STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIDGET L. MONTGOMERY,

Petitioner,

vs. Case No. 17-0129

TALLAHASSEE MEMORIAL HEALTHCARE, INC.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on March 10, 2017, in Tallahassee, Florida, before W. David Watkins, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bridget L. Montgomery, pro se
524 East Paul Russell Road
Tallahassee, Florida 32301

For Respondent: Brian A. Newman, Esquire
Gerald D. Bryant, Esquire
Pennington, P.A.
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STATEMENT OF THE ISSUE

Did Respondent, Tallahassee Memorial Healthcare, Inc. (TMH or Respondent), discriminate against Petitioner on account of

her race, color, age, sex, or marital status in violation of chapter 760, Florida Statutes?

PRELIMINARY STATEMENT

Petitioner, Bridget L. Montgomery (Petitioner or Ms. Montgomery), filed a Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) on June 24, 2016. In her Complaint, Petitioner alleged that Respondent discriminated against her on the basis of her race (African-American), color, age, sex, and marital status when it terminated her employment on May 4, 2016. The allegations were investigated, and on December 7, 2016, FCHR issued its Determination: No Cause.

On January 9, 2017, Petitioner filed a Petition for Relief requesting an administrative hearing regarding the FCHR's "No Cause" determination pursuant to section 760.11(7).

The matter was referred to the Division of Administrative Hearings on January 11, 2017, and on January 24, 2017, Administrative Law Judge Yolanda Y. Green issued a Notice of Hearing, setting the matter for final hearing on March 10, 2017. On March 6, 2017, the case was transferred to the undersigned for all further proceedings.

The final hearing was convened as noticed on March 10, 2017. At hearing, Petitioner testified on her own behalf and did not offer any exhibits in evidence.

Respondent presented the testimony of Sheree Porter, TMH Rehabilitation Center Manager - Neuro Outpatient Clinic; and Norman Pasley, TMH Rehabilitation Center Administrator. Respondent also presented the testimony of Shakayla Birch, Investigator Specialist II with FCHR (by deposition transcript). Respondent's Exhibits 1 through 15 were admitted into evidence without objection.

A one-volume Transcript of the final hearing was filed on April 3, 2017. At the conclusion of the hearing, the parties agreed to file proposed orders within 10 days of the transcript filing. Respondent timely filed its Proposed Recommended Order on April 13, 2017. Petitioner did not file a proposed recommended order.

All statutory citations are to Florida Statutes (2016), unless otherwise indicated.

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses and other evidence presented at the final hearing, and on the entire record of this proceeding, the following Findings of Fact are made:

1. Petitioner was employed by Respondent as a Rehab Technician in the TMH Rehabilitation Center beginning in 2004.

2. Petitioner was supervised by Sheree Porter, the Manager of the Neurological Outpatient Clinic of the TMH Rehabilitation

Center, during the entire course of her employment as a Rehab Technician.

3. In January or February of 2016, Petitioner met a patient who was receiving outpatient treatment at the Rehabilitation Center to recover from a stroke. The patient's treatment consisted of speech therapy, occupational therapy, physical therapy, social work, and counseling. As a recovering stroke survivor, the patient is a member of a vulnerable population.

4. Petitioner did not know the patient prior to meeting him at the Rehabilitation Center in early 2016.

5. Petitioner exchanged phone numbers with the patient after they met. Petitioner called and text messaged the patient multiple times over the next month or two.

6. On April 19, 2016, Petitioner drove to the patient's apartment and picked him up at approximately 6:30 p.m. Petitioner then brought the patient to her house. They arrived at Petitioner's house at approximately 7:00 p.m.

7. Petitioner had a glass of wine before she picked up the patient. She continued to drink wine when she returned home with the patient. The patient did not drink alcohol.

8. Petitioner and the patient talked and played pool at Petitioner's house for approximately three hours. At some point, the patient became upset and told Petitioner he was ready to go

home. At approximately 10:00 p.m., Petitioner drove the patient back to his apartment.

9. After driving the patient back to his apartment, Petitioner sent a text message to the patient in which she apologized for upsetting the patient.

10. The patient reported this interaction to Sheree Porter and Norman Pasley, the Administrator of the Rehabilitation Center. The patient also reported that while he was at Petitioner's house, Petitioner tried to persuade him to drink alcohol and made sexual advances toward him. The patient reported he felt unsafe and uncomfortable because of Petitioner's actions.

11. Petitioner denied trying to persuade the patient to drink alcohol and denied making sexual advances toward him.

12. Sheree Porter and Norman Pasley interviewed Petitioner regarding the patient's report. Both found the patient's version of events to be more credible than Petitioner's.

13. On May 4, 2016, Respondent discharged Petitioner from employment because of Petitioner's conduct with the patient. The decision to discharge Petitioner was made jointly by Sheree Porter, Norman Pasley, and Elissa Saavedra, the TMH Human Resources Director of Colleague Relations. Petitioner would have been discharged even if her account of her conduct with the patient were true.

14. Petitioner filed a charge of discrimination with FCHR on June 24, 2016, contesting her termination from TMH as based upon her race, color, sex, age, and marital status.

15. Petitioner's charge of discrimination was investigated by Shakayla Birch, Investigator Specialist II with FCHR. Ms. Birch conducted a telephone interview of Petitioner on October 14, 2016, as part of her routine investigation of a charge of discrimination. During this telephone interview, Petitioner denied that her termination from TMH was motivated by her race, color, age, sex, or marital status. Rather, per Ms. Birch's notes, Petitioner claimed her termination was a "personal issue" with Sheree Porter who she claimed "wanted to get rid of her since they always disagreed."

16. On December 7, 2016, FCHR entered a determination that no reasonable cause exists to believe that Petitioner was subjected to an unlawful employment practice. Petitioner timely requested a hearing to challenge this determination pursuant to section 760.11(7), thus giving rise to this proceeding.

17. Petitioner contends that other TMH employees (Tracy Dobson, Kendra Alex, and Carolyn Bryant) had relationships of some kind with TMH patients and yet were not terminated. Petitioner does not, however, have direct knowledge that any of these employees were involved in a relationship with a patient before the patient was discharged or that their supervisors knew

about an inappropriate relationship. Petitioner also contends that Sheree Porter had a relationship with a patient, but the patient was Mrs. Porter's husband at the time of his admission.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569 and 120.57(1), Florida Statutes.

19. The Florida Civil Rights Act of 1992 ("FCRA") prohibits discrimination in the workplace. Among other things, FCRA makes it unlawful for an employer:

> To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

§ 760.10(1)(b), Fla. Stat.

20. Florida's chapter 760 is patterned after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting chapter 760. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009).

21. Petitioner claims she was discriminated against by TMH because of her race (African-American), color, sex (female), age

and marital status (single) in violation of FCRA. Specifically, Petitioner alleges that each of the above was a motivating factor in Respondent's decision to terminate her employment.

22. Section 760.11(7) permits a party who receives a no cause determination to request a formal administrative hearing before the Division of Administrative Hearings. "If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." Id.

23. Petitioner claims disparate treatment (as opposed to disparate impact) under the FCRA; in other words, she claims she was treated differently because of her race, color, sex, age, and marital status. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against her. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). A party may prove unlawful race discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631 (M.D. Fla. May 27, 2009); 2009 U.S. Dist. LEXIS 44885 (M.D. Fla. 2009). When a petitioner alleges disparate treatment under chapter 760, or the Civil Rights Act, the petitioner must prove that her protected status "actually motivated the employer's decision. That is,

the [petitioner's race] 'must have actually played a role [in the employer's decision-making] process and had a determinative influence on the outcome.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (alteration in original). The same analysis applies to all of Petitioner's claimed bases of discriminatory. See Valenzuela v. GlobeGround North America, LLC, 18 So. 3d 17, 21-22 (Fla. 3d DCA 2009).

24. Direct evidence is evidence that, "if believed, proves [the] existence of [a] fact in issue without inference or presumption." Burrell v. Bd. of Trs. of Ga. Mil. Coll., 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

25. The record in this case did not establish unlawful race discrimination by direct evidence.

26. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the

employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC, supra. Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

27. Accordingly, Petitioner must prove discrimination by indirect or circumstantial evidence under the McDonnell Douglas framework. Petitioner must first establish a prima facie case by showing: (1) she is a member of a protected class; (2) she was qualified for the position held; (3) she was subjected to an adverse employment action; and (4) other similarly situated employees, who are not members of the protected group, were treated more favorably than Petitioner. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "When comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (l1th Cir. 2004).

28. Thus, in order to establish a prima facie case of disparate treatment based on race, Petitioner must show that TMH treated similarly situated employees of a non-protected class differently or less severely. Valdes v. Miami-Dade Coll., 463 Fed. Appx. 843, 845 (11th Cir. 2012); Camara v. Brinker Int'l, 161 Fed. Appx. 893 (11th Cir. 2006).

29. Petitioner did not establish the fourth element of a prima facie case, the existence of a similarly situated comparator who was treated more favorably. A comparator must be similarly situated in all relevant respects, including position, job duties, disciplinary history, and misconduct. Valenzuela, 18 So. 3d at 23. When the claimant's conduct is at issue, "the quantity and quality of the comparator's misconduct must be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." Id. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

30. Petitioner's conduct is at issue. The evidence established that Petitioner repeatedly called and texted a current TMH patient who she met at TMH facilities. The patient was receiving treatment to recover from a stroke. Petitioner brought the patient back to her house for several hours one night while she drank alcohol. Petitioner failed to prove that a similarly situated TMH employee engaged in nearly identical conduct without being discharged. While Petitioner testified that she believes four employees--Sheree Porter, Tracy Dobson, Kendra Alex, and Carolyn Bryant--had relationships of some kind with TMH patients, none of these employees is an appropriate comparator.

31. Mrs. Porter is not an appropriate comparator because the patient in question is (and was at the time his admission) her husband.

32. Ms. Dobson, Ms. Alex, and Ms. Bryant are not appropriate comparators because their alleged relationships were with former TMH patients. Petitioner's conduct involved a current TMH patient. What is more, Petitioner did not prove that Ms. Dobson, Ms. Alex, and Ms. Bryant engaged in relationships--let alone inappropriate relationships--with any former TMH patients. Petitioner testified that she "believes" these employees had relationships of some kind with former TMH patients, but Petitioner admitted she has no direct knowledge of the alleged relationships and offered no other evidence to substantiate their existence. Petitioner's uncorroborated speculation is not proof. Therefore, even if engaging in a personal relationship with a former patient constituted nearly identical conduct, Petitioner failed to meet her burden of proving that Ms. Dobson, Ms. Alex, or Ms. Bryant engaged in such conduct.

33. The inquiry can end here. Without an appropriate comparator, Petitioner cannot establish a prima facie case of discrimination on any of her claims. McDonnell Douglas, 411 U.S. 792. But Petitioner's claims also fail for another

reason: she did not rebut Respondent's legitimate, non-discriminatory reason for her discharge.

34. Respondent presented evidence that it discharged Petitioner because she engaged in inappropriate behavior with a current TMH patient. The burden is on Petitioner to prove Respondent's stated reason was mere pretext for unlawful discrimination. Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997).

35. To prove pretext, a claimant must show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Id. Moreover, when a claimant alleges she was fired for misconduct, whether the claimant actually engaged in the misconduct is irrelevant. See Bruce v. Sam's East, Inc., 2012 WL 6733034, *3 (N.D. Fla. 2012). "What matters is not what [the claimant] actually did or said or what she believed, but only what the [employer's] decisionmakers reasonably concluded she did or said. As the Eleventh Circuit has recognized time and again, 'The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory or retaliatory reason.'" Id.

36. Petitioner disputes the patient's account of her behavior on the night she brought the patient to her house. But the issue is not what Petitioner did or said that night. The issue is what Respondent's decision-makers--Sheree Porter, Norman Pasley, and Elissa Saavedra--reasonably concluded Petitioner did or said. Id. Respondent presented evidence that the decision-makers concluded Petitioner offered the patient alcohol and made sexual advances toward him. Petitioner offered no evidence to suggest this conclusion was unreasonable or was motivated by the Petitioner's race, color, age, sex, or marital status. Moreover, Respondent presented evidence that it would have discharged Petitioner even if Petitioner's account of the night was accurate. Petitioner offered no evidence to shed doubt on this testimony. Thus, Petitioner failed to rebut Respondent's legitimate, non-discriminatory reason for her discharge.

37. "The ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [employee] remains at all times with the [employee]." Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 253. In this case, Petitioner failed to meet her burden.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human

Relations dismiss the Petition for Relief from an Unlawful Employment Practice filed against Respondent.

DONE AND ENTERED this 26th day of May, 2017, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
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this 26th day of May, 2017.

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.