STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PHILOMENE AUGUSTIN, Petitioner, vs. MARRIOTT SENIOR LIVING SERVICES, INC.,[1] Respondent.	)	Case No. 02-4049

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on February 24, 2003, by video teleconference at sites in Fort Lauderdale and Tallahassee, Florida.

APPEARANCES

For Petitioner: Philomene Augustin, pro se
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For Respondent: Michael W. Casey, III, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner's Petition for Relief from an Unlawful Employment Practice (Petition for Relief) filed against Respondent should be granted by the Florida Commission on Human Relations (Commission).

PRELIMINARY STATEMENT

On July 12, 1999, Petitioner filed an employment discrimination complaint with the Commission alleging that she was terminated from her position as a Certified Nursing Assistant with Respondent "because of [her] race - Black."

On August 27, 2002, following the completion of its investigation of Petitioner's complaint, the Commission issued a Notice of Determination: Cause. The cause determination was based upon Respondent's "fail[ure] to provide [requested] information within its control to the Commission." Petitioner, on September 20, 2002, filed with the Commission a Petition for Relief seeking "$190,000.00 for all of the pain and emotional distress [and] embar[ra]ssment[]" [she suffered] when [she] lost [her] job," which, she alleged, was the result of her being discriminated against by Respondent because of her race.

On October 18, 2002, the Commission referred the matter to the Division of Administrative Hearings (Division) for the assignment of a Division Administrative Law Judge to conduct a hearing on the allegations in Petitioner's Petition for Relief.

As noted above, the hearing was held on February 24, 2003,[2] Four witnesses testified at the hearing: Respondent, John Culhane, Meg McKaon, and Joyce Montero. In addition, four exhibits (Respondent's Exhibits 1 through 4) were offered and received into evidence. The record was left open to give Petitioner the opportunity to present the testimony of an additional witness, Marie Mondesir. On March 24, 2003, Respondent filed a Status Report in the instant case, in which it stated the following:

> 1. Respondent scheduled the deposition of Marie Mondesir for March 13, 2003.
>
> 2. Respondent sent a Notice of Taking Deposition via certified mail to Petitioner on February 25, 2003. Petitioner received the Notice of Taking Deposition on March 1, 2003. A copy of the Notice of Taking Deposition and Petitioner's receipt of such Notice is attached at Tab 1.
>
> 3. Respondent served a Subpoena Ad Testificandum on Marie Mondesir for the taking of her deposition on March 4, 2003. A copy of proof of service is attached at Tab 2.
>
> 4. Neither Petitioner nor Marie Mondesir appeared for the deposition. A copy of the certificate of no-show is attached at Tab 3. Respondent and the court reporter waited for one hour for Petitioner and Ms. Mondesir to appear. Respondent then called both Petitioner and Ms. Mondesir to determine whether either of them would be attending the deposition. However, Respondent could not reach either Petitioner or Ms. Mondesir by telephone.

Having received Respondent's Status Report, the undersigned, on March 24, 2003, issued an Order Directing Response, which provided, in pertinent part, as follows:

> No later than ten days from the date of this Order Directing Response, Petitioner shall advise the undersigned in writing as to whether she still desires to present the testimony of Ms. Mondesir and, if so, those dates on which she and Ms. Mondesir will be unavailable for the taking of Ms. Mondesir's testimony.
>
> If Petitioner indicates in her written advisement that she is no longer desirous of presenting Ms. Mondesir's testimony, or if she fails to timely file the written advisement required by this Order Directing Response, the undersigned will issue an order closing the evidentiary record in the instant case.
>
> If Petitioner indicates in a timely filed written advisement that she still desires to present the testimony of Ms. Mondesir, no later than five days after the filing of such written advisement, Respondent shall advise the undersigned in writing of those dates on which it will be unavailable for the taking of Ms. Mondesir's testimony.
>
> After the expiration of this five-day response period, the undersigned will notify the parties in writing of when and where the final hearing in this case will resume (for the purpose of taking Ms. Mondesir's testimony).[[3]]

Not having received a response from Petitioner to his Order Directing Response, the undersigned, on April 9, 2003, issued an order closing the evidentiary record in this case and establishing a deadline for filing proposed recommended orders

(no later than 30 days from the date of the filing of the hearing transcript with the Division).

The Transcript of the final hearing (consisting of one volume) was filed with the Division on May 7, 2003.

Petitioner and Respondent filed Proposed Recommended Orders on March 24, 2003, and June 6, 2003, respectively. These post-hearing submittals have been carefully considered by the undersigned.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. At all times material to the instant case, Respondent operated Marriott Forum at Deercreek (hereinafter referred to as the "Facility"), a "senior living community, nursing home."

2. Petitioner was employed as a Certified Nursing Assistant (hereinafter referred to as "CNA") at the Facility from 1992 or 1993, until July of 1998, when she was terminated.

3. Petitioner is black.

4. At the time of Petitioner's termination, all of the CNAs, and all but one of the nurses, at the Facility were black.

5. At the time of Petitioner's termination, the chain of command leading down to Petitioner was as follows: the General Manager, Joanna Littlefield; the Health Care Administrator, Sheila Wiggins, and the Interim Director of Nursing, Michelle

Borland. The Director of Human Resources was Meg McKaon. Ms. Littlefield had the ultimate authority to terminate employees working at the Facility. Ms. Wiggins, Ms. Borland, and Ms. McKaon had the authority to make termination recommendations to Ms. Littlefield, but not to take such action themselves.

6. In July of 1998, F. S., an elderly woman in, or approaching, her 90's, was a resident at the Facility.

7. On or about July 9, 1998, Petitioner was involved in a scuffle with F. S. while giving F. S. a shower. Joyce Montero, a social worker at the Facility, was nearby in the hallway and heard the "commotion." When F. S. came out of the shower, Ms. Montero spoke to her. F. S. appeared to be "very upset." She was screaming to Ms. Montero, "Get her away from me; she hit me," referring to Petitioner. Ms. Montero noticed that F. S. "had blood [streaming] from her nostril to at least the top of her lip." The nursing staff then "took over" and "cleaned up [F. S.'s] blood" with a towel.

8. Ms. McKaon was contacted and informed that there was a CNA who had "had an altercation with a resident."

9. Ms. McKaon went to the scene "right away" to investigate.

10. When Ms. McKaon arrived, F. S. was still "visibly shaken and upset." Ms. McKaon saw the "bloody towel" that had

been used to clean F. S.'s face "there next to [F. S.]." F. S. told Ms. McKaon that she was "afraid [of Petitioner] and that she [had been] punched in the nose" by Petitioner.

11. In accordance with Facility policy, Petitioner was suspended for three days pending the completion of an investigation of F. S.'s allegation that Petitioner had "punched" her.

12. Ms. Wiggins and Ms. McKaon presented Petitioner with a written notice of her suspension, which read as follows:

> Description of employee's behavior . . . .
>
> On July 9, 1998, one of our residents [F. S.] was being given a shower by [Petitioner]. [F. S.] stated that [Petitioner] punched her in the nose. (She was crying and bleeding: witnessed by Joyce Montero).
>
> <u>Suspension For Investigation</u>
>
> To provide time for a thorough investigation of all the facts before a final determination is made, you are being suspended for a period of 3 days.
>
> <u>Guarantee Of Fair Treatment Acknowledgement</u>
>
> I understand that my manager has recommended the termination of my employment for the reasons described above and that I have been suspended for 3 days while a decision regarding my employment status is made. I understand that the final decision regarding my employment status will be made by the General Manager.
>
> The suspension period will provide time for an investigation of all facts that led to

> this recommendation. I understand that the General Manager will be conducting this investigation. I further understand that if I feel I have information which will influence the decision, I have a right to and should discuss it with the General Manager.
>
> I am to report to my manager on July 13, 1998 at 10:00 a.m.

Petitioner was asked to sign the foregoing notice, but refused to do so.

13. Ms. McKaon conducted a thorough investigation into the incident. Following her investigation, she came to the conclusion that there was "enough evidence to terminate" Petitioner. As a result, she recommended that Ms. Littlefield take such action, the same recommendation made by Ms. Wiggins.

14. After receiving Ms. McKaon's and Ms. Wiggins' recommendations, Ms. Littlefield decided to terminate Petitioner's employment.

15. The termination action was taken on or about July 23, 1998.

16. At this time, the Facility was on "moratorium" status (that is, "not allowed to accept any more patients") as a result of action taken against it by the Agency for Health Care Administration because of the "many" complaints of mistreatment that had been made by residents of the Facility.

17. Ms. Wiggins was given the responsibility of personally informing Petitioner of Ms. Littlefield's decision.

18. After telling Petitioner that her employment at the Facility had been terminated, Ms. Wiggins escorted Petitioner out of the building and to the parking lot. In the parking lot, Ms. Wiggins said to Petitioner something to the effect that, she, Ms. Wiggins, was "going to take all of the black nurses in the Facility." (What Ms. Wiggins meant is not at all clear from the evidentiary record.)

19. Following Petitioner's termination, the racial composition of the CNA staff at the Facility remained the same: all-black, as a black CNA filled Petitioner's position.

20. There has been no persuasive showing made that Petitioner's race played any role in Ms. Littlefield's decision to terminate Petitioner's employment.

CONCLUSIONS OF LAW

21. The Florida Civil Rights Act of 1992 (hereinafter referred to as the "Act") is codified in Sections 760.01 through 760.11, Florida Statutes, and Section 509.092, Florida Statutes.

22. Among other things, the Act makes certain acts "unlawful employment practices" and gives the Commission the authority, if it finds, following an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, that such an "unlawful employment practice" has

occurred, to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay." Sections 760.10 and 760.11(6), Florida Statutes.

23. Among the "unlawful employment practices" prohibited by the Act is that described in Section 760.10(1)(a), Florida Statutes, which provides as follows:

> It is an unlawful employment practice for an employer:[4]
>
> 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.

24. In the instant case, Petitioner has alleged that Respondent committed such an "unlawful employment practice" when it acted with discriminatory intent based on her race to terminate her employment as a CNA at the Facility in July of 1998.

25. Petitioner had the burden of proving, at the administrative hearing held in this case, that she was the victim of such discriminatorily motivated action. See Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996)("'The general rule is that a party

asserting the affirmative of an issue has the burden of presenting evidence as to that issue."'); Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974)("[T]he burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal."'); and Mack v. County of Cook, 827 F. Supp. 1381, 1385 (N.D. Ill. 1993)("To prevail on a racially-based discriminatory discharge claim under Title VII, Mack must prove that she was a victim of intentional discrimination."[5]).

26. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001).

27. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption." King v. La Playa-De Varadero Restaurant, No. 02-2502, 2003 WL 435084 *3 n.9 (Fla. DOAH 2003)(Recommended Order).

28. "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor. . . . If an alleged statement at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Likewise, a statement "that is subject to more than one

interpretation . . . does not constitute direct evidence." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997).

29. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997).

30. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the "shifting burden framework established by the [United States] Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981)" is applied. "Under this framework, the [complainant] has the initial burden of establishing a prima facie case of discrimination. If [the complainant] meets that burden, then an inference arises that the challenged action was motivated by a discriminatory intent. The burden then shifts to the [respondent] to 'articulate' a legitimate, non-discriminatory reason for its action.[6] If the [respondent] successfully articulates such a reason, then the burden shifts back to the [complainant] to show that the proffered reason is

really pretext for unlawful discrimination." Schoenfeld v. Babbitt, 168 F.3d at 1267 (citations omitted.).

31. Under this "shifting burden framework," "comments by non-decisionmakers do not raise an inference of discrimination, especially if those comments are ambiguous." Mitchell v. USBI Co., 186 F.3d 1352, 1355 (11th Cir. 1999). Nor do decisionmakers' "stray remarks" of uncertain meaning, having no apparent connection to the adverse employment decision, raise such an inference. See Beatty v. Wood, 1998 WL 832639 *4 (N.D. Ill. 1998)("A single ambiguous remark, standing alone, cannot support an inference of pretext.").

32. A complainant alleging discriminatory discharge, who lacks proof of a decisionmaker statement related to the decisional process which suggests that the complainant's discharge was discriminatorily motivated, may nonetheless establish "a prima facie case of discrimination [by] show[ing] (1) that she is a member of a protected group; (2) that she was qualified for the job that she formerly held; (3) that she was discharged; and (4) that after her discharge, the position she held was filled by someone not within her protected class." Singh v. Shoney's, Inc., 64 F.3d 217, 219 (5th Cir. 1995).

33. Under no circumstances is proof that, in essence, amounts to no more than mere speculation and self-serving belief on the part of the complainant concerning the motives of the

respondent sufficient, standing alone, to establish a prima facie case of intentional discrimination. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001)("The record is barren of any direct evidence of racial animus. Of course, direct evidence of discrimination is not necessary. . . . . However, a jury cannot infer discrimination from thin air. Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.")(citations omitted.); Reyes v. Pacific Bell, 21 F.3d 1115 (Table), 1994 WL 107994 **4 n.1 (9th Cir. 1994)("The only such evidence [of discrimination] in the record is Reyes's own testimony that it is his belief that he was fired for discriminatory reasons. This subjective belief is insufficient to establish a prima facie case."); Little v. Republic Refining Co., Ltd., 924 F.2d 93, 96 (5th Cir. 1991)("Little points to his own subjective belief that age motivated Boyd. An age discrimination plaintiff's own good faith belief that his age motivated his employer's action is of little value."); Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983)("We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief."); Coleman v. Exxon Chemical Corp., 162 F. Supp. 2d 593, 622 (S.D. Tex. 2001)("Plaintiff's conclusory, subjective belief that he has suffered

discrimination by Cardinal is not probative of unlawful racial animus."); Cleveland-Goins v. City of New York, 1999 WL 673343 *2 (S.D. N.Y. 1999)("Plaintiff has failed to proffer any relevant evidence that her race was a factor in defendants' decision to terminate her. Plaintiff alleges nothing more than that she 'was the only African-American man [sic] to hold the position of administrative assistant/secretary at Manhattan Construction.' (Compl.¶ 9.) The Court finds that this single allegation, accompanied by unsupported and speculative statements as to defendants' discriminatory animus, is entirely insufficient to make out a prima facie case or to state a claim under Title VII."); Umansky v. Masterpiece International Ltd., 1998 WL 433779 *4 (S.D. N.Y. 1998)("Plaintiff proffers no support for her allegations of race and gender discrimination other than her own speculations and assumptions. The Court finds that plaintiff cannot demonstrate that she was discharged in circumstances giving rise to an inference of discrimination, and therefore has failed to make out a prima facie case of race or gender discrimination."); and Lo v. F.D.I.C., 846 F. Supp. 557, 563 (S.D. Tex. 1994)("Lo's subjective belief of race and national origin discrimination is legally insufficient to support his claims under Title VII.").

34. In the instant case, Petitioner failed to meet her burden of proving, at the administrative hearing, that

Respondent discharged her from her position as a CNA at the Facility because of her race, as she had alleged in her employment discrimination complaint.

35. She presented no direct or circumstantial evidence establishing, even prima facie, that she was the victim of intentional race-based discrimination by Respondent. While Petitioner may sincerely and genuinely believe that her discharge was motivated by discriminatory animus on the basis of her race, such a good faith belief, unaccompanied by any persuasive proof establishing a nexus between Petitioner's race and her discharge,[7] is simply insufficient to prove intentional discrimination on the part of Respondent.

36. Although not required to do so inasmuch as the burden of production never shifted to it, Respondent advanced a legitimate, non-discriminatory reason for terminating Petitioner's employment, to wit: that Petitioner had punched F. S. in the nose. See Billups v. Methodist Hospital of Chicago, 922 F.2d 1300, 1303 (7th Cir. 1991)("The district court found that in response to plaintiff's prima facie case the defendant articulated a legitimate non-discriminatory reason for terminating her employment, namely that she physically abused a patient. There is little doubt that the defendant's articulated reason is legitimate. Physically abusing an elderly patient is serious misconduct."). Moreover, the record affirmatively

establishes that this articulated reason was, more likely than not, the real reason Petitioner was terminated and not merely a pretext for racial discrimination.[8]

37. In view of the foregoing, no "unlawful employment practice" should be found to have occurred and Petitioner's Petition for Relief should therefore be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Commission issue a final order finding that Respondent is not guilty of the "unlawful employment practice" alleged by Petitioner and dismissing Petitioner's Petition for Relief based on such finding.

DONE AND ENTERED this 20th day of June, 2003, in Tallahassee, Leon County, Florida.

____

STUART M. LERNER
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of June, 2003.

ENDNOTES

1/ At the outset of the final hearing in this case, the undersigned granted Respondent's request that the style of the instant case be changed to reflect that "Marriott Senior Living Services, Inc.," rather than "Marriott Forum at Deercreek," is the "correct legal name of the Respondent."

2/ The hearing was originally scheduled to commence on December 27, 2002, but was continued at Respondent's request.

3/ In an endnote, the undersigned observed:

> Ms. Mondesir's mere failure to appear for her deposition on March 13, 2003, standing alone, is not a reason to prevent Petitioner from presenting Ms. Mondesir's testimony. See State v. Farley, 788 So. 2d 338, 340 (Fla. 5th DCA 2001) ("Exclusion of a witness for failure to appear at a deposition is appropriate only when lesser sanctions have been attempted without success."); and State v. Gonzalez, 695 So. 2d 1290, 1292 (Fla. 4th DCA 1997)("The exclusion of a witness is justified only after some lesser sanction, such as contempt or a writ of bodily attachment, has been attempted without success in making the witness attend a deposition.").

4/ An "employer," as that term is used in Section 760.10(1)(a), Florida Statutes, is defined in Section 760.02(7), Florida Statutes, as "any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person."

5/ "Because th[e] [A]ct is patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, federal case law dealing with Title VII is applicable." Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

6/ "To 'articulate' does not mean 'to express in argument.' . . . It means to produce evidence." Rodriguez v. General Motors Corporation, 904 F.2d 531, 533 (9th Cir. 1990).

7/ The indecipherable remark concerning the "black nurses" at the Facility made by Ms. Wiggins (who was not the person who made the decision to discharge Petitioner) does not constitute such evidence.

8/ Regardless of whether Petitioner actually punched F. S. in the nose (which is an issue the undersigned need not resolve), the evidentiary record reveals that Ms. Littlefield, who made the decision to terminate Petitioner, certainly had reason to believe that Petitioner engaged in such serious misconduct. See Moore v. Sears, Roebuck and Co., 683 F.2d 1321, 1323 n.4 (11th Cir. 1982)("It is well settled in employment discrimination cases such as this that for an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory and that the asserted reason for the discharge is therefore not a mere pretext for discrimination.").

That the Facility's CNA staff was all-black at the time of Petitioner's termination and remained so following Petitioner's departure from the Facility strongly suggests that, in discharging Petitioner, Ms. Littlefield did not act out of racial animus and that the reason given for the discharge (Petitioner's physically abusing F. S.) was not a mere subterfuge to mask such animus. See Nieto v. L&H Packing Co., 108 F.3d 621, 623-24 (5th Cir. 1997)("Not only did Nieto fail to provide evidence that would allow a fact finder to infer that Surlean's decision was motivated by his national origin, but the record evidence provides substantial support to the contrary. For starters, eighty-eight percent of Surlean's work force is comprised of minorities. Second, it is undisputed that the employee who was promoted to replace Nieto as night production supervisor was also Hispanic. While not outcome determinative, this fact is certainly material to the question of discriminatory intent.").

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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.