

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRACY JEAN,

Petitioner,

vs.

Case No. 16-1229

FLORIDA HOSPITAL MEDICAL GROUP,

Respondent.

_____ /

RECOMMENDED ORDER

On July 6, 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: Tracy Jean, pro se
Apartment 206
915 Northeast 199th Street
Miami, Florida 33179

For Respondent: Christopher R. Parkinson, Esquire
Brian J. Moran, Esquire
Moran Kidd Lyons Johnson, P.A.
Suite 900
111 North Orange Avenue
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue in the case is whether Tracy Jean (Petitioner) was the subject of unlawful discrimination by Florida Hospital

Medical Group (Respondent)^{1/} in violation of chapter 760, Florida Statutes (2015).^{2/}

PRELIMINARY STATEMENT

By Charge of Discrimination dated August 14, 2015, and filed with the Florida Commission on Human Relations (FCHR), the Petitioner alleged that the Respondent committed unlawful discrimination on the basis of race.

By Notice of Determination dated February 3, 2016, the FCHR found that there was "no reasonable cause to believe that an unlawful employment practice occurred."

On March 2, 2016, the Petitioner filed a Petition for Relief (Petition) with the FCHR. On March 3, 2016, the FCHR forwarded the Petition to the Division of Administrative Hearings, which scheduled the dispute for a hearing to commence on May 10, 2016. Upon the Petitioner's request, the hearing was continued and subsequently rescheduled for July 6, 2016.

At the hearing, the Petitioner testified on her own behalf and had Exhibits 1 and 12 admitted into evidence. The Respondent presented the testimony of two witnesses and had Exhibits 5 through 11, 13 through 15, 18 through 21, and 23 admitted into evidence. Petitioner's Exhibit 7 was identical to, and was admitted as, Respondent's Exhibit 9.

A Transcript of the hearing was filed on August 2, 2016. The Respondent filed a Proposed Recommended Order that has been reviewed in the preparation of this Order.

FINDINGS OF FACT

1. The Petitioner is a black female, who is qualified for employment as a Florida-licensed registered nurse (RN).

2. The Respondent is an "employer" as defined by the Florida Civil Rights Act of 1992.

3. At a job fair held on June 9, 2015, the Petitioner met representatives from the Respondent, including Tracy Decker, a manager, and Sarah Emerson, a nurse recruiter, and was interviewed by them in relation to potential employment.

4. Ms. Emerson subsequently called the Petitioner to express an interest in hiring the Petitioner as an RN, and to encourage her to submit an application.

5. On June 23, 2015, the Petitioner submitted an electronic employment application for a position as an RN at Florida Hospital.

6. The Respondent's online application form included questions calling for disclosure of an applicant's criminal history.

7. Although the Respondent does not automatically reject an applicant who discloses previous criminal activity, the failure to disclose such activity may be deemed by the

Respondent to be a falsification of the information, and may disqualify an applicant from employment. The Respondent's online application form states as follows:

I understand that I will not be automatically disqualified from possible employment if, in response to application questions, I disclose criminal records information. I also understand that any false, misleading, incomplete or omitted information in response to application questions will result in ineligibility for employment or termination of employment as it will be deemed falsification of information. As a result, I hereby confirm that if I failed to disclose any criminal records information, it is because it is not required in response to the application's questions (e.g., parking tickets) or it is because I am certain that the information has been expunged and thus, will not show up during a background check. Finally, I understand that my mistaken belief about whether the response is required or whether the information has been expunged is not a defense to falsification. Accordingly, if I erroneously omitted information, I will be ineligible for employment or my employment will be terminated for falsification.

* * *

Employment is subject to completion of pre-employment procedures, including but not limited to; verifying employment/personal references; conducting a background investigation/criminal record check; verifying driving record (if appropriate); and confirmation of licensure or registration.

8. In relevant part, the Respondent's online application form stated as follows:

Have you served any of the following for any criminal offense? (check all that apply):

pretrial diversion

* * *

probation (any type)

* * *

Any other type of alternative, deferred, suspended, postponed or conditional prosecution, adjudication, disposition, sentence, program or release not listed above, please describe:
(if not, type N/A)

9. The Petitioner's response was "N/A" indicating that she had not served any type of punitive sentence or alternative disposition for a criminal offense.

10. On July 19, 2015, the Respondent extended a written offer of employment to the Petitioner. The letter was issued by Erika Cardona-Geis, a recruiter for the Respondent. The offer was contingent on the completion of various requirements, including a background check.

11. For the Respondent's purposes, an acceptable background check is one that corresponds with the information disclosed on a potential employee's application. The Respondent's focus is on the truthfulness and integrity of potential employees, especially those such as RNs employed to

provides services and medications to patients.

12. The Respondent utilized a third-party vendor to perform background checks on potential employees. The Respondent provided the vendor's website link to the Petitioner so that she could submit her information for the background check, and the Petitioner did so.

13. On July 27, 2015, the Respondent received the results of the Petitioner's background check from the vendor.

14. The Petitioner's background check revealed criminal activity that had not been disclosed by the Petitioner in her employment application.

15. According to the background check, the Petitioner was charged with separate counts of Grand Theft, Obstruction of Fire Equipment, and Criminal Mischief on September 7, 2008, in Broward County, Florida (Case No. 08-021191CF10-A). The charges resulted in the Petitioner being placed on probation for 15 months and required to make restitution. Adjudication of guilt was withheld.

16. The background check also revealed that the Petitioner was charged with solicitation to commit prostitution on August 16, 2010, in Miami-Dade County, Florida (Case No. B-10-042025-B). The Petitioner entered a pre-trial diversion program, and the charge was nolle prossed.

17. The Respondent's formal policy provided that falsification of background check information in an employment application may result in an applicant being deemed ineligible for employment. Nonetheless, when an applicant's background check revealed information other than that disclosed on an employment application, the Respondent's standard procedure was to allow an applicant an opportunity to submit additional information to explain the discrepancy, so that the Respondent could assess the reason for nondisclosure rather than automatically reject the applicant.

18. Because the Petitioner's background check included information inconsistent with that submitted by the Petitioner in her employment application, Ms. Cardona-Geis contacted the Petitioner and offered her the option to submit a written statement regarding the discrepancies and to provide related court records.

19. In response, the Petitioner submitted a letter of explanation dated July 28, 2015, and related court records, as well as a letter from the Florida Board of Nursing and a letter purportedly written by an attorney.

20. Ms. Cardona-Geis provided the Petitioner's response and materials to Karla Muniz, the Respondent's human resources director.

21. Ms. Cardona-Geis also provided the Petitioner's response and materials to Lorraine Pitre, a lawyer and member in good standing of the Florida Bar, employed by the Respondent as an employee relations consultant.

22. Ms. Pitre was responsible for providing counsel and advice to the management of the Respondent's Human Relations Department. She was also directly involved in the creation of the Respondent's human resource policies and practices, including those relevant to the Respondent's consideration of the Petitioner's employment application.

23. Ms. Pitre was the Respondent's employee specifically assigned to review matters involving employment background check discrepancies.

24. Ms. Pitre reviewed the Petitioner's letter of explanation, wherein the Petitioner stated, in relevant part, as follows:

The charges were not disclosed because I sealed & expunged the cases. Under the advice of my attorney, he told me there was no need to disclose this information once I went through the expungement process.

25. Ms. Pitre reviewed the court documents submitted by the Petitioner and publicly-available records accessible through the Broward County Clerk's Office and determined that the Broward County charges that resulted in the Petitioner's probationary sentence had not been sealed or expunged.

26. Ms. Pitre also reviewed the letter submitted by the Petitioner and purportedly written by an attorney. The letter, dated August 4, 2015, stated as follows:

The set forth individual has retained my services to expunge and seal the mentioned cases. I am not at liberty to disclose the information, but I am aware that my client has revealed her past indiscretions. The client, Tracy Jean, has honestly answered "no" to the set forth employment questions of convictions. Furthermore, my client informed me that she has submitted the appropriate documents and has revealed this information to you, which under Florida Statutes is not necessary. Tracy has honored all of your request [sic], has not knowingly lied on the application, and only wants to be looked at as a professional.

27. The letter contradicted the Petitioner's assertion that the charges had been expunged or sealed prior to the submission of her application for employment.

28. Although the letter identified the writer as "Eric Volz, ESQ," the letter was not printed on letterhead and was unsigned. Ms. Pitre, who routinely interacted with attorneys in private practice, was concerned about the authenticity of the letter.

29. Ms. Pitre discussed her findings and concerns with Ms. Muniz and with Ms. Cardona-Geis.

30. Based on the Respondent's review of the Petitioner's application, the background check information, and the materials subsequently submitted by the Petitioner, the Respondent

determined that the Petitioner had submitted false responses to the criminal background history questions on the application.

31. The Respondent revoked the conditional offer of employment previously extended to the Petitioner.

32. There is no evidence that the Petitioner's race was a consideration in the Respondent's decision to revoke the conditional offer of employment.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

34. Chapter 760, Part I, Florida Statutes, sets forth the Florida Civil Rights Act of 1992 (the "Act").

35. The Petitioner has alleged that she was subjected to unlawful discrimination by the Respondent on the basis of race in violation of the Act. The Petitioner has the burden of proving by a preponderance of the evidence that the Respondent committed an unlawful employment practice. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

36. The Respondent is an "employer" as defined in section 760.02(7).

37. Section 760.10 provides in relevant part 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.

38. 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).

39. 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 in this case.

40. When there is no direct evidence of discrimination, the Petitioner may establish unlawful discrimination through the presentation of circumstantial evidence. Such evidence is

subject to the analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under such analysis, the Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination.

41. If the Petitioner is able to prove a prima facie case by a preponderance of the evidence, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its actions. Assuming the employer articulates a legitimate, non-discriminatory 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. In this case, the burden has not been met because the Petitioner has failed to establish a prima facie case of discrimination.

43. To establish a prima facie case of discrimination, the Petitioner must show that; (1) she is a member of a protected class; (2) she was qualified for the position; (3) she suffered

an adverse employment action; and (4) she was treated differently than other similarly situated employees who are not members of her protected class. McDonnell Douglas, 411 U.S. at 802.

44. In this case, the evidence establishes that the Petitioner is a member of a protected class, that she was qualified for the position sought, and that she suffered an adverse employment action. However, the Petitioner has failed to establish a prima facie case of discrimination because there is no evidence that she was treated differently than other similarly situated employees who were not members of a protected class. Because the failure to establish a prima facie case ends the analysis, the Petitioner's complaint of discrimination must be dismissed.

45. Had the Petitioner met the burden of establishing a prima facie case, the burden would have shifted to the Respondent to establish a legitimate, non-discriminatory reason for its decision to withdraw the conditional employment offer. The evidence offered by the Respondent would have met the burden.

46. The Respondent's offer of employment to the Petitioner was conditional on the Petitioner meeting clearly stated requirements, including acceptable completion of a background check. The background check indicated that the Petitioner's

response to one question on the employment application was false. Consistent with the Respondent's standard practice, the Respondent asked the Petitioner to submit additional information to clarify the circumstances. The Petitioner submitted additional information that was reviewed by the Respondent. Based on a review of all relevant information, the Respondent concluded that the Petitioner's disclosures on the employment application were untruthful and the conditional offer of employment was rescinded.

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 25th day of August, 2016, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of August, 2016.

ENDNOTES

^{1/} The Respondent has asserted that it should properly be identified as Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital. For purposes of this proceeding, the identification of the Respondent is as set forth by the Florida Commission on Human Relations in its Transmittal of Petition dated March 2, 2016.

^{2/} All statutory references are to Florida Statutes (2015).

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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.