

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LISA J. FUNCHESS,

Petitioner,

vs.

Case No. 18-3949

FLORIDA DEPARTMENT OF HEALTH-
VOLUSIA,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 19, 2018, by video teleconference at sites in Tallahassee and Daytona Beach, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lisa J. Funchess, pro se
Apartment 706
3900 Yorktowne Boulevard
Port Orange, Florida 32129

For Respondent: Richard V. Blystone, Esquire
Garganese, Weiss & D'Agresta
111 North Orange Avenue
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STATEMENT OF THE ISSUE

Whether Petitioner demonstrated that she was terminated from employment by Respondent, Florida Department of Health-

Volusia (Respondent or FDOH-Volusia), as the result of an unlawful employment practice based on her identification with a protected class, or as retaliation for Petitioner's opposition to a practice which is an unlawful employment practice.

PRELIMINARY STATEMENT

On June 27, 2017, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission) in which she alleged that:

On September 23, 2016, I made a verbal complaint regarding Dr. Lauren Husband my former supervisor. During a 1:1 with Dr. Husband and her supervisor Ms. Boswell, I spoke out against negative comments and the tone during our discussion. Since making the complaint, I have been subjected to retaliatory actions and different terms and conditions.

Petitioner did not check a box for the cause of discrimination. She made no allegation that she was subject to discrimination on the basis of any protected class.

On June 21, 2018, the Commission issued a "Determination: No Reasonable Cause," by which it determined that no reasonable cause existed to believe that Respondent engaged in an unlawful employment practice involving Petitioner. Petitioner filed a Petition for Relief, which was referred to the Division of Administrative Hearings for disposition, and assigned to the undersigned. The final hearing was scheduled for October 9,

2018, by video teleconference in Tallahassee and Daytona Beach, Florida.

On October 4, 2018, the parties filed a Joint Pre-hearing Stipulation, in which they stipulated to a number of facts. Those facts are adopted herein, and if not specifically recited, then by reference.

Due to the approach of Hurricane Michael, State office buildings in the panhandle, including Tallahassee, were officially closed on October 9, 2018. The final hearing was rescheduled for November 19, 2018, at the same venues, and proceeded as scheduled.

At the hearing, Petitioner testified on her own behalf. Petitioner's Exhibits 1 through 8 were received in evidence.

Respondent presented the testimony of Patricia Boswell, administrator of the local Volusia County Health Department; Dr. Lorraine Husband, Respondent's director of Community Planning and Assessment; Denise Ayers, Respondent's health nursing director; Susan Skelley, a registered licensed dietician for Respondent; Ana Soto, Respondent's public health services manager; and Sarah McDonald, an administrative assistant during the period in question. Respondent's Exhibits 1 through 6, 8 through 10, 12, 14, 15, and 20 were received in evidence.

The hearing was not transcribed. The parties filed their Proposed Recommended Orders on December 7, 2018, which have been considered in the preparation of this Recommended Order.

References to Florida Statutes are to those in effect at the time the alleged acts of discrimination occurred, unless otherwise noted.

FINDINGS OF FACT

1. Respondent is a provider of health services in Volusia County, Florida. Among the programs administered by FDOH-Volusia is the Women, Infants, and Children program (WIC). WIC is a federally-funded nutrition program, which provides healthy foods, nutrition education and counseling, breastfeeding support, and referrals for health care and community services. At all times relevant to this proceeding, FDOH-Volusia operated WIC health clinics in Daytona Beach, New Smyrna Beach, Orange City, and Pierson.

2. Petitioner began working for FDOH-Volusia in June 2010, as a nutrition program director. In her capacity as nutrition program director, Petitioner was responsible for certain management activities of WIC.

3. The State of Florida maintains close supervision of WIC. FDOH-Volusia is required to provide an annual Nutrition Plan (the Plan) to the State. The Plan is a report of WIC operations, sites, hours of operation, various objectives, local agency plans

for increasing participation, local agency disaster plan, and staffing. As nutrition program director, Petitioner is responsible for preparing the Plan, and submitting it for revisions and/or final approval by FDOH-Volusia's administrator.

4. Ms. Boswell became the administrator of FDOH-Volusia on or about April 1, 2016.

5. Dr. Husband, who is African-American, became Petitioner's direct supervisor beginning in July 2016. As Petitioner's direct supervisor, Dr. Husband provided oversight of WIC.

6. In 2016, FDOH-Volusia consolidated its Deland and Deltona WIC offices into the office in Orange City. Petitioner was very involved in the move and was, during the period of the move, reassigned from her primary duties in Daytona Beach to duties in Orange City. By all accounts, the move went well.

7. On September 23, 2016, Ms. Boswell requested that Petitioner meet with her and Dr. Husband to discuss the draft Plan provided by Petitioner on September 21, 2016, and for Ms. Boswell and Dr. Husband to provide comments, suggestions, and revisions to the Plan, which was due for submission to the State of Florida on September 30, 2016. The purpose of the meeting was to discuss the steps necessary to get the Plan in final form for submission.

8. At the onset of the September 23, 2016, meeting, Ms. Boswell complimented Petitioner and her staff for getting DOH-Volusia's new Orange City location "up and going." Petitioner responded that "it's good to hear something positive after so much negative." The comment was directed at Dr. Husband, who Petitioner thought had been negative towards various aspects of her job performance. Petitioner's comment led to tensions between Petitioner and Dr. Husband. Both said, at one time or another during the meeting, words to the effect of "don't speak to me like that." Ms. Boswell became a little uncomfortable with the interaction between the two.

9. During the September 23, 2016, meeting, a number of deficiencies in the draft Plan were identified, including grammatical and syntax errors, discussion that did not align with the corresponding graphs, and a lack of data to support the Plan conclusions. Dr. Husband gave guidance and feedback on the Plan. Ms. Boswell indicated that, but for Petitioner's comment regarding Dr. Husband's negativity, the meeting was otherwise professional.

10. At the hearing, Petitioner explained that Dr. Husband made other negative comments to her at various times, stating that at a meeting with the director of nursing regarding WIC work schedules, Dr. Husband said "we're not going to nitpick"; and that on another occasion during a discussion on the difficulty of

recruiting and retaining staff at base salary, Dr. Husband said to Petitioner "that's the way you designed it." According to Petitioner, Dr. Husband made similar comments to other of her direct reports.

11. Dr. Husband testified at the hearing that she thought -- before and after the September 23, 2016, meeting -- that Petitioner was insubordinate, disrespectful to employees and supervisors, and rude.

12. Petitioner would take meeting notes in red ink when she perceived instances of "negativity" and "unacceptable behavior" from her direct supervisor, which she described as her "red flag system."

13. Petitioner argued that since she "spoke up and spoke out" during the September 23, 2016, meeting, she has been the subject of retaliation by Ms. Boswell and Dr. Husband. She expressed her belief that Ms. Boswell was upset that Petitioner criticized Dr. Husband because Dr. Husband was Ms. Boswell's direct report, i.e., that Petitioner's criticism "was a reflection on her."

14. On or about October 5, 2016, Petitioner was informed that her duty station was being changed from Daytona Beach to New Smyrna Beach. Petitioner testified that she posed four questions to Dr. Husband as to the reasons for the transfer and that, in her opinion, Dr. Husband's responses did not justify the

action. Petitioner felt that as the WIC nutrition program director, she should be in Daytona Beach, the largest administrative office. Thus, Petitioner could think of no reason for the move other than retaliation for her criticism of Dr. Husband.

15. Ms. Boswell testified credibly that the reason for Petitioner's transfer was that New Smyrna Beach was reopening WIC services at the office. In light of how well things went with the opening of the Orange City office, she wanted Petitioner to go to New Smyrna Beach to make sure that location was up and running. She testified that the reassignment was not a punishment, rather, "that was her job" to make sure WIC was running well. Her testimony is credited.

16. In addition to the fact that Dr. Boswell had perfectly legitimate reasons for having Petitioner cover the New Smyrna Beach office, it is clear that Petitioner suffered no adverse employment action as a result. Petitioner lives between Daytona Beach and New Smyrna Beach, and the New Smyrna Beach office is no further from her home than the Daytona Beach office. Petitioner's pay was not changed, her title was not changed, and her benefits were not changed.^{1/} More to the point, Petitioner neither pled nor proved that the change in duty station had anything to do with discrimination based on race, color, religion, sex, pregnancy, national origin, age, handicap, or

marital status; that it was taken because Petitioner opposed any practice engaged in by FDOH-Volusia based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status; or that it was based on Petitioner having made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing regarding conduct based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

17. On or about October 18, 2016, Petitioner received a Documented Counseling and Performance Notification (Documented Counseling) from Dr. Husband. The Documented Counseling included a number of deficiencies in performance, and several corrective measures. The deficiencies included: that Petitioner failed to monitor and spend allocated WIC funding during the 2015-16 fiscal year; that the Plan submitted by Petitioner was rejected by the administrator for lack of detail, grammatical errors, and poor work product, and when the Plan was finally completed it was discovered that Petitioner's staff performed the majority of the work; that the WIC participation rate (65 percent) was significantly less than the program goal (85 percent); and that Petitioner failed to support efforts to refer WIC clients to the dental hygienist at the Orange City location. The Documented Counseling also reflected that Petitioner had been disrespectful to Ms. Boswell and Dr. Husband. Petitioner refused to sign the

Documented Counseling to acknowledge her receipt. Petitioner provided excuses for the deficiencies noted, e.g., she used most of the allocated WIC funding; the draft Plan was mostly complete, and she had never before been required to submit a draft nine days before its final submission date; she was only required to increase WIC participation by four percent per year; it was not in the WIC scope of work to facilitate clients to get dental services, just to refer them; she objected to co-location of the dental hygienist in the WIC office and, in any event, referrals were not the responsibility of management, only staff. None of Petitioner's explanations were convincing. Rather, the testimony of Ms. Boswell and Dr. Husband that the Documented Counseling was completely performance-based and had nothing to do with the September 23, 2016, meeting, was compelling and is accepted. More to the point, Petitioner neither pled nor proved that the Documented Counseling had anything to do with discrimination based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status; that it was taken because Petitioner opposed any practice engaged in by FDOH-Volusia based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status; or that it was based on Petitioner having made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing regarding

conduct based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

18. On or about December 16, 2016, Petitioner received an oral reprimand. The oral reprimand noted that Petitioner violated prior instruction and FDOH-Volusia written policy regarding absence from work and reporting such absences to her supervisor by telephone. The oral reprimand was documented. Petitioner refused to sign the oral reprimand documentation to acknowledge her receipt. Petitioner acknowledged that prior notice of absences is important so that FDOH-Volusia could make sure personnel were available to perform clinical services. Despite Petitioner's prior knowledge that she would not be at work on November 28, 2016, she did not call her supervisor, Dr. Husband, until after 8:00 a.m. on November 28, 2016. She left an earlier voicemail with a direct report. The testimony of Ms. Boswell and Dr. Husband that the oral reprimand was completely performance-based and had nothing to do with the September 23, 2016, meeting, was compelling and is accepted. More to the point, Petitioner neither pled nor proved that the oral reprimand had anything to do with discrimination based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status; that it was taken because Petitioner opposed any practice engaged in by FDOH-Volusia based on race, color, religion, sex, pregnancy, national origin, age, handicap,

or marital status; or that it was based on Petitioner having made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing regarding conduct based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

19. On April 12, 2017, Petitioner was required to participate in an investigatory interview to determine why she was absent from her duty station on numerous occasions between January 4, 2017, and April 10, 2017. Petitioner testified that she saw no problem in coming to work late since, if she was not scheduled for clinic duties, there was no adverse affect on staff or the clinic. Petitioner thought the investigatory interview for her failure to be at work during scheduled hours "was a bit harsh," and felt that FDOH-Volusia was "monitoring her coming and going." She testified that the monitoring of her "daily schedule, coming and going," was related to the September 23, 2016, meeting.

20. Petitioner provided information on her "tardies" to Ms. Ayers. Ms. Ayers had by then been assigned as Petitioner's supervisor since Petitioner had, in another act of "speaking up and speaking out," filed a formal grievance against Dr. Husband for retaliation.^{2/} Ms. Boswell testified convincingly that Petitioner was not authorized to unilaterally "flex" her time; that an agency cannot be run when employees alter their schedules

without notice; and that Petitioner's excessive absences from her duty station violated the Employees' Handbook. The documentation provided by Petitioner was deemed to be insufficient to justify her absences, and did not explain why Petitioner failed to get approval from a supervisor before modifying her work schedule. Thereafter, on or about June 22, 2017, Petitioner received a written reprimand for the absences. Petitioner refused to sign the written reprimand to acknowledge her receipt. The testimony of Ms. Boswell and Ms. Ayers that the written reprimand was completely performance-based and had nothing to do with the September 23, 2016, meeting, was compelling and is accepted. More to the point, Petitioner neither pled nor proved that the written reprimand had anything to do with discrimination based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status; that it was taken because Petitioner opposed any practice engaged in by FDOH-Volusia based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status; or that it was based on Petitioner having made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing regarding conduct based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

21. The June 22, 2017, written reprimand was the last of the retaliatory actions for the September 23, 2016, meeting alleged by Petitioner.

22. Petitioner has alleged that the October 5, 2016, change in duty station; the October 18, 2016, Documented Counseling; the December 16, 2016, oral reprimand; the April 12, 2017, investigatory interview; and the June 22, 2017, written reprimand were all unwarranted retaliation for the statement she made during the September 23, 2016, meeting, i.e., that Dr. Husband had been negative towards her. Petitioner acknowledged that there was "some truth" in the discipline, but lots of "fluff." To the contrary, the evidence is convincing that, if anything, FDOH-Volusia was, and remains, exceedingly lenient and accommodating to Petitioner with regard to the substantiated discipline meted out.

23. As set forth previously, Petitioner has not been terminated or demoted, and has not suffered a pay decrease or a decrease in benefits. While her duty station was moved from Daytona Beach to New Smyrna Beach, those locations are approximately the same distance from Petitioner's home, and she has since been moved back to Daytona Beach for "need" related reasons.

24. Respondent in this case presented hours of compelling testimony from multiple credible witnesses regarding Petitioner's

poor management skills, poor interpersonal skills, poor leadership skills; her tense, argumentative, and disrespectful attitude; and more. The testimony was, presumably, offered to demonstrate that FDOH-Volusia had a legitimate, non-discriminatory basis for the alleged adverse employment actions taken against Petitioner. The testimony and evidence was unnecessary.

25. Not once during the course of the hearing did Petitioner allege or argue that the actions taken as described herein had anything to do with discrimination or retaliation based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status. Petitioner stated that the actions taken against her were the result of her having "spoken up and spoken out" against negative comments from her supervisor, Dr. Husband. There was nothing raised in Petitioner's Employment Complaint of Discrimination, in her Petition for Relief, in her statement of position in the Joint Pre-hearing Stipulation, in the testimony and evidence that she offered at the final hearing, or in her Proposed Recommended Order that even intimates that FDOH-Volusia committed an unlawful employment practice as established in section 760.10, Florida Statutes. As will be discussed herein, the failure to allege, argue, or prove discrimination or retaliation based on a protected class or opposition to an unlawful act constitutes a failure to meet the

most basic jurisdictional element of an unlawful employment practice complaint.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018).

27. Section 760.11(1) provides that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [C]ommission within 365 days of the alleged violation." Petitioner timely filed her complaint.

28. Section 760.11(7) provides that upon a determination by the Commission that there is no probable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, "[t]he aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause." Following the Commission's determination of no cause, Petitioner timely filed her Petition for Relief requesting this hearing.

29. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same construction as placed on its federal prototype." Brand v. Fla. Power Corp., 633 So. 2d

504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

30. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

31. With regard to Petitioner's claim of discrimination, section 760.10 provides, in pertinent part:

(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. (emphasis added).

32. With regard to Petitioner's claim of retaliation, section 760.10(7) provides, in pertinent part:

(7) 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. (emphasis added).

Thus, the alleged retaliation must be for a reason that is subject to protection under the Act, i.e., race, color, religion, sex, national origin, age, handicap, or marital status.

33. The only basis for Petitioner's claim of discrimination or retaliation is, by her admission, that Petitioner's supervisor, Dr. Husband, made negative comments towards her work practices and product, and that she "spoke up and spoke out" against those negative comments.

34. That reason, even if true, is insufficient to establish that Petitioner was subject to an unlawful employment practice based on any protected class, or that she was the subject of retaliation as a result of her opposition to an unlawful employment practice as defined in section 760.10.

35. An action pursuant to the Florida Civil Rights Act may not be predicated on whether an employment decision is fair or reasonable, but only on whether it was motivated by unlawful discriminatory intent. As set forth by the Eleventh Circuit Court of Appeals, "[t]he employer may [discipline] 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 reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). In a proceeding under the Civil Rights Act, "[w]e are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our

sole concern is whether unlawful discriminatory animus motivates a challenged employment decision.” Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999). Moreover, “[t]he employer’s stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve.” Dep’t of Corr. v. Chandler, 582 So. 2d 1183, 1187 (Fla. 1st DCA 1991).

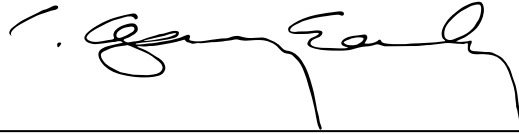
36. Based on Petitioner’s admission that the sole basis for the alleged retaliatory actions was that she spoke out against Ms. Husband’s negative comments, it is concluded that Petitioner failed to state a basis for the disciplinary actions imposed by FDOH-Volusia that falls within the ambit of the Florida Civil Rights Act. Therefore, the Petition for Relief should be dismissed.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing Petitioner, Lisa J. Funchess’s Petition for Relief, FCHR No. 201701356.

DONE AND ENTERED this 17th day of January, 2019, in
Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of January, 2019.

ENDNOTES

^{1/} Petitioner stayed in the New Smyrna office until April 2018, at which time, based on the needs of the WIC program, she returned to the Daytona Beach office in her same capacity as director of nutrition services.

^{2/} The inspector general found that Dr. Husband engaged in no violation of FDOH-Volusia policies.

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.