STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEBBIE SMITH,

Petitioner,

vs. Case No. 18-5292

ESCAMBIA COMMUNITY CLINIC (ECC),
d/b/a COMMUNITY HEALTH NORTHWEST
FLORIDA,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on December 3, 2018, in Pensacola, Florida, before Garnett W. Chisenhall, a duly designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Debbie C. Smith, pro se
Apartment 14B
2800 North Ninth Avenue
Pensacola, Florida 32503

For Respondent: Elmer C. Ignacio, Esquire
Sniffen & Spellman, P.A.
123 North Monroe Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice by discriminating against Petitioner Debbie

Smith ("Ms. Smith") based on her age, disability, race, and/or religion.

PRELIMINARY STATEMENT

Ms. Smith filed a complaint of discrimination on March 1, 2018, with the Florida Commission on Human Relations ("the Commission"), alleging the Escambia Community Clinic, d/b/a Community Health Northwest Florida ("ECC"), violated the Florida Civil Rights Act of 1992 ("FCRA").

On August 18, 2018, the Commission determined there was no reasonable cause to conclude that an unlawful employment practice had occurred:

> [Ms. Smith] was hired by [ECC], a community health center, as a patient access representative. [Ms. Smith] stated that she reported to [ECC]'s health center to begin training for her new job, but she was terminated that same day. [ECC] submitted affidavits from its site manager and its chief employee services officer which state that [Ms. Smith] walked off the jobsite without informing anyone and failed to return. [ECC]'s employee handbook indicates that this is grounds for discipline. The investigation did not reveal other employees who engaged in similar conduct. [Ms. Smith] alleged that she was subjected to disparate treatment based on her race, color, religion, age, and disability. [Ms. Smith] fails to prove a prima facie case because she failed to provide evidence of similarly situated comparators outside her protected class who were treated more favorably or any other evidence of discrimination. Also, [Ms. Smith] alleged that she was harassed. [Ms. Smith] fails to prove a prima facie case because [Ms. Smith] failed to allege that she

> suffered any severe or pervasive conduct. In addition, [Ms. Smith] alleged that [ECC] retaliated against her. [Ms. Smith] fails to prove a prima facie case because she was not engaged in a protected activity as described in Section 760.10(7), Florida Statutes.

Ms. Smith responded by filing a Petition for Relief with the Commission on October 2, 2018, and the Commission referred the case to DOAH that same day.

Via a Notice of Hearing, issued on October 15, 2018, the undersigned scheduled the final hearing to occur in Pensacola, Florida, on December 3, 2018.

The final hearing was commenced as scheduled and was completed that day. Ms. Smith testified on her own behalf and presented testimony from Penelope McCants, Andrea Nutt, Alexis Pineda, Krissy Smith, Angie Brewer, Vicki Merold, Linda Edwards, Tom Anderson, Vanidy Stromas, Darlene Roberts, and Glenda Humphreys. ECC presented testimony from Teresa Cline, Cathy O'Sullivan, and Sunny Notimoh.

ECC's Exhibits 1 and 2, which ECC pre-marked as A and B respectively, were accepted into evidence. Ms. Smith's Exhibits 1, 4, and 5 were accepted into evidence. Ms. Smith filed a Proposed Recommended Order on December 13, 2018.

The Transcript from the final hearing was filed on December 19, 2018.

On December 26, 2018, ECC's counsel filed a motion requesting that the deadline for proposed recommended orders be extended by 14 days to January 16, 2019. The undersigned issued an Order on December 27, 2018, granting the motion. The aforementioned Order further specified that Ms. Smith could file a response to ECC's Proposed Recommended Order by January 28, 2019.

On January 15, 2019, ECC's counsel filed a motion seeking to extend the deadline for proposed recommended orders to January 18, 2019. The undersigned issued an Order on January 17, 2019, granting the Motion but specified that "no further extensions" would be granted "absent extraordinary circumstances." Ms. Smith's deadline for responding to ECC's Proposed Recommended Order was extended to January 28, 2019.

ECC filed its Proposed Recommended Order on January 18, 2019. After receiving two extensions, Ms. Smith responded to ECC's Proposed Recommended Order on February 11, 2019.

The undersigned considered all of the post-hearing submittals in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following Findings of Fact are made:

The Parties

1. Ms. Smith is African American and was 61 years old at the time of the final hearing.

2. Ms. Smith is blind in her right eye and has low vision in her left eye. She has been receiving disability benefits since March of 2018.

3. Ms. Smith is Baptist.

4. Ms. Smith has an associate's degree in medical office administration and a bachelor's degree in health care administration. At the time of the final hearing, she was pursuing a master's degree in criminal justice from the University of West Florida and was expecting to graduate in 2019.

5. In addition to her educational pursuits, Ms. Smith participates in a supported work program sponsored by the National Caucus for Black Age ("the NCBA"). The NCBA is a training organization that places seniors in nonprofit organizations so they can obtain experience that will lead to a permanent job. Participants in the NCBA's training program must conduct at least two job searches a week and graduate from the program when they obtain a permanent job.

6. Prior to the events at issue in this proceeding, the NCBA had placed Ms. Smith with Big Brothers and Big Sisters, and she was working as an administrative assistant and being trained to be a case worker.

7. ECC is a federally funded health center that serves the uninsured and underinsured through approximately 15 different locations in Escambia and Santa Rosa Counties.[1/]

8. Ms. Smith lacks health care insurance and has received treatment at ECC for 20 years.

The Events Leading to Ms. Smith's Discharge from ECC

9. At some point during the first quarter of 2017, Ms. Smith learned that ECC was hiring in order to staff four or five new offices in Escambia County.

10. On March 13, 2017, Ms. Smith interviewed for a patient access representative ("PAR") position with ECC. A PAR works the front desk at an ECC facility by greeting patients, placing their demographic information into a computer system, collecting co-pays, and registering patients to see a physician.

11. The first two weeks of a PAR's employment are devoted to training. ECC prefers for PARs to work 40 hours a week during that training period. However, that amount of work is not guaranteed. The number of hours depends on how much training a new PAR needs and whether an experienced PAR is available to provide training.

12. After the training period, PARs work on an "as needed" or "PRN" basis. If a full-time position at ECC becomes available, then a PAR is eligible to apply for that position.

13. Teresa Cline supervised ECC's PARs at the time relevant to the instant case and hired Ms. Smith to fill a PAR position on a PRN basis.

14. Ms. Smith was under the mistaken impression that she would be on PRN status for the two-week training period and then working full-time.

15. Ms. Smith reported to an ECC clinic for her first day of work on the morning of April 3, 2017. Ms. Smith began her workday by training with two women who were working as PARs that morning, one of whom was Alexis Pineda.

16. After observing the duties of a PAR for 30 to 40 minutes, Ms. Smith received an employee handbook, was photographed for an identification badge, and toured the facility.

17. While Ms. Smith was touring the facility, Ms. Pineda told Ms. Cline that she had concerns about working with Ms. Smith. According to Ms. Pineda, Ms. Smith had visited ECC as a patient at some point in the months preceding April 3, 2017, and had been very disruptive in the presence of other patients.

18. Nevertheless, Ms. Pineda ultimately told Ms. Cline that she was willing to work with Ms. Smith.

19. Ms. Cline and Cathy O'Sullivan, ECC's employment and benefits manager at the time, met with Ms. Smith and notified her about the concerns regarding the aforementioned incident.

Ms. Cline and Ms. O'Sullivan assured Ms. Smith that any issues would be resolved in a professional manner.

20. Ms. Smith rigorously denied that she was the person who caused the disruption.[2/]

21. Ms. Smith also learned during the meeting with Ms. Cline and Ms. O'Sullivan that she would only be working 12 hours a week during her training period and that she would be on PRN status after her training was complete.

22. This news was very upsetting to Ms. Smith because she was unsure that she could survive on the income generated from 12 hours of work, per week. Therefore, Ms. Smith asked Ms. Cline at approximately noon, on April 3, 2017, if she could contact her former supervisor at the NCBA about re-entering that program. Ms. Cline granted her request and walked Ms. Smith to the back door of the ECC facility.

23. Ms. Smith got into her car and left the ECC facility.

24. Ms. Smith did communicate with her former supervisor at the NCBA but did not return to the ECC on April 3, 2017. Ms. Smith believed that she had permission from Ms. Cline to make direct physical contact with her former supervisor and that Ms. Cline was not expecting her to return to ECC that day.[3/]

25. However, Ms. Cline was under the impression that Ms. Smith was going to simply call her former supervisor from the ECC facility and then return to her PAR training. After waiting

10 to 15 minutes for Ms. Smith to return, Ms. Cline walked outside the ECC facility and was unable to find Ms. Smith.

26. Ms. Cline then conferred with Cathy O'Sullivan, ECC's director of training. Because Ms. Cline had not intended to give Ms. Smith permission to leave ECC for the rest of the day, Ms. Cline and Ms. O'Sullivan concluded that Ms. Smith should be discharged for abandoning her job.

27. ECC's handbook provides that "[e]mployees who stop and/or leave work before their scheduled end of shift without authorization of their supervisor will be regarded as abandoning their job and are subject to disciplinary action."

The Events Following Ms. Smith's Discharge

28. Ms. Smith reported to work at ECC on the morning of April 4, 2017, and went to Ms. Cline's office to reiterate that she was not the patient who Ms. Pineda accused of being disruptive. Ms. Smith then learned from Ms. Cline and Ms. O'Sullivan that she had been discharged for leaving without permission the previous day.

29. After demanding to speak with someone in a higher position at ECC, Ms. Smith met with Sunny Notimoh, the head of ECC's Human Resources Department. Ms. Smith thought ECC had no grounds for discharging her, but Ms. Notimoh responded by stating that leaving without permission was unacceptable.[4/]

30. ECC did not rescind its decision to discharge Ms. Smith.

31. Ms. Smith was able to re-enter the work program sponsored by the NCBA the week after her discharge from ECC.

CONCLUSIONS OF LAW

32. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (2016),[5/] and Florida Administrative Code Rule 60Y-4.016(1).

33. The State of Florida, under the legislative scheme contained in sections 760.01-760.11, Florida Statutes, incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et. seq.

34. Section 760.10 prohibits discrimination "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." § 760.10(1)(a), Fla. Stat.

35. Florida courts have determined that federal discrimination law should be used as guidance when construing the FCRA. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17,

21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

36. Ms. Smith has the burden of proving by a preponderance of the evidence that ECC committed an unlawful employment practice. See EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002)(noting that a claimant bears the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee); § 120.57(1)(j), Fla. Stat.

37. 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). 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).

38. There is no direct evidence that ECC's discharge of Ms. Smith resulted from unlawful discrimination based on her race, religion, disability, or age. That is not uncommon because "direct evidence of intent is often unavailable." Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996). Accordingly, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

39. 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, 18 So. 3d 17, 25 (Fla. 3d DCA 2009). Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

40. Under the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), one generally establishes a prima facie case of discrimination by demonstrating

that: (a) she is a member of a protected class; (b) she was qualified for the position held; (c) she was subjected to an adverse employment action; and (d) other similarly-situated employees, who are not members of the protected group, were treated more favorably. "When comparing similarly situated individuals to raise an inference of discriminatory motivation, the individuals must be similarly situated in all relevant respects . . . ." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (11th Cir. 2004).

41. With regard to her claims of discrimination based on race and religion, Ms. Smith has demonstrated that she is a member of a protected class. As noted above, she is African American and Baptist. See Love v. Escambia Cnty. Bd. of Cnty. Comm'r, Case No. 17-0564 (Fla. DOAH May 24, 2017; Fla. FCHR August 17, 2017)(concluding that the first, second, and third prongs of petitioner's religious discrimination case had been met because petitioner was Christian, qualified for the position, and terminated by Escambia County).

42. Ms. Smith also demonstrated that she was qualified for the PAR position and her discharge from ECC amounted to an adverse employment action.

43. However, Ms. Smith presented no persuasive evidence demonstrating that similarly-situated people of other races and/or religions were treated more favorably. In other words,

she did not demonstrate that similarly-situated people of other races and/or religions were able to violate provisions of ECC's handbook without being discharged. Thus, Ms. Smith failed to establish a prima facie case of discrimination based on race or religion.

44. The failure to demonstrate that others received more favorable treatment from ECC also undermined Ms. Smith's effort to establish a prima facie case of age discrimination. Rather than establishing that one is over a certain age and thus part of a protected class, the Commission has explained that a petitioner must demonstrate that he or she was treated differently than similarly situated individuals of a different age, as opposed to a younger age:

> With regard to the need to establish that Petitioner lost the position to a "younger" person, we note that it has been stated, "Commission panels have long concluded that the Florida Civil Rights Act of 1992 and its predecessor law the Human Rights Act of 1977, as amended, prohibited age discrimination in employment on the basis of any age "birth to death." See Green v. ATC/VANCOM Management, Inc., 20 F.A.L.R. 314 (1997), and Simms v. Niagra Lockport Industries, Inc., 8 F.A.L.R. 3588 (FCHR 1986). A Commission panel has indicated that one of the elements in determining a prima facie case of age discrimination is that Petitioner is treated differently than similarly situated individuals of a "different" age, as opposed to a "younger" age. See Musgrove v. Gator Human Services, c/o Tiger Success Center, et al., 22 F.A.L.R. 355, at 356 (FCHR 1999). The Commission has concluded that, unlike the

> federal Age Discrimination in Employment Act (ADEA), the age of 40 has no significance in the interpretation of the Florida Civil Rights Act of 1992. See Green, at 315. Williams v. Sailorman, Inc., d/b/a Popeye's Chicken and Biscuits, FCHR Order No. 04-037 (June 2, 2004). Accord, Coffy v. Porky's Barbecue Restaurant, FCHR Order No. 05-053 (May 18, 2005), Johnson v. Tree of Life, Inc., FCHR Order No. 05-087 (July 12, 2005), and Bean v. Department of Transportation, FCHR Order No. 05-107 (September 23, 2005).

Marchinko v. The Wittemann Company, LLC, Case No. 05-2062 (Fla. DOAH Nov. 1, 2005), rejected in part Case No. 2005-00251 (Fla. FCHR Jan. 10, 2006).

45. As for Ms. Smith's disability discrimination claims, a prima facie case of disability discrimination differs from the general McDonnell Douglas framework in that the first element requires a petitioner to demonstrate that he or she is actually disabled or regarded as disabled. Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285 (11th Cir. 1997).

46. In that regard, Florida Courts construe the FCRA in conformity with the federal Americans with Disabilities Act ("the ADA"). McCaw Cellular Comm. of Fla., Inc. v. Kwiatek, 763 So. 2d 1063, 1065 (Fla. 4th DCA 1999).

47. As for whether one is "disabled" within the meaning of the FCRA and the ADA, the Second District Court of Appeal has explained that:

As a general rule, a physical or mental impairment is not automatically a "disability" under the ADA. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002); Albertson's Inc. v. Kirkingburg, 527 U.S. 555, 565-66, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999); Wimberly v. Sec. Tech. Group, Inc., 866 So. 2d 146, 147 (Fla. 4th DCA 2004). Instead, to constitute a "disability" under the ADA, the impairment at issue must "substantially limit" a major life activity of the petitioner. Albertson's, 527 U.S. at 565; Wimberly, 866 So. 2d at 147. The term "substantially limits" means "[u]nable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner and duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(2005). In determining whether an impairment "substantially limits" a major life activity, courts should also consider the nature and severity of the impairment, the expected duration of the impairment, and the expected long-term impact of the impairment. 29 C.F.R. § 1630.2(j)(2).

"Major life activities" are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). With respect to the major life activity of working, the term "substantially limits" means "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial

> limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

Lenard v. A.L.P.H.A. "A Beginning," Inc., 945 So. 2d 618, 621-22 (Fla. 2d DCA 2006).

48. Ms. Smith testified that she is legally blind but offered no testimony as to how her limited vision substantially limits a major life activity. In fact, Ms. Smith's testimony indicated that she drives a car. However, ECC did not dispute that Ms. Smith is disabled.

49. Even if it were to be concluded that Ms. Smith established prima facie cases of discrimination based on age, race, religion, and/or disability, ECC had a legitimate, non-discriminatory reason for discharging her. As noted above, Ms. Cline was under the impression that Ms. Smith abandoned her PAR position, and ECC's handbook specifies that abandonment is a basis for discharge.[6/]

RECOMMENDATION

Based on 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's Petition for Relief.

DONE AND ENTERED this 15th day of February, 2019, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
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 15th day of February, 2019.

ENDNOTES

[1/] ECC is now known as Community Health of Northwest Florida.

[2/] Because Ms. Pineda's allegation was not the basis for Ms. Smith's discharge from ECC, resolution of that conflicting testimony has no bearing on whether ECC committed an unlawful employment practice.

[3/] As additional justification for why she did not return to ECC on April 3, 2017, Ms. Smith testified that it "was storming" and that she was too distraught to function effectively.

[4/] Toward the end of her meeting with Ms. Notimah, Ms. Smith pulled out her cell phone and announced that their conversation had been recorded. Ms. Notimoh responded by stating Ms. Smith's action was illegal and demanded that Ms. Smith turn over her phone. According to Ms. Smith, Ms. Notimoh prevented her from leaving Ms. Notimoh's office until Ms. Smith began calling 911. Ms. Notimoh testified that she never detained Ms. Smith in her office. Whether Ms. Notimoh detained Ms. Smith in her office appears to be irrelevant to resolution of the instant case because Ms. Smith had already been discharged when she returned to ECC on April 4, 2017. However, to whatever extent that this allegation is relevant to assessing whether ECC committed an

unlawful employment practice, the testimony is insufficient to establish the severe or pervasive conduct associated with harassment or a hostile work environment. See Dep't of Child. & Rams. v. Shapiro, 68 So. 2d 298, 303-04 (Fla. 4th DCA 2011)(stating that with regard to a hostile work environment claim, "[h]arassment is actionable when it is sufficiently severe or pervasive to alter the terms and conditions of employment and creates a discriminatorily abusive working environment.").

[5/] Unless stated otherwise, all statutory references will be to the 2016 version of the Florida Statutes.

[6/] There was conflicting testimony as to whether Ms. Cline gave Ms. Smith permission to call her previous supervisor or to leave ECC in order to directly confer with her previous supervisor. However, the undersigned's role is not to evaluate whether ECC correctly determined that Ms. Smith abandoned her PAR position. Also, the undersigned is not to assess whether ECC's decision to discharge Ms. Smith was appropriate under the circumstances. Instead, the undersigned's role is limited to determining whether ECC's discharge of Ms. Smith was improperly motivated by her age, race, religion, or disability.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(eServed)

Elmer C. Ignacio, Esquire
Sniffen & Spellman, P.A.
123 North Monroe Street
Tallahassee, Florida 32301
(eServed)

Debbie C. Smith
Apartment 14B
2800 North Ninth Avenue
Pensacola, Florida 32503
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(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.