STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMAINE JONES,

Petitioner,

vs. Case No. 17-1996

WINTER HAVEN HOSPITAL, INC., *AMENDED AS TO PRELIMINARY STATEMENT ONLY

Respondent.
_____/

AMENDED RECOMMENDED ORDER*

D. R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a hearing in this case by video teleconference at sites in Lakeland and Tallahassee, Florida, on June 20, 2017.

APPEARANCES

For Petitioner: Jason Bradford Woodside, Esquire
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For Respondent: Thomas M. Gonzalez, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner was unlawfully terminated from employment by Respondent on the basis of his race.

PRELIMINARY STATEMENT

On September 27, 2016, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) alleging that he "had been discriminated against because of [his] race." After the FCHR determined no reasonable cause existed to believe an unlawful employment practice had occurred, Petitioner filed his Petition for Relief. The matter was then referred by the FCHR to DOAH to resolve the dispute.

At the hearing, Petitioner testified on his own behalf. Petitioner's Exhibits 1 through 5 were accepted in evidence. Respondent presented the testimony of four witnesses. Respondent's Exhibits 1 through 16 were accepted in evidence.

A one-volume Transcript of the hearing has been prepared. Both parties timely filed a proposed recommended order.

FINDINGS OF FACT

A. Background

1. Petitioner is a 32-year-old male of African-American heritage. Respondent is a full-service, non-profit hospital in Winter Haven, Florida, and is a part of the BayCare Health System (Baycare).

2. Petitioner began working at the hospital in 2007. In June 2010, he transferred to a mental health technician position in the Center of Psychiatry and continued working in that position until his termination in late 2015. Except for the

incident that resulted in his termination, there is no record of any other disciplinary action.

3. On November 10, 2015, Petitioner and another mental health technician, Ted Mitchell, escorted an unruly, combative 62-year-old male patient, J.Q., to the ward's seclusion room. The patient suffers from mental limitations, takes medications, was admitted to the hospital under the Baker Act, and is considered a vulnerable adult. The patient is around five feet, eight inches tall, and weighs more than 200 pounds. Petitioner is six feet tall and weighs around 160 pounds. While Petitioner and Mitchell restrained J.Q. on a bed so that he could be medicated by a nurse, two employees alleged that they observed Petitioner strike J.Q. with his fist.

4. Pursuant to hospital policy, Petitioner was placed on administrative leave pending the outcome of an investigation. Based on the hospital's in-house investigation, which confirmed the charges, Petitioner was terminated on December 13, 2015, for violating hospital policy.

5. Because a vulnerable adult was injured, the hospital was required to notify the Department of Children & Families (Department). After conducting an Adult Institutional Investigation of the incident, the Department concluded that Petitioner had injured the patient and closed its investigation with verified findings of physical injury. Although Petitioner

asserts that "an independent investigation conducted by the Department [cleared him] of any wrongdoing," this assertion is contrary to the evidence.

6. After being terminated, Petitioner filed his Charge of Discrimination. Petitioner contends he was terminated on the basis of his race, and that a white employee in the same position, David Tiege, was involved in numerous incidents of this sort, including one in January 2016, but was not terminated.

B. The Incident

7. On November 10, 2015, Petitioner and Mitchell, also an African-American, were directed to conduct a safety check of all patient rooms in the ward and remove items that were considered contraband. Although no contraband was found in J.Q.'s room, he became very upset at the intrusion and began yelling at them.

8. Ten or 15 minutes later, Petitioner went to the Social Room to do a patient count. That room is used by patients to read, watch television, and socialize with one another. J.Q. entered the room, spotted Petitioner, "rushed" him, and began swinging and kicking. Petitioner bear-hugged the patient to protect his own body and looked around for help. A few moments later, Mitchell arrived, and the two escorted J.Q. to the seclusion room, which is next door to the Social Room. During

the transfer of the patient, Petitioner says he sustained injuries when J.Q. struck and kneed him.

9. Because J.Q. was kicking, screaming, and trying to punch and spit on them, Petitioner and Mitchell placed him in a bed and restrained him until the nurse could administer an injection.

10. Two registered nurses, Mary Jo Combs and Melissa White, both Caucasian, arrived within a minute or two. Combs intended to administer the injection. While they stood at the door no more than a few feet from J.Q., both nurses observed Petitioner clench his fist and strike a blow to J.Q's lower back. Petitioner then looked up to see if anyone had seen him hit the patient. Petitioner asserts that Mitchell can confirm that no blow was struck, but Mitchell did not testify at the final hearing.

11. After sedating the patient, Combs immediately reported the incident to her charge nurse, who instructed her to contact the nurse manager of the ward, Lynne Harty. Details of the incident eventually worked their way through the chain of command until they reached Rosemary Myers, a manager at Team Resources, a Baycare unit that investigates this type of incident.

12. Based on interviews with a number of hospital personnel, including Petitioner, Mitchell, and the two nurses

who observed the incident, a three-person investigative team consisting of Harty, Myers, and the director of the behavioral health division, Anthony Santucci, concluded that Petitioner had struck the patient. The hospital then notified the Department, which conducted a second investigation and rendered a confirmed abuse report on January 12, 2016. Although Petitioner denies he hit the patient, the greater weight of evidence supports a finding that he did.

C. Petitioner's Termination

13. Hospital policy requires termination of employment whenever an employee strikes a patient. Petitioner acknowledged that he was aware of this policy before the incident. Based on the hospital's in-house investigation, the three-member team concluded that the charge was substantiated and recommended that Petitioner be terminated. Petitioner was terminated effective December 13, 2015, or before the Department closed its abuse investigation with a verified finding of abuse. A suggestion by Petitioner that the hospital's decision was based in part on the Department's confirmed abuse report is contrary to the evidence. There is no evidence that race was a factor in the hospital's decision to terminate Petitioner.

14. In his Charge of Discrimination, Petitioner contends that a white employee, Daniel Tiege, was not terminated even though he was involved in "numerous altercations with patients

many of which resulted in injuries sustained by the patients," including one incident in January 2016.

15. To begin with, there is a record of only one complaint against Tiege. In January 2016, a complaint was lodged against Tiege by a patient who contended Tiege had injured him. Unlike Petitioner's encounter, there were no other witnesses to the incident. In Tiege's case, a combative patient went to his bathroom and slammed the door while trying to elude Tiege. After opening the door, Tiege attempted to restrain the patient and the two fell onto the floor. The patient injured his head when he fell causing a bruise on his face, and he was immediately administered first aid. After conducting an in-house investigation, the hospital determined Tiege did not intentionally injure the patient during their encounter. A similar investigation conducted by the Department reached the same conclusion.

16. Like Petitioner, Tiege was placed on administrative leave pending the outcome of the hospital's investigation. The investigation was performed in the same manner as the investigation of Petitioner. After a determination was made that the patient's injury was not intentionally inflicted, Tiege was reinstated. Tiege is not a relevant comparator.

17. Petitioner points out that he filed a criminal complaint against J.Q. with the local police department because

J.Q. injured him during the encounter on November 10, 2015. But even if Petitioner was injured, this does not excuse his striking the patient, a violation of hospital policy.

18. Petitioner contends the investigation was flawed because the hospital had no cameras in the quiet area to confirm his version of what occurred. He also contends the hospital declined to implement his suggested staffing changes that are designed to minimize conflicts between staff and patients. However, eye witness testimony by two other employees confirms the allegation.

19. In his Charge of Discrimination, Petitioner alleges that the investigation was flawed because it was conducted by Myers, a Caucasian, and was based on information provided by two Caucasian employees. But no evidence was produced to support the allegation that the charge was sustained because of his race.

CONCLUSIONS OF LAW

20. 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.

21. Section 760.10(1)(a) makes it an unlawful employment practice for an employer to discharge any individual because of his race.

22. Regarding race discrimination, Florida law is construed in conformity with the federal law. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009). Accordingly, chapter 760 claims are analyzed under the same standards as its federal prototype.

23. When bringing a claim of discrimination under the Florida Civil Rights Act based on race, a complainant may proceed on the theory of disparate impact, disparate treatment, or both. EEOC v. Joe's Stone Crab, Inc., 220 F.2d 1263, 1273 (11th Cir. 2000). Here, Petitioner has alleged facts giving rise to a claim of disparate treatment on the basis of his race. In other words, he contends he was intentionally treated differently than similarly-situated employees on the basis of his race. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1025 (11th Cir. 2016). "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000).

24. Discriminatory intent can be established through direct or circumstantial evidence. Since no direct evidence of discrimination on the basis of race was presented, a finding of discrimination, if any, must be based on circumstantial evidence.

25. To establish a prima facie case of race discrimination based on circumstantial evidence, Petitioner must demonstrate by a preponderance of the evidence that: 1) he is a member of a protected class; 2) he was qualified for the position; 3) he was subjected to an adverse employment action; and 4) his employer treated similarly-situated employees outside of his protected class more favorably than he was treated. Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006).

26. The first three elements of the prima facie case have been met by Petitioner. He is African-American, he was qualified for the position, and he was terminated from his position at the hospital. He failed, however, to establish that other similarly-situated employees outside his protected class were treated more favorably than he.

27. An adequate comparator for Petitioner must be similarly-situated in all relevant respects. Johnson v. Great Expressions Dental Ctrs. of Fla., 132 So. 3d 1174 (Fla. 3d DCA 2014). As explained by the court, they must have "reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to plaintiff's, without such differentiating conduct that would distinguish their conduct or the appropriate discipline for it." Id. at 1176. In other words, these individuals must be

similarly situated in all relevant respects, including position, job duties, disciplinary history, and misconduct. Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (11th Cir. 2004). This means that the comparator's misconduct must be "nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." Valenzuela, 18 So. 3d at 23; Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

28. The evidence does not show that David Teige's conduct was "nearly identical" to Petitioner's actions or that Tiege was treated differently. Although Petitioner alleges Tiege had a string of altercations with patients resulting in injuries to the patients, there is only one reported complaint against that individual. Second, unlike Petitioner's incident, there were no witnesses present when the Tiege's alleged misconduct occurred and thus no corroboration of the abuse. Third, an investigation by the hospital (and the Department) confirmed that Tiege did not act inappropriately. Thus, Petitioner failed to prove that Tiege engaged in nearly identical conduct without being discharged. And there is no evidence that the hospital's investigation of Tiege was flawed or motivated by the fact that Tiege is white. Tiege is not a similarly-situated comparator.

29. Without an appropriate comparator, Petitioner cannot establish a prima facie case of discrimination and the inquiry must end.

30. Petitioner's claim must also fail for another reason: he did not rebut Respondent's legitimate, non-discriminatory reason for his discharge, namely, the violation of hospital policy that forbids an employee from striking a patient. The burden is on Petitioner to prove Respondent's stated reason was mere pretext for unlawful discrimination. Here, there was no evidence that the hospital's action was taken for a discriminatory reason.

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 11th day of August, 2017, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 11th day of August, 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 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.