STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VERA EVANS,

Petitioner,

vs. Case No. 16-0765

LIFE CARE CENTER OF ALTAMONTE SPRINGS,

Respondent.
_____/

RECOMMENDED ORDER

On April 15, 2016, an administrative hearing in this case was held by video teleconference in Orlando and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Vera L. Evans, pro se
402 Cutter Court
Orlando, Florida 32835

For Respondent: Deborah Elizabeth Frimmel, Esquire
Wicker, Smith, O'Hara, McCoy & Ford, P.A.
Suite 1000
390 North Orange Avenue
Orlando, Florida 32802

STATEMENT OF THE ISSUE

The issue in the case is whether Vera Evans (Petitioner) was the subject of unlawful discrimination by Life Care Center

of Altamonte Springs (Respondent) on the basis of disability, in violation of chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

By Employment Charge of Discrimination filed with the Florida Commission on Human Relations (FCHR) on June 22, 2015, the Petitioner alleged that the Respondent committed unlawful discrimination against her on the basis of disability.

By Notice of Determination dated January 13, 2016, the FCHR determined that there was "reasonable cause to believe that an unlawful employment practice occurred."

On February 1, 2016, the Petitioner filed a Petition for Relief with the FCHR. On February 12, 2016, the FCHR forwarded the Petition for Relief to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner testified on her own behalf, presented the additional testimony of one witness, and had Exhibits numbered 20, 21, 24 through 31, and 33 through 38, admitted into evidence. The Respondent presented the testimony of three witnesses, and had Exhibits numbered 1 through 19, 22, and 23, admitted into evidence.

A Transcript of the hearing was filed on April 29, 2016. Both parties filed proposed recommended orders that have been reviewed in the preparation of this Order.

FINDINGS OF FACT

1. Since 1977, and at all times material to this case, the Petitioner has been employed as a licensed practical nurse (LPN).

2. In 2003, the Petitioner began her employment as an LPN with the Respondent in their skilled nursing unit, where she remained employed until her termination from employment on March 26, 2015.

3. According to the formal job description adopted by the Respondent for its LPNs, persons employed as LPNs by the Respondent must "practice dependable, regular attendance" because the essential function of the LPN position is to provide patient care. The Respondent must insure that adequate staffing is available and present to provide such care. The failure of an LPN to be present for work and to be prepared to carry out the functions of the position increases the workload of other staff and can negatively affect patient care.

4. The Respondent has adopted formal policies related to various forms of leave, including routine sick leave as well as extended requests for leave related to medical issues, such as Family Medical Leave Act (FMLA) leave.

5. Additionally the Respondent's formal policies encourage an employee to request an accommodation when medical impairments

present challenges to the performance of the essential functions of an employee's position.

6. At the hearing, the Petitioner acknowledged that she was aware of the Respondent's attendance and leave policies.

7. The Petitioner previously requested and received a work accommodation in February 2014, when she was unable to work a full schedule due to a medical issue.

8. In November 2014, the Petitioner took FMLA leave to address another medical issue. According to the documentation submitted by the Petitioner to the Respondent as part of her FLMA leave request, the period of the Petitioner's incapacity was November 17, 2014, through February 28, 2015.

9. The Petitioner requested and was granted 12 weeks of FMLA leave, which commenced on November 17, 2014. The end of the Petitioner's 12-week FMLA leave period was February 9, 2015.

10. The Respondent's FMLA leave policy specifically provides that an employee must return to work on the next scheduled workday after the expiration of the leave period, unless the employee provides a doctor's note and receives approval from the Respondent.

11. The Respondent's FMLA leave policy also requires an employee to periodically contact the Respondent during the leave period and report her status, including her intention to return to work.

12. During the time that the Petitioner was on approved FMLA leave, the Petitioner failed to contact the Respondent to indicate when she would be available to return to work.

13. Several times during the Petitioner's absence, Jermaine Morris, the Respondent's staffing coordinator, contacted the Respondent and attempted to determine when she would be able to return to work. Mr. Morris did so at the direction of Astrid Lopez, the Respondent's Director of Human Resources.

14. Mr. Morris' attempts were unsuccessful because the Petitioner was unable to identify an anticipated return date during their conversations.

15. The Petitioner's approved FMLA leave expired on February 9, 2015, by which time the Petitioner had failed to communicate to the Respondent her intention to return to work.

16. The Respondent's adopted leave policy specifically requires that non-FMLA leave requests must be submitted in writing to the requesting employee's immediate supervisor, and must state the purpose of the request and the proposed dates of absence.

17. Although the Petitioner had not filed a written request for additional leave or submitted the required documentation prior to the expiration of her FMLA leave, the

Respondent granted non-FMLA leave to the Petitioner when the Petitioner did not return to work.

18. At the same time, Ms. Lopez also placed the Petitioner on an "as needed" work status (also known as "PRN" status). The PRN classification allowed the Petitioner to remain on the Respondent's employment roster and required only that she work a single shift during a 60-day period.

19. The Respondent's leave policy provides that non-FMLA leave is limited to no more than six weeks. Accordingly, the Petitioner's non-FMLA leave period continued through March 26, 2015.

20. Ms. Lopez testified that, despite the Petitioner's failure to submit a written request for non-FMLA leave policy, she decided to grant non-FMLA leave because the Petitioner was a valued employee of the Respondent.

21. The Petitioner never submitted a written request for non-FMLA leave, but apparently after Ms. Lopez had already approved the non-FMLA leave, the Petitioner had a doctor's note delivered to the Respondent.

22. After the Petitioner filed her complaint of discrimination with the FCHR, the Respondent, in preparing to respond to the Petitioner's complaint, located a note in the Petitioner's personnel file, purportedly written by a physician on a prescription pad and signed February 19, 2015. The note

indicated that the Petitioner would require an additional three months of leave.

23. The Petitioner's approved FMLA leave had expired prior to the date of the note.

24. For reasons that are unclear, the note was never delivered to Ms. Lopez for her review. Ms. Lopez had approved the non-FMLA leave for the Petitioner prior to the date of the note.

25. The Petitioner never contacted anyone in the Human Resources office to follow-up on the note, and apparently assumed that an additional three months of leave had been approved.

26. The Respondent's failure to respond to the note was inadvertent. Had the Petitioner actually submitted a written request for non-FMLA leave as required by the Respondent's policy, the Respondent would have been made aware of the note.

27. There is no evidence that the Respondent's failure to respond to the note was purposeful or discriminatory against the Petitioner.

28. The Respondent's leave policy also sets forth the procedure and timelines by which the benefits of an employee on non-FMLA leave are suspended and a COBRA insurance notice issued. The Petitioner's benefits were suspended and she

received a timely COBRA insurance notice as provided by the policy.

29. On March 26, 2015, at the conclusion of the approved non-FMLA leave period, the Respondent terminated the Petitioner's employment.

30. Prior to the termination, the Petitioner had failed to work a single shift as required by her PRN classification. Moreover, the Petitioner had failed to comply with state-mandatory LPN training requirements that had been imposed prior to the termination date.

31. The Petitioner offered no evidence at the hearing that the Respondent's decision to terminate her employment was at all related to disability. To the contrary, the Respondent approved the leave requested by the Petitioner, and in fact, granted additional leave to the Petitioner, without her request, so that she remained on the Respondent's roster of employees.

32. There is no evidence that the Respondent failed to provide any disability-related accommodation requested by the Petitioner.

33. At the hearing, the Petitioner testified that she was not interested in returning to work for the Respondent.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2015).[1/]

35. The Respondent is an employer as the term is defined at section 760.02, Florida Statutes.

36. Section 760.10, Florida Statutes, provides as follows:

> (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.

37. Florida courts interpreting the provisions of section 760.10, have held that federal discrimination laws should be used as guidance when construing provisions of the Florida law. See Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

38. The Petitioner has the ultimate burden to establish discrimination either by direct or indirect evidence. Direct evidence is evidence that, if believed, would prove the existence of discrimination without inference or presumption. Carter v. City of Miami, 870 F.2d 578, 581-582 (11th Cir. 1989).

Blatant remarks, whose intent could be nothing other than to discriminate, constitute direct evidence of discrimination. See Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). There is no evidence of direct discrimination on the Respondent's part in this case.

39. Absent direct evidence of discrimination, the Petitioner has the burden of establishing a prima facie case of discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In order to establish a prima facie case of discrimination on the basis of disability, the Petitioner must show that: she has a disability; she is qualified for the employment position; and that she was subjected to an adverse employment decision. Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1106 (Fla. 5th DCA 1998); Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1224 (11th Cir. 1997).

40. If the Petitioner establishes the facts necessary to demonstrate a prima facie case, the employer must then articulate some legitimate, nondiscriminatory reason for the challenged employment decision. The employer is required only to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, 450 U.S. at

257. The employer "need not persuade the court that it was actually motivated by the proffered reasons." Burdine, 450 U.S. at 254. This burden has been characterized as "exceedingly light." Perryman v. Johnson Products Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983).

41. Assuming the employer articulates a legitimate, nondiscriminatory reason for the employment decision, the burden then shifts back to the Petitioner who must establish that the reason offered by the employer is not the true reason, but is mere pretext for the decision. The question becomes whether or not the proffered reasons are "a coverup for a . . . discriminatory decision." McDonnell Douglas, 411 U.S. at 805.

42. The ultimate burden of persuading the trier of fact that there was intentional discrimination by the Respondent remains with the Petitioner. Burdine, 450 U.S. at 253.

43. The Petitioner has established a prima facie case of discrimination. The evidence in this case establishes that the Petitioner has a disability and is qualified for the employment position she held with the Respondent. By her termination, the Petitioner was subjected to an adverse employment decision.

44. The Petitioner having established her prima facie case, the burden then shifts to the Respondent to articulate a "legitimate, nondiscriminatory reason" for the employment decision. The Respondent has met the burden. The Respondent

terminated the Petitioner's employment solely due to the Petitioner's failure to comply with the Respondent's leave policies and to communicate an anticipated date of return to employment. In fact, the evidence establishes that the Respondent valued the Petitioner as an employee, maintained her on the employment roster beyond the leave time for which she had applied, and would again re-employ the Petitioner as an LPN, if the Petitioner had any interest in returning to work.

45. Upon evidence of a legitimate and nondiscriminatory reason for the Respondent's employment decision, the burden then shifts back to the Petitioner to establish that the reason offered by the employer is not the true reason, but is mere pretext for the decision. The Petitioner has failed to meet this burden. The evidence fails to establish that the termination of the Petitioner's employment by the Respondent was at all related to her disability. The Petitioner has offered no credible evidence that the reasons identified by the Respondent for the termination were pretextual.

46. To the extent that the Petitioner has asserted that the Respondent failed to provide a reasonable accommodation for her medical issue, the evidence fails to support the assertion. The evidence establishes that the Petitioner's only formal request for an accommodation occurred in February 2014, and was granted by the Respondent.

47. The Respondent's failure to respond to the "prescription pad" note does not constitute denial of a request for accommodation. The Petitioner's approved FMLA leave had expired before the date of the note. The Respondent's Human Resources office was unaware that the note even existed until after the Petitioner filed her complaint of discrimination. Had the Petitioner complied with the Respondent's leave policy and filed a written request seeking non-FMLA leave, the Respondent would have been made aware of the "prescription pad" note, and could have taken action on the request. The Respondent cannot be held responsible for failing to approve a request, assuming one was actually submitted, of which they were unaware.

48. Additionally, there is no evidence that the Respondent would not have welcomed the Petitioner back to employment, either full-time or on "PRN" status, had the Respondent been willing to return to her employment. The Respondent's director of nursing described the Petitioner as a good nurse and testified at the hearing that the Petitioner was eligible to return to work for the Respondent.

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 Petitioner's complaint of discrimination.

DONE AND ENTERED this 18th day of May, 2016, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
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 18th day of May, 2016.

ENDNOTE

[1/] All statutory references are to Florida Statutes (2015).

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399
(eServed)

Deborah Elizabeth Frimmel, Esquire
Wicker, Smith, O'Hara, McCoy & Ford, P.A.
Suite 1000
390 North Orange Avenue
Orlando, Florida 32802
(eServed)

Vera L. Evans
402 Cutter Court
Orlando, Florida 32835
(eServed)

Swalitha Richardson
Life Care Legal and Risk Services, LLC
3001 Keith Street Northwest
Cleveland, Tennessee 37312

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

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.