



STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:)	
)	
KIMBERLY D. CRUMP,)	
)	
Complainant,)	
)	
and)	CHARGE NO: 2000SN0563
)	EEOC NO: 21BA08051
CASTLEHAVEN CARE CENTER, INC.)	ALS NO: S-11484
)	
Respondent.)	

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). On March 7, 2001, the Commission granted the motion by the Department of Human Rights for entry of an order finding Respondent to be in default for its failure to file a verified response to Complainant’s Charge of Discrimination. A hearing on the issue of damages was held before me in Springfield, Illinois on July 16, 2001. The parties have filed their post-hearing briefs. Respondent has also filed a motion to strike portions of Complainant’s post-hearing briefs.

Contentions of the Parties

Complainant, who appeared on her own behalf, contends that she is entitled to \$1,368,000 in back wages and other relief arising out of her suspension and dismissal from her position as a certified nursing assistant (cna) in Respondent’s nursing home. Respondent, on the other hand, submits that Complainant is entitled to only nominal damages since, under the after-acquired evidence doctrine, Complainant would have been properly suspended for abusing a resident of the nursing home. It similarly maintains that Complainant was terminated for displaying unprofessional conduct in front of residents and co-workers.

Findings of Fact

Based on the record in this matter and the uncontested facts alleged in the Charge of Discrimination, I make the following findings of fact:

1. On October 20, 1999, Complainant, an African-American, began her employment in Respondent's nursing home as a cna in Respondent's PRN pool. At the time of her employment Complainant received \$12.00 per hour and \$18.00 per hour of overtime. Throughout her tenure as a cna in Respondent's PRN pool, Complainant averaged 31.80 hours per week.

2. On December 24, 1999, three Caucasian maintenance men uttered via the nursing home's intercom a series of swear words and comments of a racial and sexist nature regarding black women and Jesse Jackson. Respondent's employees, residents and visiting family members of residents heard these comments throughout the nursing home. Shortly thereafter, Complainant and others went to the office of Debbie Drury (Respondent's acting administrator) to complain about the incident.

3. On December 30, 1999, Drury suspended Complainant. At the time Complainant received notice of her suspension, Drury told Complainant that the suspension was because another cna and a resident heard Complainant curse in front of a resident. The suspension was actually given because of Complainant's race and in retaliation for Complainant's opposition to the sexist and racist comments made by her co-workers during the December 24, 1999 intercom incident.

4. In mid-January, 2000, Vicki Curther, Respondent's administrator converted Complainant's suspension into a termination due to Complainant's race and her opposition to the sexist and racist comments made by her co-workers during the December 24, 1999 intercom incident.

5. On January 1, 2000, Respondent abolished its PRN program. As a consequence, Complainant would have been converted to a staff cna earning \$8.25 per hour

with benefits and would have been given 32 hours per week until May 31, 2000, when Respondent ceased operations. During this time, Complainant would have made \$5,808.00 (32 hours times \$8.25 per hour times 22 weeks). Complainant also received during this same time frame, \$1,201 from other jobs and \$246 in unemployment benefits.

6. Complainant suffered emotional damages in the amount of \$1,000.

7. On March 23, 2000, Complainant filed a Charge of Discrimination, alleging that Respondent suspended and eventually discharged her because of her race and in retaliation for opposing unlawful discrimination.

8. On July 17, 2000, the Department of Human Rights mailed Respondent a Notice to Show Cause for Respondent's failure to file a verified response to the Charge of Discrimination. The Department thereafter mailed to Respondent a Notice of Default for its failure to file a verified response and its failure to show good cause for neglecting to file a verified response.

9. On December 19, 2000, the Department filed with the Human Rights Commission a petition to determine Complainant's damages. On March 21, 2001, the Commission granted the Department's petition, found Respondent to be in default and transmitted the matter to the Administrative Law Section for a hearing on Complainant's damages.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. As a consequence of the default order entered on March 21, 2001, all of the allegations contained in Complainant's Charge of Discrimination are deemed admitted.

4. The after-acquired evidence doctrine permits a respondent to limit the remedy of a prevailing complainant where the respondent demonstrates by a preponderance of the evidence that it would have taken an adverse act for reasons unrelated to the imposition of the adverse act at issue in a charge of discrimination, and that it acquired knowledge of the separate incident after imposition of the adverse act at issue in the charge of discrimination.

Discussion

On March 21, 2001, the Commission found Respondent to be in default on the issue of liability due to its failure to file either a verified response to the Charge of Discrimination or a Request for Review of the Department's Notice of Default. The allegations in the Charge of Discrimination indicate that: (1) Complainant was suspended and ultimately discharged based on an accusation that she cursed in front of a resident; and (2) Complainant's suspension and termination were based upon her race since Respondent did not similarly discipline Caucasian co-workers who cursed and made racist and sexist statements over the intercom system. Complainant's Charge of Discrimination also alleged that she was suspended and terminated in retaliation for opposing the sexist and racist remarks made by her co-workers. These allegations of unequal treatment are sufficient to establish claims for discrimination under the Human Rights Act.

Respondent, though, argues that under the after-acquired evidence doctrine Complainant's damages should be cut-off as of December 30, 1999 since: (1) Complainant was accused of cursing in the presence of a resident on December 26, 1999; (2) the allegations with respect to the alleged December 26, 1999 incident triggered an investigation by the Department of Public Health and a suspension mandated by section 3-611 of the Nursing Home Care Act (210 ILCS 45/3-611); and (3) Complainant's conduct constituted an independent incident that would have supported her suspension on December 30, 1999. It similarly contends that Complainant is not entitled to any damages stemming from her termination since the record showed that her termination arose out of another separate

incident in which Complainant “ranted and raved” in front of families and residents once she had been informed of her suspension on December 30, 1999. Neither argument, however, is with merit.

In **Battieste and C.E. Niehoff & Co.**, ___ Ill. HRC Rep. ___ (1989CF4075, November 14, 1995), the Commission recognized that the after-acquired evidence doctrine, as discussed in **McKennon v. National Banner Publishing Co.**, 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995), applied to Human Rights Act claims at least with respect to the possibility of restricting a complainant’s damages based upon what a respondent discovered after imposition of the adverse act. (**Battieste**, slip op. at p. 17.) In order to apply the after-acquired evidence doctrine, an employer must first establish that the wrongdoing was of such severity that the employee would have been disciplined if the employer had known of such wrongdoing at the time of the imposition of the adverse act, and that the employer would have taken an adverse act against the employee for reasons unrelated to the imposition of the adverse act at issue in the Charge of Discrimination. Here, I am unsure that Respondent has satisfied either prong of this test.

Specifically, while Respondent argues that state regulations and its own policy required that Complainant be suspended pending investigation of the cursing incident by the Department of Public Health, the admitted allegations in the Charge of Discrimination indicate that other employees who committed similar acts of cursing within earshot of residents over the nursing home’s intercom system were not disciplined by Respondent. Thus, to the extent that the allegations in the Charge of Discrimination establish that suspensions for cursing in the presence of residents were discretionary with Respondent, Respondent cannot now maintain that Complainant’s suspension was mandatory or otherwise challenge the factual basis of the Charge of Discrimination in view of the Commission’s default order entered on March 21, 2001.

More important, under **Battieste** and **McKennon**, in order for the after-acquired evidence doctrine to apply, the employer must have conducted an investigation into an employee's misconduct after the imposition of the adverse act at issue in the charge of discrimination. Here, of course, Respondent cannot satisfy this prong since its management was well aware of the allegations pertaining to both the December 26, 1999 cursing incident, as well as Complainant's alleged tirade against her co-workers, at the time Respondent suspended and eventually terminated Complainant from its workforce. Indeed, Respondent's acting administrator testified that the allegations with respect to the December 26, 1999 cursing incident actually led to Complainant's suspension on December 30, 1999. (Transcript pp. 117-118.) Thus, unlike the employer in **Lomax and Walmart**, ___ Ill. HRC Rep. ___ (1997SF0834, November 30, 1999), Respondent cannot rely on the after-acquired evidence doctrine to cut-off Complainant's back pay claim since it cannot show that the independent reasons for Complainant's suspension and termination were only discovered after the December 30, 1999 suspension or the mid-January 2000 termination.

To hold otherwise would essentially permit Respondent to attack the factual basis of the default order by providing alternative, neutral reasons for both the suspension and the termination. However, if Respondent wished to contest Complainant's allegations with respect to her suspension and termination, it should have filed a verified response to the Charge of Discrimination. Because it did not, it cannot now offer an alternative reason for Complainant's suspension and termination.

Respondent, though, submits that regardless of Complainant's allegations of race discrimination and retaliation associated with her suspension and termination, Complainant disqualified herself from receiving damages after December 30, 1999 since once Complainant had been accused of uttering the phrase "kiss my ass" in the presence of a nursing home resident, state law (210 ILCS 45/3-611), as well as state regulations (77 Ill. Admin. Code §300.3240(e)) mandated that Complainant be suspended pending the outcome

of an investigation of those allegations by the Department of Public Health. A close reading of section 3-611 of the Nursing Home Care Act, however, does not support Respondent's argument in this regard.

Specifically, section 3-611 of the Nursing Home Care Act does not require that employees suspected of resident abuse be suspended from their jobs, but rather "be barred from any further contact with residents of the facility, pending the outcome of any further investigation, prosecution or disciplinary action against the employee." Here, of course, there is no evidence regarding whether Complainant could have been removed from her cna position and placed in a comparable position away from the residents of the nursing home. Respondent suggests that its own policy, which required that Complainant be suspended from her employment pending the investigation by the Department of Public Health into the charges of resident abuse, precluded such an option. Maybe so, but issues with respect to Respondent's policy and what it would have done faced with charges levied against Complainant are not relevant under the circumstances of this case where Respondent failed to raise these issues in a verified response to the Charge of Discrimination. Thus, it is enough to say that section 3-611 and its accompanying regulations did not mandate that Complainant be removed entirely from the workforce or be precluded from obtaining any back wage claim arising out of Respondent's discriminatory suspension and termination.

But for what period of time is Complainant entitled to lost wages? Respondent offers three possible dates, beginning with the May 31, 2000 cessation of its nursing home operations, or Complainant's October 1, 2000 employment at a nursing home where she made more money than what she was expected to receive at Respondent's nursing home, or Complainant's January, 2001 move to California to assist her son. Complainant, on the other hand, insists that she is entitled to receive backpay up to the date of the public hearing. However, because Complainant can only receive damages that are causally connected to the established discrimination, May 31, 2000 is the appropriate cut-off date since

Complainant would only have received wages from Respondent up until that time, and any backpay award subsequent to that date would place Complainant in a better position than what she would have been absent Respondent's discriminatory acts.

Thus, in using the \$8.25 per hour figure Respondent would have paid Complainant for a 32 hour per hour workweek, Complainant would have earned \$5,808 in wages up to May 31, 2000. Respondent, though, is entitled to a credit for any wages that Complainant made during this time period, and the record reflects that Complainant earned \$158 selling newspapers and \$1,043 at a home for disabled adults during the spring of 2000. The record also shows that Complainant earned \$616.40 as a property manager on May 31, 2000, but this sum should not be used to off-set Complainant's backpay claim since Complainant was already working at this job at the time of her suspension, and there is no evidence that Complainant increased her hours in this position as a result of her suspension or termination.

Respondent also argues that it is entitled to a credit of \$656 that it paid Complainant in January of 2000 for work performed in December of 1999, as well as a credit for unemployment compensation received by Complainant during the relevant time frame of Complainant's backpay claim. The record reflects that Complainant made her claim for unemployment compensation on May 21, 2000, and thus Respondent will receive a week and a half credit (to May 31, 2000) based upon Complainant's weekly benefit of \$164, i.e. \$246. However, Respondent will not receive a credit on the \$656 it paid to Complainant in January of 2000 since this payment was for services rendered prior to her suspension. Thus, in factoring all of the credits and claims for backpay, I find that Complainant is entitled to \$4,361 (\$5,808 in gross wages minus \$1,201 received from other jobs during the relevant time period and minus \$246 received in unemployment compensation) in backpay.

Complainant also seeks \$72,000 in punitive damages for lost wages, \$216,000 in sexual harassment damages, \$678,000 in punitive damages for sexual harassment, \$216,000 in racial discrimination damages, \$648,000 in punitive damages for racial

discrimination, as well as living expenses from May, 2001 to July, 2001 of \$724.19 and traveling expenses of \$429.37. However, Complainant's claims for punitive damages can be denied since there is no provision in the Human Rights Act that permits such an award. Moreover, Complainant's additional request for damages arising out of an alleged sexual harassment and race discrimination can be denied since: (1) Complainant's Charge of Discrimination did not allege a sexual harassment; and (2) the damages associated with Complainant's race discrimination have already been measured in her backpay claim. As to Complainant's request for certain living expenses incurred prior to the public hearing, I will deny this request since Complainant, who would have incurred living expenses whether she was located in California or Illinois, did not establish that she was entitled to such expenses as part of her compensation package with Respondent. Similarly, I find that Complainant is not entitled to her travel expenses to and from California inasmuch as Complainant failed to link her move to California with any discriminatory treatment on the part of Respondent.

Although not specifically expressed as a separate claim for emotional damages in her post-hearing brief, Complainant asserted that the discrimination that she experienced in Respondent's nursing home caused her severe mental distress. While Complainant attributed some of her mental distress to the fact that she had been wrongfully accused of being verbally abusive to a resident, she also linked her mental state to the racist and sexist remarks she heard over the intercom and, according to the admitted facts contained in the Charge of Discrimination, to Respondent's apparent refusal to timely discipline these workers while imposing discipline on her. Under these circumstances, I find that Complainant is entitled to \$1,000 in emotional distress damages.

Additionally, Complainant made a request for costs totaling \$36.76 for unspecified "items purchased" and "Court house copies of tax forms". Unfortunately, Complainant did not testify at the public hearing regarding these expenses, and the record is unclear as to the identity of these items. Accordingly, this request will be denied. Moreover, I will not order

Complainant to be reinstated to her cna position since she has not sought this relief, and the record reflects that Respondent has ceased its operations as a nursing home. Complainant will also not receive attorney fees since she represented herself in this matter.

Finally, Respondent has filed a motion seeking to strike portions of Complainant's opening and reply briefs since, according to Respondent, they contain newly asserted facts and evidence that were not presented at the public hearing. After reviewing the pleadings I will grant in part the motion with respect to an attached copy of an alleged statement by Debbie Drury since that document had not been properly admitted during the public hearing. The remaining portion of the motion to strike will be denied inasmuch as I find that the subject statements were only attempts by Complainant to argue her position with respect to her claim for damages.

Recommendation

For all of the above reasons, I recommend that the Commission enter an Order which:

1. Requires Respondent to pay Complainant \$4,361 in back wages;
2. Requires Respondent to pay Complainant \$1,000 in emotional damages;
3. Denies Complainant's request for punitive damages, travel and living expenses, and unspecified costs.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 4TH DAY OF JUNE, 2002

