STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SONIA E. BROWN,

Petitioner,

vs. Case No. 14-2976

POINCIANA MEDICAL CENTER HCA,

Respondent.
_____/

RECOMMENDED ORDER

On March 12, 2015, this case was heard by D.R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH), at videoconferencing sites in Orlando and Tallahassee, Florida.

APPEARANCES

For Petitioner: Sonia E. Brown, pro se
14643 Eagles Crossing Drive
Orlando, Florida 32837-6920

For Respondent: Lori R. Benton, Esquire
Ford and Harrison LLP
Suite 1300
300 South Orange Avenue
Orlando, Florida 32801-3379

STATEMENT OF THE ISSUE

The issue is whether Petitioner was unlawfully terminated from employment in retaliation for engaging in a protected activity, in violation of the Florida Civil Rights Act of 1992, as amended.

## PRELIMINARY STATEMENT

On November 4, 2013, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) alleging that she was terminated from employment by her most recent employer, Poinciana Medical Center HCA (PMC), in retaliation for filing a discrimination complaint in August 2012 against her previous employer, Osceola Regional Hospital, Inc., d/b/a Osceola Regional Medical Center (ORMC). After the FCHR determined that reasonable cause existed to believe an unlawful employment practice occurred, Petitioner filed her Petition for Relief. The matter was then transmitted by the FCHR to DOAH to resolve the dispute.

At the hearing, Petitioner testified on her own behalf and presented two witnesses. Petitioner's Exhibits E, F, H, I, M, N, O, P, Q, and U were accepted in evidence. To the extent there are hearsay statements in her remaining exhibits that corroborate other competent evidence, they have been considered. Respondent presented the testimony of five witnesses. Respondent's Exhibits 1 through 5, 8 through 14, 16 through 20, 22, and 23 were accepted in evidence.

A two-volume Transcript of the hearing has been prepared. The parties filed proposed recommended orders (PROs), which have been considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. Petitioner is a 57-year-old female of Jamaican origin. In 2000, she began working as a registered nurse with ORMC, a hospital in Kissimmee, Florida, and continued working in that capacity until June 23, 2013, when she voluntarily resigned. See Resp. Ex. 3. Effective July 1, 2013, she began working as a registered nurse for PMC, a new hospital in Kissimmee, which began accepting patients on July 24, 2013. Petitioner claims she was unlawfully terminated by PMC on September 6, 2013, in retaliation for engaging in a protected activity while employed at ORMC. Other claims presented by Petitioner after the case began were excluded as being untimely.[1/] PMC disputes her claim and says she was not terminated, but only voluntarily separated from employment. PMS also contends that no matter how it is characterized, the separation/termination was for legitimate, non-discriminatory reasons, and not in retaliation for a protected activity.

2. During her tenure with ORMC, Petitioner filed two discrimination complaints against that facility. In August 2007, she alleged race discrimination in a complaint filed with the Equal Opportunity Employment Office, but that charge was dismissed on December 4, 2007. In August 2012, she filed a discrimination complaint with the FCHR alleging discrimination based on age, race, and national origin. That charge was

dismissed by the FCHR on February 21, 2013, and Petitioner never requested a hearing regarding those charges. In August 2012, she also filed a complaint with the Agency for Health Care Administration (AHCA) regarding alleged safety or health hazards at ORMC. However, the AHCA complaint is not a protected activity under chapter 760, Florida Statutes (2014).

3. ORMC and PMC are wholly-owned subsidiaries of HCA Holdings, Inc., a non-operating company without employees. Petitioner contends they are affiliated companies, or "joint employers," and that ORMC exercises control over the terms and conditions of employment of PMC's employees. However, the evidence shows that the two hospitals operate independently, and PMC has sole control over the terms and conditions of its employees' employment. Even so, in resolving this case, the undersigned has considered whether there is a causal connection between Petitioner's alleged adverse employment action and the charge of discrimination filed against ORMC in 2012.

4. Sylvia Lollis serves as the Vice President of Human Resources of both facilities. Respondent stipulates that Ms. Lollis was aware of Petitioner's August 2012 charge filed with the FCHR against ORMC. However, there is no evidence that Ms. Lollis disclosed this information to any person acting on behalf of PMC during Petitioner's tenure with that facility. To the contrary, the evidence shows that the individual who hired

Petitioner, Linda Coffey, PMC's director of surgical services, was unaware of any discrimination complaints Petitioner had filed against ORMC while employed by that facility. And, the employee who handled her transfer to a different position within PMC, Anna Netys, was unaware of the complaint.

5. Petitioner worked as a per diem (as needed) employee at ORMC before she was hired at PMC. Per diem employees are not full-time employees and do not receive health insurance benefits. When she learned that PMC would open in July 2013, Petitioner voluntarily resigned from ORMC and applied for a full-time position with PMC. It was never suggested by ORMC, nor was Petitioner pressured by that facility, to seek a position at another hospital. Petitioner's motivation was to secure a full-time position in order to receive health insurance.

6. Petitioner hoped to land a position in the radiology department and was first interviewed by Gregg Jacob, PMC's director of radiology. He told her there were no full-time positions open in that department. However, based on her background and resume, Mr. Jacob advised Ms. Coffey that Petitioner appeared to be qualified for a position in the catheterization lab department (cath lab), a combined department consisting of interventional radiology procedures and cardiac catheterization.

7. According to her resume, Petitioner was a critical care nurse whose main function was to assess patients and assist the radiologist in providing various interventional radiology procedures that are routinely performed in the cath lab. See Pet. Ex. E. She had also worked in noninvasive cardiology. After reviewing her resume, which reflected a "strong critical care background," Ms. Coffey offered Petitioner a full-time position in the cath lab. In doing so, Ms. Coffey relied on Petitioner's resume and interview and did not contact ORMC or Ms. Lollis to verify her experience. Petitioner's contention at hearing that she always believed she was being interviewed and then hired for a position in radiology, and not the cath lab, is contrary to the accepted evidence.

8. During the interview, Ms. Coffey described the job in the cath lab and what was required and expected in that position. Although Petitioner testified at hearing that she had "no experience for this position," she voiced no objection to an assignment in the cath lab and told Ms. Coffey there were no barriers in her transition to that position. Petitioner admitted that she had no exposure to "MAC lab" equipment, a mainstay in the cath lab. However, General Electric Company (GE) offered in-house MAC lab training, and Ms. Coffey assumed this would give Petitioner the training that she needed. If Ms. Coffey believed that further training was needed, she would have

provided Petitioner with that training. Petitioner was hired on a full-time basis effective July 1, 2013, and told to report to the cath lab. In accordance with hospital protocol, for the first ninety days, she was on probation.

9. Besides broad general training and hospital orientation, Petitioner's initial training was geared around the MAC lab. At Petitioner's request, she received three days of hands-on training with patients at ORMC's cath lab since PMC had not yet accepted patients. Also, she was given training for specific instrumentation and equipment used in the cath lab. This was the same training given to other nurses in the cath lab hired at the same time. Because her training included instruction on the database, the MAC lab, and other equipment she had never used in the past, Ms. Coffey had no reason to believe that Petitioner could not perform in the cath lab.

10. During her training classes, other participants frequently observed Petitioner sleeping and failing to concentrate on the lecture. A co-worker testified that Petitioner fell asleep mid-sentence while the two were having a conversation; another testified that she fell asleep while working at her computer. Barbara Ott, who participated in the MAC lab training sessions with Petitioner, observed her appearing drowsy and sometimes falling asleep. When asked if she was tired, Petitioner told Ms. Ott that she was tired

because "I was up studying last night." While monitoring Petitioner's training, Ms. Coffey observed her appearing very drowsy, with her eyes closed and head nodding. At one point, Ms. Coffey asked Petitioner to move to the more common area of the lab which had more activity and would hopefully keep her stimulated.

11. In a memorandum dated July 10, 2013, Doris Hale, who attended MAC lab training with Petitioner, advised Ms. Coffey that Petitioner "has on multiple occasions fallen asleep, even [while] standing at [her] computer and monitoring stations"; she "routinely appears drowsy and can't participate in training sessions"; and she "lacks the attitude, skills and fore-sight needed for a critical care area." Resp. Ex. 9.

12. In response to Ms. Hale's memorandum, on July 15, 2013, Ms. Coffey conducted a counseling session with Petitioner to discuss the complaints. Ms. Coffey was concerned with these reports because complications in the cath lab can arise very quickly, and an inattentive nurse presents a huge patient safety issue. Ms. Coffey was also concerned with complaints that Petitioner was falling asleep during the MAC lab training that is vital for a cath lab nurse.

13. In response to these concerns, Petitioner told Ms. Coffey that she was staying up late every night working on a master's degree, she was very tired, and she would rearrange her

schedule to address the problem. She added that while she may have been falling asleep during training, there was no record of her falling asleep while caring for patients. This was obviously true since the cath lab did not receive its first patients until after July 24, 2013.

14. Shortly after the counseling session, Ms. Coffey received a report from a GE MAC lab trainer stating that Petitioner's participation was less than 50 percent, and "she appeared very tired and kept dozing during the training event." Resp. Ex. 11. During this same time, multiple complaints were made by other nurses that Petitioner appeared very tired and was falling asleep. Ms. Coffey confirmed this with personal visits to the cath lab.

15. With the end of the 90-day probationary period drawing closer, on August 19, 2013, Petitioner was counseled a second time for sleeping and not staying alert during her training sessions. The counseling session was intended to serve as a written warning on performance and to provide Petitioner notice that she had not made any progress since being counseled in mid-July. Ms. Coffey advised Petitioner that her inability to retain the training that she was receiving presented major safety concerns for patients. Petitioner did not request additional training at the counseling session. In fact, she told Ms. Coffey that much of what she had learned from the MAC

lab database was "very similar" to what she was learning in school.

16. Petitioner was never told by Ms. Coffey that she could not return to the cath lab, as no decision had been made on whether to keep her past her 90-day probationary period. At that time, it was still Petitioner's choice to stick it out and stay in the cath lab, or find another position. When Ms. Coffey attempted to persuade Petitioner that there may be another nursing position that was more suitable for her skill sets, Petitioner conceded that "the cath lab may not be the place for her, and she was willing to go look to see what else was available within [PMC]." Based on Petitioner's comments, Ms. Coffey recommended that Petitioner look for another position that better matched her skills. The two then met with PMC's Human Resource generalist, Anna Netys (then known as Otto), to search for available positions.

17. Petitioner's first choice was always radiology, but she was told that there was only a per diem position available. Petitioner was concerned that she might not be successful in the cath lab at the end of the 90-day probationary period, which could end in termination. Therefore, she voluntarily filled out a transfer form to radiology. Ms. Netys encouraged Petitioner to look at the entire list of open positions, and she was told that she could apply for any one of them. Prior to that date,

Petitioner had never searched for available job positions. As it turned out, there was another full-time position that Petitioner felt she was qualified for, but she did not apply for the position. Notably, at no time during the August 19 meetings did Petitioner ever indicate to Ms. Coffey or Ms. Netys that she wished to return to the cath lab if the new position did not work out.

18. Ms. Coffey immediately approved the transfer and signed the form releasing Petitioner from the cath lab department. That was the last time Ms. Coffey saw or spoke with Petitioner.

19. After the transfer form was executed, Petitioner's full-time position in the cath lab was filled by another nurse, Barbara Ott, then a per diem employee. Ms. Ott had previously worked in three cath labs and was fully qualified for the position by reason of training and experience.

20. After the transfer was approved by Gregg Jacob, Petitioner was initially assigned to work in radiology covering for a nurse on a pre-scheduled two-week vacation. Within a few days, however, she notified Mr. Jacob that she was ill and would be on sick leave. On August 29, 2013, she went to the PMC emergency room where she was diagnosed with a serious illness. Petitioner remained on medical leave until September 6, 2013, when she was cleared to return to work.

21. On September 6, 2013, Petitioner went to Ms. Netys's office with a return to work slip from her physician. She told Ms. Netys that she was returning to the cath lab, presumably to enable her to have health benefits reinstated. By then, however, Petitioner's position had been filled by Ms. Ott, and no full-time positions were available in that department.

22. In view of Petitioner's demands to return to the cath lab, Ms. Netys and Petitioner participated in a telephone conference call with Ms. Lollis. Prior to the call, Ms. Lollis was unaware of Ms. Coffey's counseling session with Petitioner on August 19, 2013, and Petitioner's decision to voluntarily transfer to radiology. After Petitioner stated that she intended to return to the cath lab, Ms. Lollis explained that no full-time positions were available in the cath lab, and that she had already transferred to radiology. Petitioner was told that she could apply for any available position at PMC that suited her qualifications, and that until an acceptable full-time position became available, she could continue working as a per diem employee in radiology. She was also offered a position in ICU but declined. Petitioner was never given a take-it-or-leave-it choice between termination or demotion.

23. The conference call ended with Petitioner refusing to work in radiology because of a loss of benefits and insisting that she return to the cath lab. Ms. Lollis explained that

because she had turned down the available position in radiology, Petitioner was choosing to end her employment with PMC. Petitioner was reminded multiple times that she could review available positions and apply for a full-time position for which she was qualified. In sum, Petitioner was given three choices: search and apply for available positions within PMC; return to her per diem radiology position that she requested and to which she was currently assigned; or terminate her employment, where she was eligible for rehire. Petitioner chose to not return to a per diem position and to separate from employment. She continues to remain eligible to apply for any full-time or per diem position at PMC that becomes vacant. PMC did not provide Petitioner with termination paperwork because she ended her own employment on September 6, 2013.

24. The decision to separate Petitioner from employment at PMC was not in retaliation for Petitioner filing a complaint against ORMC. Rather, it was because she refused to fill an available and accepted position or search for an alternative available position.

25. At hearing, Petitioner contended that after she was observed appearing drowsy and sleeping during training sessions, PMC had a duty to investigate the cause of her fatigue and take whatever steps were necessary to diagnose the problem. However, Petitioner cites no authority to support that proposition.

Moreover, Petitioner always told PMC personnel that her day-time fatigue was due to extra-curricular activities involving school, studying, and writing papers. While there were concerns on the part of other PMC employees who observed Petitioner sleeping, those concerns were directed to patient safety if she remained in the cath lab. In her testimony and PRO, Petitioner asserted that she was required to lift heavy boxes and supplies when the cath lab was first set up for operations, which may have contributed to her fatigue. But this explanation is not an excuse for the poor performance in training sessions.

26. At hearing, Petitioner testified that in the mid-July counseling session, she told Ms. Coffey that she had a newly diagnosed condition called autoimmune thyroiditis that might be making her tired. However, Ms. Coffey did not recall such a comment. A vague reference to a "serious diagnosis," without further explication, in Petitioner's Employee Counseling Form dated July 15, 2013, has been discounted as being insufficient to put Ms. Coffey on notice of any ailment. In any event, discrimination on account of a disability is not a charge raised by Petitioner in her initial complaint.

27. After her complaint was filed, Petitioner contended for the first time that she was denied the necessary training to qualify for a position in the cath lab. There is no evidence, however, that Petitioner advised Ms. Coffey that she needed more

training, or that anyone at PMC ever denied her that opportunity. Indeed, she told Ms. Coffey that the MAC lab database training was very similar to what she was learning in school. Even assuming that the allegation is true, it made no sense to provide more training if Petitioner was falling asleep in class or failing to participate in more than half of the training sessions. Notably, this charge was never raised in her Employment Complaint of Discrimination or Petition for Relief.

28. Unfortunately, Petitioner has not worked since she left PMC because of a major medical issue. She cannot currently work, and she does not know if she will be able to work in the future. She filed her Employment Complaint of Discrimination with FCHR on November 4, 2013, after she left PMC.

CONCLUSIONS OF LAW

29. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See § 120.57(1)(j), Fla. Stat.

30. Section 760.10(7) makes it unlawful for an employer to take adverse action against a person because that person has opposed any practice which is an unlawful employment practice, or because that person has made a charge in an investigation, proceeding, or hearing under section 760.10.

31. The FCHR's retaliation provision "is almost identical to its federal counterpart" under Title VII of the Civil Rights

Act of 1964, as amended. Carter v. Health Mgmt. Assocs., 989 So. 2d 1258, 1262 (Fla. 2d DCA 2008). Thus, Florida courts follow federal case law when examining FCHR retaliation claims. Id.; see also Hinton v. Supervision Int'l, Inc., 942 So. 2d 986, 989 (Fla. 5th DCA 2006).

32. To establish a prima facie case of retaliation, Petitioner must show that: 1) she was engaged in an activity protected by the FCHR; 2) she suffered an adverse employment action by her employer, PMC; and 3) there is a causal connection between the protected activity and the adverse employment action. See Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001).

33. Petitioner has the ultimate burden of proving by a preponderance of the evidence that PMC intentionally retaliated against her. See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). She must come forward with evidence that PMC intentionally retaliated against her because of her charge of discrimination against ORMC in August 2012. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993). On the other hand, PMC's burden of proof is "merely one of production, not persuasion, and is exceedingly light." Buzzi v. Gomez, 62 F. Supp. 2d 1344, 1356 (S.D. Fla. 1999).

34. Petitioner has satisfied the first prong of the test, as the charge of discrimination against ORMC in August 2012 is a

protected activity under the FCHR. However, Petitioner has not established that she suffered an adverse employment action by PMC. The evidence shows that Petitioner made a voluntary choice to transfer to radiology and to then end her employment. Therefore, she was not subject to an actionable adverse employment action by PMC. See Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432-33 (11th Cir. 1998). An unfavorable result from an action taken or choice made by an employee is not an actionable employment action. See Rowell v. BellSouth Corp., 433 F.3d 794, 806 (11th Cir. 2005). See also Turley v. SCI of Ala., 190 Fed. Appx. 844, 847 (11th Cir. 2006)(affirming district court's finding that employee's decision to accept a position that reduced her pay was not a demotion resulting from employer's deliberate decision and was not an actionable employment action); Allen v. U.S. Postmaster Gen., 158 F. Appx. 240, 244 (11th Cir. 2005)(finding a transfer is not an adverse employment action because plaintiff requested a transfer even though she lost seniority); Doe v. Dekalb Cnty. Sch. Dist., 145 F.3d 1441, 1454 (11th Cir. 1998)(a transfer cannot be an actionable employment action if it occurred as a result of an employee's own request); Santandreu v. Miami-Dade Cnty., 513 F. Appx. 902, 906 (11th Cir. 2013)(a choice to voluntarily resign when faced with unpleasant alternatives is not an adverse employment action by the employer).

35. As to the third prong of the test, there is no evidence establishing the requisite causal connection. To satisfy the causal connection requirement of a prima facie case, Petitioner must demonstrate "but for" causation to sustain a retaliation claim. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013). In other words, Petitioner must show that the adverse employment action would not have occurred if she did not engage in the protected activity. Here, there is no evidence that Ms. Coffey had actual knowledge of Petitioner's protected activity. Thus, she could not have taken any adverse action against Petitioner because of her protected activity. And, if Ms. Lollis is considered the decision maker, there was no evidence showing "but for" Petitioner's charge of discrimination she would not have been transferred from the cath lab to radiology, and her employment with PMC would have ended on September 6, 2013.

36. Finally, assuming arguendo that Petitioner established a prima facie case, PMC offered a legitimate, non-retaliatory business explanation for its employment actions. First, Ms. Coffey recommended that Petitioner search for another position within PMC because Ms. Coffey believed that Petitioner would not improve and would not be able to perform as a nurse in the cath lab position. She also wanted Petitioner to have an opportunity to locate a different position that matched her

skills to avoid a possible termination. Second, when Petitioner indicated she no longer wanted the per diem position she requested and held, she wanted to return to a cath lab position that was no longer available. PMC provided Petitioner with several legitimate reasonable options, which could not include a position that was no longer available.

37. Petitioner failed to produce evidence that PMC's actions were unworthy of credence. See, e.g., Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997).

38. Because Petitioner has failed to establish a prima facie case of retaliation, her 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, with prejudice.

DONE AND ENTERED this 19th day of May, 2015, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
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 19th day of May, 2015.

ENDNOTE

[1/] After the case was referred to DOAH, and the discovery process began, Petitioner attempted to assert new claims of discrimination, including a charge that she was terminated by PMC on account of age, race, and disability, and a charge that ORMC was guilty of discrimination. These charges were untimely, and the introduction of evidence regarding those claims was precluded by Orders dated March 3 and 10, 2015.

COPIES FURNISHED:

Tammy Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Suite 110
Tallahassee, Florida 32399-7020

Sonia E. Brown
14643 Eagles Crossing Drive
Orlando, Florida 32837-6920
(eServed)

Lori R. Benton, Esquire
Ford and Harrison LLP
Suite 1300
300 South Orange Avenue
Orlando, Florida 32801-3379
(eServed)

Cheyanne M. Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Suite 110
Tallahassee, Florida 32399-7020

## NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.