenure at Lake C.I., Petitioner was on light duty as a result of an injured foot. It is believable that Dr. Mesa gave Petitioner orders or directives to do certain tasks which Dr. Mesa believed were within the light duty category. Petitioner contends that she discussed the tasks requested by Dr. Mesa with Respondent's human resource office, and Dr. Mesa's requests were found to be outside the light duty category. There was no evidence to support or contradict Petitioner's discussion with Respondent's human resource office, and it was hearsay as to what she was told. As the CHO, Dr. Mesa could ask or direct Petitioner to perform medically related tasks.

Retaliation

11. In late November 2012, Petitioner claimed she reported to Warden Folsom problems regarding Dr. Mesa's continued verbal abuse towards Petitioner, medical staffing issues including long work-breaks, and missing medical supplies and equipment. Warden

Folsom does not recall this November meeting with Petitioner, and there was no investigation conducted in late November or December regarding Petitioner's allegations.

12. After reporting the irregularities in the medical section, Petitioner felt Dr. Mesa increased her verbal abuse towards Petitioner. Petitioner felt she was being retaliated against and tortured by Dr. Mesa. Petitioner deemed the abuse to be a hostile work environment, yet she did not report it again until February.

13. Petitioner testified that Assistant Warden Young spoke with her several days after the alleged November meeting with Warden Folsom, and reminded her that she needed "to follow the chain of command." Assistant Warden Young failed to provide any insight into this meeting, claiming that he did not recall talking with Petitioner about following the chain of command.

14. Petitioner believed that Dr. Mesa had the ability to fire her, and Petitioner remained in constant fear of Dr. Mesa. Petitioner felt Dr. Mesa belittled and humiliated her in front of prisoners and other nurses. Petitioner believed that Dr. Mesa intentionally spoke Spanish to other nurses when Petitioner was present.^{4/} Petitioner believed that Dr. Mesa hated white people, and black people who defended white people. During one interaction between Petitioner and Dr. Mesa, Dr. Mesa stuck her

finger between Petitioner's eyeballs; however, the exact verbal exchange that led to that encounter remains unclear.

15. Dr. Mesa denied making fun of Petitioner or intentionally giving medical orders to nurses in Spanish, when Petitioner was present. However, Dr. Mesa conceded it was possible that she did so, as Spanish is her first language. Dr. Mesa denied ever intentionally putting her finger on Petitioner.

16. Dr. Mesa supervised Ms. Armentrout and her replacement, nurse Isabga, but claimed not to supervise Petitioner. As the CHO in charge of the health care for inmates, it is logical that the CHO would have supervisory duties over all the health care workers, maybe not directly, but certainly through the chain of command. When Dr. Mesa gave or wrote a medical order, she expected a high level of performance from the Lake C.I. staff.

17. Ms. Gadacz, who worked with Petitioner at Lake C.I., did not know Petitioner had a disability. Ms. Gadacz witnessed Dr. Mesa yelling at different times to different people, including Petitioner; but Ms. Gadacz did not believe it was motivated by anyone's race or age. Although Ms. Gadacz witnessed Dr. Mesa putting her finger on Petitioner's face, she could not explain the circumstances.

18. Licensed Practical Nurse Theresa Williams worked with Petitioner at Lake C.I. At various times, Ms. Williams observed

Dr. Mesa's interactions with Petitioner, which she deemed to be less than professional. During at least one meeting, with six or seven employees present, Dr. Mesa addressed everyone but Petitioner with respect. When Respondent began the investigation of Petitioner's complaint (after Petitioner's resignation), Ms. Williams was interviewed and provided her observations of Dr. Mesa's treatment of Petitioner.

Petitioner's Resignation

19. On February 1, 2013, Petitioner requested a meeting with Warden Folsom. During this meeting Petitioner initially expressed her desire that nothing be done about what she was going to tell the Warden. Petitioner expressed her frustrations with Dr. Mesa's verbal abuse and discrimination. At that meeting, Petitioner gave Warden Folsom a resignation letter. The letter provided:

I would like to inform you that I am resigning from my position as Senior Register [sic] Nurse for Lake Correction Institution, effective February 15, 2013.

Thank you for the opportunities for professional and personal development that you have provided me during the last 28 months. I have enjoyed working for the agency and appreciate the support provided me during my tenure with the Institution.

If I can be of any help during this transition, please let me know.

Sincerely,
[signature]
Ms. Charlotte Pinkerton
Senior Register [sic] Nurse

Warden Folsom was surprised that Petitioner was resigning and provided her with the opportunity to continue to work for Respondent. However, when Petitioner used the phrase "hostile work environment," Warden Folsom instituted Respondent's procedures to have the allegation investigated.

20. Dr. Mesa participated in Respondent's Inspector General's investigation that ensued after Petitioner left Lake C.I., but couldn't recall the details. Further, Dr. Mesa testified repeatedly that she did not recall having conversations with other Lake C.I. personnel regarding Petitioner or others. There is evidence that Petitioner and Dr. Mesa do not care for one another; however, the evidence necessary to prove any discrimination is lacking.

21. Following her resignation, Petitioner has attempted to obtain another RN position, but has been unsuccessful. In December 2013, Petitioner sustained an injury which has precluded her from continuing to seek employment.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569, 120.57(1), and 760.11(7) Fla. Stat.

23. The Florida Civil Rights Act of 1992 (the Act) is codified in sections 760.01 through 760.11, and prohibits discrimination in the workplace. When "a Florida statute [such as the Act] 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 Act 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.

24. Section 760.10 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.

25. 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. In this case, Petitioner presented only self-serving testimony.

26. 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. In this instance, Petitioner and her witnesses did not provide that proof.

27. In addressing Petitioner’s retaliation claim, she alleges that she was forced to resign as a result of her reporting the discrimination, lengthy work-breaks, and missing medical equipment. Petitioner’s own actions show otherwise.

28. Section 760.10(7) 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.

29. It can be said that Petitioner felt as if she was participating in a protected activity when she allegedly complained in November. However, Warden Folsom was not aware of Petitioner's complaint until February. Warden Folsom did not terminate Petitioner's employment; Petitioner resigned.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner's Petition for Relief from an unlawful employment action be dismissed.

DONE AND ENTERED this 4th day of March, 2015, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2015.

ENDNOTES

- 1/ Petitioner's Exhibit 8 contained the same documentation.
- 2/ Although never defined by either party, when used by a Florida state agency, OPS means "other personal services."
- 3/ In or around October 2013, Respondent contracted with Corizon Health to provide medical services for Respondent's inmates. Dr. Mesa and most of Respondent's health care workers were hired by Corizon Health.
- 4/ Petitioner does not speak or understand the Spanish language.

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.