

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GHANSHAMINIE LEE,

Petitioner,

vs.

Case No. 14-4580

SHELL POINT RETIREMENT
COMMUNITY,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this case was held by video teleconference between sites in Fort Myers and Tallahassee, Florida, on February 13, 2015, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings. The final hearing commenced on November 25, 2014, and was continued at Petitioner's request. By agreement of the parties, the final hearing reconvened on February 13, 2015.

APPEARANCES

For Petitioner: Ghanshaminie Lee
4607 Vinewood Circle
North Fort Myers, Florida 33903-4697

For Respondent: John F. Potanovic, Esquire
Henderson, Franklin, Starnes,
and Holt, P.A.
Post Office Box 280
Fort Myers, Florida 33902-0280

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Complaint of Discrimination filed by Petitioner on February 24, 2014.

PRELIMINARY STATEMENT

Petitioner, Ghanshaminie Lee (Petitioner), filed an Employment Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (FCHR), which alleges that her employer, Shell Point Retirement Community (Respondent), violated section 760.10, Florida Statutes (2013), by discriminating against her on the basis of race, color, national origin, and religion. Petitioner also alleges that Respondent, in an act of retaliation against her for complaining about being the victim of unlawful discrimination, terminated her employment with the company.

The allegations were investigated, and on August 25, 2014, FCHR issued its Determination: No Cause. A Petition for Relief was filed by Petitioner on September 26, 2014. On October 2, 2014, FCHR transmitted the case to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing.

At the hearing, Petitioner testified on her own behalf and offered testimony from Jeffrey Lee, her husband; and Olna Exantus and Nadine Bernard, both former co-workers. Respondent offered

testimony from its employees Karen Anderson, Stacey Daniels, and Marjorie Cartwright. Petitioner's Exhibits A-1 through A-58, and Respondent's Exhibits A, and A-1 through A-38 (including A-18a and A-18b) were admitted into evidence.

A Transcript of the final hearing was filed with the Division of Administrative Hearings on February 24, 2015. The parties each submitted a Proposed Recommended Order.

FINDINGS OF FACT

1. Respondent operates one of the largest continuing care retirement communities in the country with about 2,400 residents and just over 1,000 employees on a single site in Fort Myers, Florida.

2. Petitioner describes herself as "Indo-Guyanese" and testified that she is a member of the Catholic denomination. Petitioner is an articulate woman who projects an air of dignity and refinement. These qualities, when combined, can easily be interpreted by some individuals as producing an arrogant personality type.

3. On June 6, 2013, Petitioner began employment with Respondent and was assigned to work at The Arbor, which is one of Respondent's assisted living facilities. Petitioner was employed as a hospitality care assistant (HCA) and worked on a PRN, or "as needed/on-call," basis. Petitioner's final date of employment with Respondent was May 8, 2014. Petitioner's employment

relationship with Respondent ended after Petitioner refused to return to work after being cleared to do so by her authorized workers' compensation treating physician.

4. During her employment by Respondent, Petitioner was supervised by Stacey Daniels, the registered nurse manager assigned to The Arbor. Ms. Daniels has held this position for 15 years. In her capacity as registered nurse manager, Ms. Daniels supervised seven licensed practical nurses, approximately 35 HCAs and resident care assistants, and two front-desk staff. In addition to Petitioner, Ms. Daniels also supervised Marjorie Cartwright, who works at The Arbors as a full-time HCA.

A. Alleged Harassment by Marjorie Cartwright

5. Petitioner, in her Complaint, alleges that she "endured on-going harassment by Marjorie Cartwright." According to Petitioner, Ms. Cartwright would tell Petitioner things like "we don't allow terrorists to have keys and [a] radio," would ask Petitioner if she is "Muslim," and referred to Petitioner as "that bitch nigger" when speaking with other staff. The Complaint also alleges that Ms. Cartwright told co-workers that she "hate[s Petitioner] to the bone."

6. Olna Exantus and Nadine Bernard were previously employed by Respondent, and each woman worked with both Petitioner and Ms. Cartwright.

7. Ms. Exantus testified that she witnessed an incident between Ms. Cartwright and Petitioner, during which Ms. Cartwright called Petitioner "stupid" and an "idiot" because Petitioner did not deliver to Ms. Cartwright the number of lemons that were requested. Ms. Exantus also recalled an incident where she was working with Ms. Cartwright and Petitioner when, out of the presence of Petitioner, Ms. Cartwright said that she hates Petitioner to the bone or words of similar import.

8. Ms. Bernard testified that Ms. Cartwright referred to Petitioner as "stupid" on one occasion, and on another occasion, she called Petitioner a "bitch." Ms. Bernard also testified that she heard Ms. Cartwright state that she hates Petitioner to the bone or words of similar import.

9. Both Ms. Exantus and Ms. Bernard testified that they heard Ms. Cartwright say that the reason why she hates Petitioner to the bone is because Petitioner thinks that "she is a rich lady" and is, therefore, better than everyone else. Neither Ms. Exantus nor Ms. Bernard testified to having heard Ms. Cartwright refer to Petitioner as either a "nigger" or a "bitch."

10. Ms. Cartwright, who is not Indo-Guyanese, has been employed by Respondent for approximately six years as a full-time HCA. Although Ms. Cartwright testified for only a few minutes during the final hearing, she projects a personality type that can best be described as "feisty." Ms. Cartwright and Petitioner

worked together approximately ten times during Petitioner's period of employment with Respondent. Ms. Cartwright testified that she never referred to Petitioner using either the word "nigger" or "Muslim." Ms. Cartwright did not deny that she referred to Petitioner as "stupid" or called her an "idiot." Ms. Cartwright also did not deny that she stated that she hates Petitioner to the bone.

11. Petitioner was informed by Mses. Exantus and Bernard that she was disliked by Ms. Cartwright, and they suggested to Petitioner that she should take appropriate steps to protect her food items from possible contamination by Ms. Cartwright. Although Petitioner was warned to take such steps, there is no evidence that Ms. Cartwright engaged in any behaviors designed to cause harm to Petitioner. The evidence is clear, however, that Ms. Cartwright disliked Petitioner during Petitioner's period of employment by Respondent.

12. Petitioner contemporaneously prepared personal notes as certain events happened during her employment by Respondent, including issues she claimed to have had with Ms. Cartwright. None of Petitioner's contemporaneous notes indicate that Ms. Cartwright, or anyone else employed by Respondent, referred to her as either a "nigger" or a "Muslim."

13. The evidence does not support Petitioner's claim that Ms. Cartwright referred to Petitioner as a "bitch nigger" or as a "Muslim" as alleged in the Complaint.

B. Stacey Daniel's Alleged Failure to Act on Complaints

14. Petitioner alleges in her Complaint that she attempted to report Ms. Cartwright's behavior to their joint supervisor Ms. Daniels, but was told by Ms. Daniels that she "didn't have time to listen" to Petitioner's complaints.

15. On December 13, 2013, Ms. Daniels met with Petitioner to discuss Petitioner's possible workers' compensation claim. During the meeting, Petitioner mentioned to Ms. Daniels that she was upset with her because approximately three months earlier, on or about September 4, 2013, Ms. Daniels refused to immediately meet with Petitioner to discuss the problems that Petitioner was having with Ms. Cartwright. Ms. Daniels had no recollection of Petitioner approaching her with concerns about Ms. Cartwright. Petitioner acknowledged that she only approached Ms. Daniels once to discuss her concerns about Ms. Cartwright.

16. During the meeting on December 13, 2013, Ms. Daniels reminded Petitioner that she (Ms. Daniels) is very busy during the workday, that it may be necessary to bring matters to her attention more than once, and that she is not always able to stop what she is doing and immediately meet with employees to address work-related disputes. She apologized to Petitioner for the

oversight and immediately offered to mediate any dispute between Petitioner and Ms. Cartwright. Petitioner refused Ms. Daniels' offer because Ms. Cartwright, according to Petitioner, would simply lie about her interaction with Petitioner. Petitioner never complained to Ms. Daniels about Ms. Cartwright referring to Petitioner as either a "nigger" or a "Muslim."

C. Petitioner Complains to Karen Anderson

17. Karen Anderson is the vice-president of Human Resources, Business Support, and Corporate Compliance and has been employed by Respondent for approximately 18 years.

18. On November 21, 2013, Petitioner met with Ms. Anderson to discuss matters related to a workers' compensation claim. During this meeting with Ms. Anderson, Petitioner complained, for the first time, about Ms. Cartwright and the fact that Ms. Cartwright had called Petitioner "stupid" and had also referred to Petitioner as a "bitch." At no time during this meeting did Petitioner allege that she had been referred to by Ms. Cartwright as a "nigger" or a "Muslim." Additionally, at no time during her meeting with Ms. Anderson did Petitioner complain about Ms. Daniels, Petitioner's immediate supervisor, refusing to meet with her in order to discuss her concerns about Ms. Cartwright.

D. Denied Promotion on Three Occasions

19. In her Complaint, Petitioner alleges that she "was denied promotions to Registered Medical Assistant 3 different times" by Ms. Daniels. This allegation is not supported by the evidence. Ms. Daniels testified that Petitioner was never denied, nor did she ever seek, a transfer to the position of registered medical assistant. Ms. Daniels also testified that the only conversation that she and Petitioner had about the position of registered medical assistant occurred before Petitioner was hired by Respondent. Petitioner offered no credible evidence to refute Ms. Daniels' testimony.

E. Retaliatory Reduction in Hours Worked

20. In her Complaint, Petitioner alleges that "[o]ut of retaliation for complaining to Ms. Stacey about Ms. Marjorie, they cut my hours back to 2 days a week without my request." As previously noted, Petitioner worked for Respondent on an "as needed/on-call" basis.

21. Typically, Respondent's on-call staff members are presented with a work schedule that has already been filled in with work times for the full-time staff members. Any work times not filled by full-time staff are then offered to on-call staff. In addition, on-call staff may be called at the last minute, if there is a last minute schedule change by a full-time staff

member. On-call HCAs do not have set work schedules and are offered work hours on a first-come, first-served basis.

22. After Petitioner was cleared to return to work following her alleged work-related injuries, Ms. Daniels, along with Amy Ostrander, who is a licensed practical nurse supervisor, tried to give Petitioner notice of the availability of work shifts that were open on upcoming schedules at The Arbor. Ms. Daniels encouraged Petitioner to provide her with an e-mail address in order to provide Petitioner with a more timely notice of available work shifts, but Petitioner refused to do so. E-mail communication is the most typical form of communication used by the rest of the on-call staff and serves as the most efficient and quickest way for Ms. Daniels to communicate with HCA staff.

23. Because Petitioner would not provide an e-mail address, she was at a disadvantage, because other on-call staff members were able to learn of the availability of work shifts and respond faster to the announced openings. Because Petitioner would not provide an e-mail address and indicated that she preferred to receive the notice of work shift availability by mail, Ms. Daniels complied and sent the schedule of availability to Petitioner by U.S. mail. The evidence establishes that any reduction in the number of hours worked by Petitioner resulted exclusively from her own actions and not as a result of any retaliatory animus by Ms. Daniels or Respondent.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2014).^{1/}

25. Section 760.10(1), Florida Statutes (2013), provides, in part, that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of "race, color, religion . . . [or] national origin." Section 760.10(7) provides, in part, that "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."

26. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

27. Petitioner asserts that Respondent's discriminatory harassment created a hostile working environment. "A hostile work environment claim is comprised of a series of separate acts

that collectively constitute one unlawful employment practice." Amtrak v. Morgan, 536 U.S. 101, 117 (2002).

28. In order to be actionable, harassment based on race, color, national origin, or religion must be so severe or pervasive that the harassment alters the conditions of employment and creates a hostile work environment. "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that [are] sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." Harris v. Forklift Sys., 510 U.S. 17, 21 (1993).

29. Petitioner did not present credible evidence that any harassment she experienced in the workplace occurred as a result of her race, color, national origin or religion. At best, Petitioner's evidence establishes that she and Ms. Cartwright experienced a personality conflict, which is not actionable. McCullum v. Bolger, 794 F.2d 602, 610 (11th Cir. 1986) ("plaintiff cannot turn a personal feud into a . . . discrimination case by accusation.").

30. As for Petitioner's claim of retaliation, it is well established that in order to prove a prima facie case of retaliation prohibited by Title VII, the plaintiff must show "(1) that there was a statutorily protected participation; (2) that an adverse employment action occurred; and (3) that

there was a causal link between the participation and the adverse employment action." Fleming v. Boeing Co., 120 F.3d 242, 248 (11th Cir. 1997).

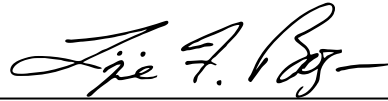
31. Petitioner's claim of retaliation fails for at least two reasons. First, Petitioner's only complaints to Mses. Anderson and Daniels were that she had been called "stupid," an "idiot," and a "bitch" by Ms. Cartwright. Complaints of this nature do not constitute statutorily protected activity, as presented in the instant case, because such statements did not reasonably put Respondent on notice that Petitioner was being targeted by the author of the statements for reasons related to Petitioner's race, color, national origin, or religion. Additionally, even if Petitioner's complaints about being called "stupid," an "idiot," and a "bitch" by Ms. Cartwright amounted to statutorily protected activity, the evidence fails to establish a causal connection between Petitioner reporting the statements and the reason for the termination of her employment. Petitioner presented no credible evidence that Respondent's decision to terminate her for refusing to return to work, despite being medically cleared to do so, was a pretext for unlawful retaliation.

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 finding: that Respondent, Shell Point Retirement Community, did not commit an unlawful employment practice as alleged by Petitioner, Ghanshaminie Lee; and denying Petitioner's Employment Complaint of Discrimination.

DONE AND ENTERED this 23rd day of March, 2015, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
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 23rd day of March, 2015.

ENDNOTE

^{1/} All statutory references are to 2014 Florida Statutes, unless otherwise indicated.

COPIES FURNISHED:

John F. Potanovic, Esquire
Henderson, Franklin, Starnes,
and Holt, P.A.
Post Office Box 280
Fort Myers, Florida 33902-0280
(eServed)

Ghanshaminie Lee
4607 Vinewood Circle
North Fort Myers, Florida 33903-4697

Cheyenne Costilla, General Counsel
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020

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

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.