

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESTHER NUNES DE SOUZA DE LIMA,

Petitioner,

vs.

Case No. 21-2631

ADVENT HEALTH HOSPITAL,

*AMENDED AS TO
FOOTNOTE 1

Respondent.

AMENDED RECOMMENDED ORDER OF DISMISSAL

This cause comes before the undersigned on AdventHealth's Motion to Dismiss Petition for Relief (Motion), filed September 21, 2021.¹ The parties presented arguments at a motion hearing on October 6, 2021, and provided additional briefs, documentation, and/or proposed orders in support of their positions after the hearing. Because the undersigned has considered the documentation submitted by both parties in addition to the allegations in the Petition for Relief (Petition), the Motion is treated as a motion to relinquish jurisdiction. *See* § 120.57(1)(i), Fla. Stat. (2020).²

STATEMENT OF THE ISSUES

Petitioner alleges AdventHealth discriminated against her based on her religion when it refused to make her a full-time Chaplain because she is Baptist, and retaliated against her when she reported the discrimination. The Motion asserts that Petitioner's claims are barred (1) by the "ministerial"

¹ Petitioner erroneously identified Respondent as "Advent Health Hospital" in her Charge of Discrimination and Petition filed with the Florida Commission on Human Relations (FCHR). Respondent's legal title is Adventist Health System/Sunbelt, Inc. d/b/a AdventHealth Orlando. For the purposes of these proceedings the case style shall remain as initially filed, and Respondent will be referred to as "AdventHealth."

² All references to the Florida Statutes and Florida Administrative Code are to the 2020 versions.

and "religious organization" exemptions; (2) because they are untimely and she failed to exhaust her administrative remedies; and (3) for lack of jurisdiction because they are based on federal law, and not the Florida Civil Rights Act (FCRA).

The dispositive issue presented is whether Petitioner can allege religious employment discrimination and retaliation under the FCRA regarding her position of Chaplain (a ministerial position) against AdventHealth (a religiously affiliated corporation). Having concluded that, even if what she has alleged is true, Petitioner cannot establish a religious discrimination or retaliation claim, it is unnecessary to determine whether the alleged discriminatory or retaliatory actions indeed took place.

PROCEDURAL HISTORY

On February 12, 2021, Esther Nunes De Souza De Lima (Petitioner) filed a Charge of Discrimination with FCHR, alleging AdventHealth discriminated against her due to her religious affiliation, Baptist, and for retaliating against her for reporting that discrimination, in violation of sections of the FCRA.

On August 11, 2021, FCHR issued a "Determination: No Reasonable Cause" on Petitioner's Charge finding it was unlikely that discrimination based on religion had occurred.

On August 31, 2021, Petitioner timely filed her 40-page Petition with FCHR, requesting an administrative hearing before the Division of Administrative Hearings (DOAH). Attached to the Petition was documentation describing Petitioner's claims against AdventHealth, including:

- Petitioner's Statements regarding her claims
- Screenshots of ZipRecruiter messages and emails
- Graphs of Salary and Compensation History
- A Job Description and Posting for the Chaplain I position from 2016
- Petitioner's Timesheet from 2019
- Photos of Petitioner's Hospital Work Badges
- 2017 Performance Evaluation
- Professional Certificates
- Correspondence with FCHR

On September 1, 2021, FCHR forwarded the Petition to DOAH for the assignment of an Administrative Law Judge to conduct all necessary proceedings required under the law and submit recommended findings to FCHR. Thereafter, the undersigned set this matter for a final hearing on October 28, 2021.

Petitioner filed several documents on September 8, 14, 15, 17, and 21, 2021, with DOAH including certificates of ordination, endorsements from various religious organizations, emails, and yearly performance evaluations. Thereafter, as stated above, on September 21, 2021, AdventHealth filed the Motion, and a hearing on the Motion was held on October 6, 2021. After the hearing, both parties filed supplemental briefings and documents. Petitioner filed Final Administrative Hearings Documents (two parts) on October 14, 2021; and AdventHealth filed a Supplement to Motion to Dismiss and Motion to Relinquish Jurisdiction or in the Alternative for Summary Judgment (three parts) on October 15, 2021. AdventHealth's Supplement included an Affidavit of Corporate Representative of AdventHealth and corporate documents. All filings have been considered in the preparation of this Recommended Order of Dismissal.

FINDINGS OF FACT

The allegations contained in Petitioner's Charge, Petition, and documentation filed with DOAH are accepted as true for the purpose of this Recommended Order of Dismissal and are quoted below where appropriate.

Parties

1. Petitioner is an ordained Baptist Chaplain. In June 2016, she applied for the position of "Chaplain" with Florida Hospital.

2. AdventHealth is made up of a number of healthcare campuses and medical institutions around the world, including AdventHealth Orlando f/k/a Florida Hospital (Hospital).

3. Petitioner admits she does not know the corporate structure of AdventHealth but notes that many employees are not Adventists.

4. AdventHealth is the largest Protestant, not-for-profit healthcare company in the United States. It owns and/or operates hundreds of healthcare facilities around the world, including the Hospital. It is headquartered in Altamonte Springs, Florida.

5. AdventHealth functions as an integral part of the total ministry of the Seventh-day Adventist Church (Adventist Church). There is no dispute the Adventist Church is a religious institution. As reflected in its corporate documents, the AdventHealth employee handbook, and the signature block of AdventHealth employees' emails, the mission of AdventHealth is "Extending the healing ministry of Christ."

6. Petitioner is not an Adventist nor has she been ordained by the Adventist Church.

7. Ellis Greg supervised Petitioner at the Hospital.³ Mr. Greg is a part of the "Pastoral Care" division of the Mission and Ministry department of AdventHealth and was responsible for signing paperwork related to Petitioner's position, and for issuing her performance evaluations.

8. Juleun Johnson is the Director of "Mission & Ministry" for AdventHealth, and the Lead Chaplain.

Employment History

9. Petitioner was hired on June 20, 2016, on a contractual or hourly basis to work at the Hospital and other AdventHealth campuses. At the time Petitioner was hired she believed her title was Chaplain. As proof, she points to ID badges from Florida Hospital and AdventHealth that are blue and have her first name, picture, and the following title: "CHAPLAIN Mission Ministry." However, her Annual Performance Reviews indicate she was hired into "Job Class: Chaplain's Assistant (CHA1)." Taking the facts in a light most favorable to Petitioner, she was hired in the position of Chaplain.

10. The job description for the Chaplain position indicates it is a per diem position, not salaried. Moreover, based on the documentation, Petitioner worked on an "as needed" basis.

11. The Chaplain job summary also states in relevant part:

As a Chaplain, you will make providing service your priority while caring for the whole person in a faith-based atmosphere. Clinically trained minister responsible for providing spiritual care to our primary customers, partners, and team members. Participates as a member of the healthcare team in evaluating spiritual needs of patients and providing appropriate interventions to meet such needs.

³ Petitioner refers to her supervisor as Ellis Greg in the Petition and elsewhere, but the documentation submitted by Petitioner indicates Petitioner reports to "Ellis, Gregory K." For the purposes of this Order, Petitioner's supervisor will be referred to as "Mr. Greg."

12. The Chaplain position also requires the following skills, education, and experience:

- Personal commitment to God.
- Personal integrity and an ability to work under stress.
- Ability to effectively relate to persons of diverse religious, educational, and cultural backgrounds.
- Master of Divinity degree
- Minimum of two units of Clinical Pastoral Education
- Congregational pastoral experience (Preferred)
- Four-unit residency in Clinical Pastoral Education (Preferred)

13. Based on Petitioner's documentation, it is clear that the Chaplain position for which she was hired was ministerial and religious in nature.

14. In contrast, the Chaplains who are ordained by the Adventist Church have badges that are green that the Adventist Church has issued to them with the title: STAFF CHAPLAIN. According to Petitioner, the Staff Chaplains are salaried employees, receive higher pay and benefits, and work regular schedules.

15. It is clear that the Staff Chaplain position, to which Petitioner feels she is entitled, is ministerial and religious in nature.

16. Petitioner wants to be a Staff Chaplain and receive the same salary, benefits, and working conditions as the Staff Chaplains.

Alleged Discriminatory and Retaliatory Actions

17. As alleged by Petitioner, Mr. Greg told Petitioner early on in her employment that she would "never have an official full-time or part-time position because it is a privilege for Seventh Day Adventists." In other words, Petitioner was told she would not be a "Staff Chaplain" unless she was part of the Adventist Church.

18. In her 2017 evaluation, Petitioner repeated what Mr. Greg had told her: she could not be an official Chaplain unless she was an Adventist.

My goal would be to become a Chaplain full time, but I believe in miracle [sic], and like my direct supervisor Ellis Greg told me, it is not possible, because I am not Seventh Day Adventist, I am Baptist.

Petitioner made similar comments in her 2018, 2019, and 2020 performance evaluations.

19. Petitioner claims that after she included the statement by Mr. Greg on her performance evaluations, he began to treat her badly.

20. For example, in May 2019, Mr. Greg accused Petitioner of misusing her computer to access confidential patient information. He required Petitioner to talk to a Human Relations Business Partner in the Hospital's Human Resources System/Support Department (HR). Petitioner was not disciplined or terminated as a result of this discussion with HR.

21. In September 2019, Petitioner discovered her title was actually "Chaplain's Assistant," not "Chaplain." In her Charge and her Petition, Petitioner claims that Mr. Greg demoted her to Chaplain Assistant in September 2019. Even assuming her title was changed and she was demoted in 2019, this demotion did not result in a cut in benefits or wages.

22. Mr. Greg also delayed executing her yearly evaluations in 2018, 2019, and 2020. In her 2020 evaluation, Mr. Greg noted, "Esther is a valued member of our contract team, ministering to patients and employees across a number of our campuses. I affirm her spirit of caring and compassion." Mr. Greg also stated Petitioner was a "blessing" and commended her "biblical counseling training," and "biblical counseling gifts." Again, nothing in these evaluations were negative and Petitioner did not suffer any cut in pay or benefits due to these delays.

23. Petitioner is still working at AdventHealth hospital campuses and continues to be supervised by Mr. Greg, despite her recent requests to change supervisors.

CONCLUSIONS OF LAW

24. Petitioner raises two claims: (1) she is being treated differently because she is not a member of the Adventist Church; and (2) when she complained about this disparate treatment based on religion, she was retaliated against. Petitioner requests the following relief:

(1) Juleun Johnson, the Lead Chaplain at AdventHealth Celebration, be her supervisor; (2) she be given a full-time Staff Chaplain position; (3) her salary be raised to \$20 an hour; and (4) an award of non-economic damages for suffering.⁴

25. AdventHealth argues in its Motion to Dismiss: (1) DOAH lacks jurisdiction because Petitioner's claims are barred by the "ministerial exception" or "ecclesiastical abstention doctrine" and/or the religious organization doctrine; (2) Petitioner's claims are time-barred; and (3) DOAH cannot address Petitioner's claims under federal law.

26. As an initial matter, DOAH has jurisdiction over claims of discrimination under the FCRA under sections 120.569, 120.57(1), and 760.11(7), Florida Statutes, and Florida Administrative Code Rule 60Y-4.016.⁵

27. Regarding her federal claims, at the motion hearing, Petitioner conceded that any references to Title VII, the Americans with Disabilities Act (ADA), or the Age Discrimination in Employment Act (ADEA) were in error. The only claims she is pursuing are for religious discrimination and retaliation under the FCRA.

⁴ Damages for non-economic damages such as mental anguish, loss of dignity, and other intangible injuries for a violation of the FCRA are only available in a civil action, and are not available in an administrative proceeding. *Compare* § 760.11(5) *with* § 760.11(6), Fla. Stat.

⁵ The FCRA is patterned after Title VII of the federal Civil Rights Act of 1964, as amended (Title VII). As such, Florida courts have held that federal decisions construing Title VII are applicable when considering claims under the FCRA. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 21 (Fla. 3d DCA 2009). *See also* 42 U.S.C. § 2000e-3(a).

28. Regarding the second argument that Petitioner's claims are time-barred, 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 [FCHR] within 365 days of the alleged violation." There is no dispute as to what date Petitioner filed her complaint with FCHR: February 12, 2021. Therefore, any acts before February 12, 2020, are time-barred.

29. Most of the actions Petitioner complains about in her Petition and Charge occurred prior to February 12, 2020. This includes AdventHealth's alleged failure to hire her in 2016 into a permanent position; her performance reviews in 2017, 2018, and 2019; and any pay disparities during that time. All of these events occurred more than 365 days before February 12, 2021, and, therefore, are barred.

30. Petitioner claims that she did not learn about the demotion to Chaplain's Assistant or the pay discrepancies until sometime in 2019. To be viable, Petitioner should have filed a charge of discrimination no later than the end of 2020 to preserve her right to sue on any claims regarding her title and pay.

31. The only claims that remain are those relating to her 2020 performance review and the denial of her request for a change in supervisors.

32. Pursuant to section 760.10(1)(a), it is an unlawful employment practice for an employer to "discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual concerning compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status."

33. However, section 760.10(9) carves out an exception for religious employers that condition employment on certain religions or give a preference to members of specific religious institutions:

This section shall not prohibit a religious corporation, association, educational institution, or

society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities.

34. This is similar to the federal exception found in Title VII.

(a) This subchapter shall not apply to an employer with respect ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a).⁶

35. In addition to the religious organization exception cited above, federal and Florida courts have recognized an "ecclesiastical abstention doctrine" or "ministerial exception," to employment disputes between a religious institution and clergy or religious employees. The purpose of the ministerial exception is to "ensure that the authority to select and control who will minister to the faithful -- a matter 'strictly ecclesiastical' -- ... is the church's alone." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 194–95 (2012); *see also Napolitano v. St. Joseph Cath. Church*, 308 So. 3d 274 (Fla. 5th DCA 2020).

36. In *Hosanna-Tabor Evangelical Lutheran Church*, the Supreme Court held that the First Amendment entitled a religious school to a special exemption from the requirements of the ADA when it discharged a teacher allegedly because of her disability. *Hosanna-Tabor Evangelical Lutheran*

⁶ As explained in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1754 (2020), the religious organization exception is statutory and based on the Constitution. "Congress included an express statutory exception for religious organizations. § 2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." *Id.* (citations omitted).

Church, 565 U.S. at 178–79. Because the school considered the teacher a "minister" since she provided religious instruction for her students, the court concluded her termination fell within the so-called "ministerial exception" to generally applicable employment laws. *Id.* at 180, 132 S. Ct. at 694. See also *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2066–67 (2020) (finding religious schools were entitled to "ministerial exceptions" from both the ADA and the ADEA).

37. In Florida, the "ecclesiastical abstention doctrine" bars a court from analyzing religious doctrine, policy, or governance in a civil lawsuit. To determine whether a dispute is barred by this doctrine, a court must determine whether the dispute is about "discipline, faith, internal organization, or ecclesiastical rule, custom or law," or whether it is just a secular dispute where one party is a "religiously affiliated organization." *Malicki v. Doe*, 814 So. 2d 347, 357 (Fla. 2002); *Springhill Missionary Baptist Church, Inc. v. Mobley*, 251 So. 3d 281, 283 (Fla. 1st DCA 2018) ("A lawsuit does not, of course, become a theological controversy just because one of the litigants is a church.").

38. Although often used interchangeably, the "ministerial exception" applies the "ecclesiastical abstention doctrine" to employment disputes between religious employees and religious employers.⁷ See *Napolitano*, 308 So. 2d at 276 (barring breach of employment contract claim; finding whether former pastor had actual or apparent authority to obligate successor pastors to retain his chosen employees is one of church governance and trial court lacked subject matter jurisdiction); *Mobley*, 251 So. 3d at 281 (Fla. 1st DCA 2018) (affirming dismissal of deacon's complaint for slander and libel against church); *Diocese of Palm Beach, Inc. v. Gallagher*, 249 So. 3d 657 (Fla. 4th DCA 2018) (granting writ of prohibition barring defamation complaint brought by ordained priest in circuit court); *Malichi v. Archdiocese of Miami*,

⁷ Florida courts have also used the term "church autonomy doctrine" in lieu of the "ecclesiastical abstention doctrine." *Mobley*, 251 So. 3d at 283.

945 So. 2d 526 (Fla. 1st DCA 2007) (affirming JCC's dismissal of workers' compensation claim brought by ordained priest against church); *Archdiocese of Miami, Inc. v. Minagorri*, 954 So. 2d 640, 641 (Fla. 3d 2007) (barring claim against religious school brought pursuant to Florida's Private Sector Whistleblower Act); *Southeastern Conf. Ass'n of Seventh-Day Adventists, Inc. v. Dennis*, 862 So. 2d 842 (Fla. 4th DCA 2003) (granting writ of prohibition barring circuit court from exercising jurisdiction over negligence action brought by ordained minister).

39. Taking the alleged facts in the light most favorable to Petitioner, AdventHealth favors Adventists for the "Staff Chaplain" position and Petitioner has been denied that position because she is not an Adventist. The relief she seeks is to be hired into the Staff Chaplain position and supervised by the Lead Chaplain. The hiring of a chaplain and the terms of a chaplain's employment are "strictly ecclesiastical" issues. Because the undersigned would be required to evaluate the "discipline, faith, internal organization, or ecclesiastical rule, custom or law" of both Petitioner and the Adventist Church, the "ministerial exception" applies.

40. Petitioner, however, argues that AdventHealth is not a "religious corporation, association, educational institution, or society" pursuant to section 760.10(9), and that this is not a religious dispute. As stated in the Findings of Fact, AdventHealth and the other medical campuses are affiliated with the Adventist Church. Federal courts addressing similar facts have found that medical facilities affiliated with religious institutions are religious entities under the "ecclesiastical abstention doctrine." *See Penn v. New York Methodist Hosp.*, 884 F.3d 416 (2d Cir. 2018) (noting that although only historically connected to a church, hospital employer that retained a significant portion of its identity through providing religious services through its pastoral care department was exempt from claims of race and religious discrimination by an African-American hospital chaplain); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362-63 (8th Cir.1991)

(finding a hospital chaplain is a 'ministerial' position and "ministerial exception" bars chaplain's claims under Title VII and ADEA against church-affiliated hospital).

41. Based on the undisputed facts regarding AdventHealth's corporate structure and mission, Petitioner's argument that the ministerial exception does not apply to AdventHealth is rejected.

42. Because the exemption applies, it is unnecessary to determine whether Petitioner's allegations are true. There are only two possible scenarios: either AdventHealth did not make its employment decision based on Petitioner's religion, in which case Petitioner's religious discrimination claim fails; or AdventHealth did make its employment decision based on her religion, in which case it gets the benefit of section 760.10(9) and the "ministerial exception." Either way, Petitioner's religious discrimination claim fails as a matter of law.

43. Turning to the retaliation claim, the FCRA protects individuals from retaliation in the workplace. Section 760.10(7) states:

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).

44. Even if Mr. Greg's statement—that Petitioner could never be a permanent or Staff Chaplain unless she was an Adventist—was true, Petitioner's report of this statement cannot constitute statutorily protected activity because the FCRA does not apply to AdventHealth or the employment dispute in this case. As such, Petitioner's retaliation claim fails as well. *See Hosanna-Tabor Evangelical Lutheran Church*, 565 U.S. at 132

(applying ministerial exception to employment retaliation claim brought under the ADA).

45. Section 120.57(1)(i) states, in part:

An order relinquishing jurisdiction shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admission on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists.

46. After considering the record and drawing all reasonable inferences in the light most favorable to Petitioner, the undersigned concludes that no genuine dispute of material fact exists as to the issue of whether AdventHealth is exempt from the FCRA under both section 760.10(9) and the "ministerial exception." Because AdventHealth could not have violated the FCRA by discriminating against Petitioner based on her religion or retaliated against her, Petitioner's claims fail as a matter of law, and her Petition for Relief must be dismissed.

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 the Petition for Relief filed by Esther Nunes De Souza De Lima in FCHR Case No. 2021-27936.

DONE AND ENTERED this 21st day of October, 2021, in Tallahassee, Leon County, Florida.



HETAL DESAI
Administrative Law Judge
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Filed with the Clerk of the
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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.