STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARLOW WILLIAMS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-1922
	)	
UNCLE ERNIE'S,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on January 25, 2006, in Panama City, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Marlow Williams, pro se
6526 Lance Street
Panama City, Florida 32404

For Respondent: Gary R. Wheeler, Esquire
McConnaughhay, Duffy, Coonrod
Pope & Weaver, P.A.
Post Office Box 550770
Jacksonville, Florida 32255-0770

STATEMENT OF THE ISSUES

The issues are whether Petitioner received notice of the August 19, 2005, administrative hearing, and if not, whether Respondent discriminated against Petitioner based on his race.

PRELIMINARY STATEMENT

On January 11, 2005, Petitioner Marlow Williams (Petitioner) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). The complaint, which listed Petitioner's address as 6526 Lance Street, Panama City, Florida, alleged that Respondent Uncle Ernie's (Respondent) had violated Section 760.10(1), Florida Statutes (2004), by subjecting him to harassment and by terminating his employment based upon his race.

On April 18, 2005, FCHR issued a Determination: No Cause. FCHR also issued a Notice of Determination: No Cause, which advised Petitioner of his right to file a Petition for Relief. Both of these pleadings listed Petitioner's address as 6501 Pridgen Street, Panama City, Florida.

On May 25, 2005, Petitioner filed a Petition for Relief with FCHR. The petition listed Petitioner's address as 6526 Lance St., Panama City, Florida.

On May 25, 2005, FCHR referred the petition to the Division of Administrative Hearings (DOAH). FCHR's Transmittal of Petition indicated that Petitioner's address of record was 6501 Pridgen Street, Panama City, Florida.

DOAH issued an Initial Order on May 25, 2005. Thereafter, the undersigned conducted a telephone conference with the

parties to establish mutually convenient dates to schedule the hearing.

On June 9, 2005, the undersigned issued a Notice of Hearing, scheduling the hearing for July 18, 2005. The notice was sent to Petitioner's address of record as stated in FCHR's Transmittal of Petition at 6501 Pridgen Street, Panama City, Florida. The United States Post Office did not return the notice to DOAH as undeliverable.

On July 8, 2005, Respondent filed a Motion to Reschedule Hearing of July 18, 2005. On July 12, 2005, the undersigned issued an Order Granting Continuance and Re-scheduling Hearing for August 19, 2005. The order was sent to Petitioner's address of record at 6501 Pridgen Street, Panama City, Florida. The United States Post Office did not return the order to DOAH as undeliverable.

On August 11, 2005, Respondent filed a unilateral Pre-hearing Statement. Petitioner did not make such a filing.

Petitioner did not make an appearance at the hearing on August 19, 2005, or make a request for a continuance. Respondent was present and prepared to proceed as scheduled. After waiting an appropriate period of time, the undersigned adjourned the hearing. On August 22, 2005, the undersigned issued an Order Closing File, which was sent to Petitioner at

his address of record at 6501 Pridgen Street, Panama City, Florida.

On November 7, 2005, FCHR issued an Order Remanding Petition for Relief from an Unlawful Employment Practice. The order directed the undersigned to make further findings whether Petitioner received notice of the August 19, 2005, administrative hearing, and if not, for further proceedings on the Petition for Relief.

On November 9, 2005, the undersigned issued an Order Reopening File After Remand, which was sent to Petitioner at 6526 Lance Street, Panama City, Florida, and at 6501 Pridgen Street, Panama City, Florida. On November 21, 2005, the United States Post Office returned the Order sent to Petitioner at 6501 Pridgen Street, Panama City, Florida, as undeliverable.

On November 29, 2005, Respondent filed a Unilateral Response to Order Reopening File After Remand. Petitioner did not make such a filing.

On November 30, 2005, the undersigned conducted a telephone conference with the parties. During the conference, the parties agreed to reschedule the hearing for January 25, 2006.

On December 1, 2005, the undersigned issued a Notice of Hearing, scheduling the hearing for January 25, 2006. The undersigned also issued an Order of Pre-hearing Instructions.

On January 10, 2006, Respondent filed a Pre-hearing Statement. Petitioner did not make such a filing.

On January 20, 2006, Respondent filed a Motion to Dismiss or in the Alternative to Postpone Hearing Pending Petitioner's Response to Proposed Show Cause Order. The motion was denied on the record during the hearing.

During the January 25, 2006, hearing, Petitioner testified on his own behalf. He did not present any other witnesses or offer any exhibits for admission into evidence.

Respondent presented the testimony of four witnesses. Respondent offered four exhibits, which were accepted as evidence.

A transcript of the proceeding was filed on March 3, 2006.

On March 9, 2006, Respondent filed a Motion for Extension of Time to File Proposed Recommended Order. An Order dated March 15, 2006, granted the motion.

Respondent filed a Proposed Recommended Order on March 17, 2006. As of the dated that this Recommended Order was issued, Petitioner had not filed proposed findings of fact and conclusions of law.

All citations shall hereinafter refer to Florida Statutes (2004) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is an African-American male. In the fall of 2004, Petitioner's cousin, Barry Walker, worked for Respondent as a cook. Mr. Walker recommended that Respondent hire Petitioner as a dishwasher.

2. James Pigneri, Respondent's owner, interviewed Petitioner and decided to hire him as a dishwasher on a trial basis. Petitioner began washing dishes for Respondent in September 2004. In October 2004, Petitioner began a 90-day probationary period as Respondent's dishwasher. At that time, PMI Employee Leasing (PMI) became Petitioner's co-employer.

3. PMI has a contractual relationship with Respondent. Through this contract, PMI assumes responsibility for Respondent's human resource issues, payroll needs, employee benefits, and workers' compensation coverage.

4. On October 10, 2004, Petitioner signed an acknowledgement that he had received a copy of PMI's employee handbook, which included PMI's policies on discrimination, harassment, or other civil rights violations. The handbook states that employees must immediately notify PMI for certain workplace claims, including but not limited to, claims involving release from work, labor relation problems, and discrimination. The handbook requires employees to inform PMI within 48 hours if employment ceases for any reason.

5. PMI's discrimination and harassment policies provide employees with a toll-free telephone number. When an employee makes a complaint or files a grievance, PMI performs an investigation and takes any corrective action that is required.

6. The cook-line in Respondent's kitchen consist of work stations for all sauté and grill cooks. The cook-line runs parallel to a row of glass windows between the kitchen and the dining room and around the corner between the kitchen and the outside deck. Customers in the dining room and on the deck can see all of the cooks preparing food at the work stations along the cook-line. On the evening of December 18, 2004, Respondent's business was crowded with customers in the dining room and on the deck.

7. On December 18, 2004, Petitioner was working in Respondent's kitchen. Sometime during the dinner shift, Petitioner was standing on the cook-line near the windows, talking to a cook named Bob. Petitioner was discussing a scar on his body. During the discussion, Petitioner raised his shirt, exposing his chest, arm, and armpit. The cook named Bob told Petitioner to put his shirt down.

8. Erin Pigneri, a white male, is the son of Respondent's owner, James Pignari. As one of Respondent's certified food managers, Erin Pigneri must be vigilant about compliance with health code regulations when he works as Respondent's shift

manager. Erin Pigneri has authority to recommend that employees be fired, but his father, James Pigneri, makes the final employment decision.

9. On December 18, 2004, Erin Pigneri, was working as Respondent's manager and was in charge of the restaurant because his father was not working that night. When Erin Pigneri saw Petitioner with his shirt raised up, he yelled out for Petitioner put his shirt back on and to get off the cook-line. Erin Pigneri was alarmed to see Petitioner with his shirt off on the cook-line because customers could see Petitioner and because Petitioner's action violated the health code.

10. Petitioner's reaction was immediately insubordinate. Petitioner told Erin Pigneri that he could not speak to Petitioner in that tone of voice. Erin Pigneri had to tell Petitioner several times to put his shirt on, explaining that Petitioner was committing a major health-code violation.

11. When Petitioner walked up to Erin Pigneri, the two men began to confront each other using profanity but no racial slurs. Erin Pigneri finally told Petitioner that, "I'm a 35-year-old man and no 19-year-old punk is going to talk to me in that manner and if you don't like it, you can leave." Erin Pigneri did not use a racial slur or tell Petitioner to "paint yourself white."

12. After the confrontation, Erin Pigneri left the kitchen. Petitioner went back to work, completing his shift without further incident.

13. Petitioner did not have further conversation with Erin Pigneri on the evening of December 18, 2004. Erin Pigneri did not discuss Petitioner or the shirt incident with any of the waiters or any other staff members that night.

14. On Monday evening, December 20, 2004, Erin Pigneri was in the restaurant when Petitioner and his cousin, Mr. Walker, came to work. Petitioner was dressed in nicer clothes than he usually wore to work. Mr. Walker approached Erin and James Pigneri, telling them that they needed to have a meeting. Erin and James Pigneri followed Petitioner and Mr. Walker into the kitchen.

15. The conversation began with Mr. Walker complaining that he understood some racist things were going on at the restaurant. Mr. Walker wanted talk about Erin Pigneri's alleged use of the "N" word. Erin Pigneri did not understand Mr. Walker's concern because Mr. Walker had been at work on the cook-line during the December 18, 2004, shirt incident.

16. According to Petitioner's testimony at the hearing, Mr. Walker had talked to a waiter over the weekend. The waiter was Mr. Walker's girlfriend. Petitioner testified that the waiter/girlfriend told Mr. Walker that she heard Erin Pigneri

use the "N" word in reference to Petitioner after Erin Pigneri left the kitchen after the shirt incident on December 18, 2004. Petitioner testified that neither he nor Mr. Walker had first-hand knowledge of Erin Pigneri's alleged use the "N" word in the dining room. Neither Mr. Walker nor the waiter provided testimony at the hearing. Accordingly, this hearsay evidence is not competent evidence that Erin Pigneri used a racial slur in the dining room after the "shirt incident."

17. During the meeting on December 20, 2004, Erin Pigneri explained to Petitioner and Mr. Walker that the incident on December 18, 2004, involved Petitioner's insubordination and not racism. Mr. Walker wanted to know why Erin Pigneri had not fired Petitioner on Saturday night if he had been insubordinate. Erin Pigneri told Mr. Walker that he would have fired Petitioner but he did not want Respondent to lose Mr. Walker as an employee. Apparently, it is relatively easy to replace a dishwasher but not easy to replace a cook like Mr. Walker.

18. Erin Pigneri asked Mr. Walker and another African-American who worked in the kitchen whether they had ever heard him make derogatory racial slurs. There is no persuasive evidence that Erin Pigneri ever made such comments even though Petitioner occasionally, and in a joking manner, called Erin Pigneri slang names like Cracker, Dago, and Guinea.

19. Petitioner was present when Mr. Walker and Erin Pigneri discussed the alleged racial slurs. Petitioner's only contribution to the conversation was to repeatedly ask whether he was fired. Erin Pigneri never told Petitioner he was fired.

20. After hearing Mr. Walker's concern and Erin Pigneri's explanation, James Pigneri specifically told Petitioner that he was not fired. James Pigneri told Petitioner that he needed to talk to Erin Pigneri and that they needed to work things out, man-to-man.

21. After the meeting, Mr. Walker began his work for the evening shift on December 20, 2004. Petitioner walked around talking on his cell phone, telling his mother that he had been fired and she needed to pick him up. James Pigneri told Petitioner again that he was not fired, that Petitioner should go talk to Erin Pigneri, and that Erin Pigneri was waiting to talk to Petitioner.

22. Erin Pigneri waited in his office for Petitioner to come in to see him. Petitioner never took advantage of that opportunity.

23. During the hearing, Petitioner testified that James Pigneri made an alleged racial slur in reference to Petitioner at some unidentified point in time. According to Petitioner, he learned about the alleged racial slur second-hand from a cook named Bob. Bob did not testify at the hearing; therefore, there

is no competent evidence that James Pigneri ever made a racial slur in reference to Petitioner or any other employee.

24. Contrary to PMI's reporting procedures, Petitioner never called or informed PMI that he had been harassed, discriminated against, fired, terminated, or ceased working for Respondent for any reason. On December 22, 2004, PMI correctly concluded that Petitioner had voluntarily terminated or abandoned his employment.

25. When Petitioner filed his Employment Complaint of Discrimination on January 11, 2005, Petitioner listed his address as 6526 Lance Street, Panama City, Florida, which is his mother's residence. On April 18, 2005, FCHR sent the Determination: No Cause to Petitioner at 6501 Pridgen Street, Panama City, Florida, which is the address of one of Petitioner's friends. When Petitioner filed his Petition for Relief on May 25, 2005, Petitioner listed his address the same as his mother's home. FCHR transmitted the petition to the Division of Administrative Hearings, indicating that Petitioner's address of record was the same as his friend's home. Therefore, the June 9, 2005, Notice of Hearing, and the July 12, 2005, Order Granting Continuance and Re-scheduling Hearing were sent to Petitioner at his friend's address.

26. During the hearing, Petitioner admitted that between January 2005 and August 2005, he lived back and forth between

his mother's and his friend's residences. When he lived with his friend, Petitioner did not check his mail at his mother's home every day. However, Petitioner admitted that he received the June 9, 2005, Notice of Hearing, scheduling the hearing for July 18, 2005, and the July 12, 2005, Order Granting Continuance and Re-scheduling Hearing for August 19, 2005.

27. Petitioner testified that he knew the first hearing was rescheduled to take place on August 19, 2005. According to Petitioner, he misplaced the "papers" identifying the location of the hearing at the Office of the Judges of Compensation Claims in Panama City, Florida. Petitioner asserts that he went to the county courthouse on August 19, 2005, based on his erroneous belief that the hearing was to take place at that location. After determining that there was no administrative hearing scheduled at the county courthouse on August 19, 2005, Petitioner did not attempt to call FCHR or the Division of Administrative Hearings.

28. On December 1, 2005, the undersigned sent Petitioner a Notice of Hearing, scheduling the hearing after remand for January 25, 2005. The December 1, 2005, Notice of Hearing was sent to Petitioner at his mother's and his friend's addresses. The copy of the notice sent to his friend's home was returned as undeliverable.

29. During the hearing on January 25, 2005, Petitioner testified that he used one of the earlier notices (dated June 9, 2005, and/or July 12, 2005) to locate the hearing site for that day. This was necessary because Petitioner had misplaced the December 1, 2005, Notice of Hearing. All three notices have listed the hearing site as the Office of the Judges of Compensation Claims, 2401 State Avenue, Panama City, Florida.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes (2005).

Notice

31. FCHR remanded this case for a determination whether Petitioner received notice of the August 19, 2005, administrative hearing. During the hearing after remand, Petitioner admitted that he received notice of the hearing as it was originally scheduled on July 18, 2005, and rescheduled on August 19, 2005.

32. Petitioner failed to attend the August 19, 2005, hearing because he "misplaced" the original Notice of Hearing and the Order Granting Continuance and Rescheduling Hearing and went to the wrong hearing site. After learning that he was not

at the designated location, Petitioner did not bother to call FCHR or the Division of Administrative Hearings.

33. In the event that there is any residual question whether Petitioner received proper notice of the August 19, 2005, hearing, the merits of Petitioner's Petition for Relief are considered below.

Discrimination

34. Petitioner has the burden of proving by the preponderance of the evidence that Respondent committed an unlawful employment practice. See Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

35. It is an unlawful employment practice for an employer to discharge or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race. See § 760.10(1)(a), Fla. Stat.

36. The provisions of Chapter 760, Florida Statutes, are analogous to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq. Cases interpreting Title VII are, therefore, applicable to Chapter 760, Florida Statutes. See School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

Hostile Work Environment

37. Petitioner alleges that Respondent harassed him by using a racial slur on December 18, 2004, during the shirt incident. Petitioner's testimony in this regard is not persuasive. However, even if Erin Pigneri had used a racial slur during the shirt incident, Petitioner still has not presented a prima facie case of racial discrimination due to a hostile work environment.

38. A prima facie case of hostile work environment requires evidence that (a) the claimant belongs to a protected group; (b) the claimant has been subject to unwelcome harassment; (c) the harassment was based on a protected characteristic; (d) the workplace is permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the terms or conditions of employment and to create an abusive working environment; and (e) the employer is responsible for such environment under either a theory of vicarious or of direct liability. See Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002); Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. 2d 1314 (M.D. Fla. 2002).

39. Here, Petitioner as an African-American is a member of a protected group. Petitioner testified that the alleged racial slur was unwelcome, race-related harassment. Even so, there is

no evidence that Petitioner's workplace was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the terms or conditions of employment and to create an abusive working environment.

40. In order to prove the fourth element of his prima facie case, Petitioner must show that: (a) he subjectively perceived the alleged conduct to be abusive, and (b) a reasonable person objectively would find the alleged conduct to be hostile or abusive. See Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. at 1323. "Mere utterance of a racial epithet that engenders offensive feelings in an employee but does not alter the conditions of employment, does not present an actionable situation." See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

41. In this case, Petitioner presented evidence that he subjectively perceived Erin Pigneri's conduct on December 18, 2005, to be offensive. The question remains whether Petitioner has satisfied the objective inquiry.

42. A court should determine whether conduct is objectively hostile or abusive by looking at the totality of the circumstances, using several factors including: (a) the frequency of the conduct; (b) its severity; (c) whether it was physically threatening or humiliating or whether it was merely offensive; and (d) whether it unreasonably interfered with the

employee's job performance. Id. at 1324. The conduct at issue must be so extreme as to "amount to a change in terms and conditions of employment." See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

43. In the instant case, there is no persuasive evidence that Erin Pigneri or James Pigneri used derogatory racial slurs at work. The kitchen staff may have joked around with each other and joked with Erin Pigneri about his Italian heritage, but Erin Pigneri did not respond in like manner. Offensive and humiliating racial slurs did not permeate the work environment in Respondent's kitchen.

44. Finally, Petitioner has not shown that Erin Pigneri's allegedly inappropriate comments altered Petitioner's working conditions. Petitioner went right back to work on December 18, 2004, after the shirt incident and completed his shift. He claims that he reported for work on December 20, 2004, prepared to work, although he was dressed in his street clothes and not his usual work clothes. Respondent did not fire him for violating the health code or being insubordinate. Petitioner made the decision to alter the conditions of his employment by walking off the job without being fired or making an effort to "work things out" with Erin Pigneri.

45. Assuming arguendo that the evidence supports Petitioner's allegations relative to a hostile work environment,

Respondent has satisfied the Faragher-Ellerth affirmative defense which states as follows in relevant part:

> According to the Supreme Court, if a plaintiff shows that the supervisor effected a tangible employment action against plaintiff, then the corporate defendant is liable for the harassment. Faragher, 524 U.S. at 807-08, 118 S. Ct. 2275; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998); Miller, 277 F.3d at 1278. Where, however, the plaintiff does not show that the supervisor took a tangible employment action, the employer may raise an affirmative defense that it: 1) exercised reasonable care to prevent and promptly correct the harassing behavior, and 2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities the employer provided or to avoid harm otherwise. Miller v. Kenworth of Dothan, Inc., 277 F.3d at 1278 (citing, Faragher, 524 U.S. at 807, 118 S. Ct. 2275; Ellerth, 524 U.S. at 765, 118 S. Ct. 2257.

See Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. at 1327.

46. Here, Respondent and its co-employer, PMI, never took a tangible employment action against Petitioner. Petitioner was not fired. Instead, James Pigneri tried to encourage Erin Pigneria and Petitioner to work out their differences. Erin Pigneri was willing to talk to Petitioner but Petitioner was not willing to talk to Erin Pigneri.

47. Furthermore, Respondent and PMI exercised reasonable care to prevent harassment by having a policy in place to prevent discrimination. Petitioner failed to follow the policy

by making a complaint, filing a grievance, and failing to inform PMI that he was no longer working for Respondent for whatever reason.

Unlawful Discharge

48. As stated above, Petitioner has the initial burden of proving a prima facie case of unlawful discrimination. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas v. Green, 411 U.S. 792 (1973).

49. Petitioner may prove discrimination either directly or through circumstantial evidence. See Arrington v. Cobb County, 139 F.3d 865, 873 (11th Cir. 1998).

Direct Evidence of Unlawful Discharge

50. Under Hinson v. Clinch County Bd. of Educ., "direct evidence is not inferential; it is 'evidence which if believed, proves existence of fact in issue without inference or presumption.'" See Id., citing Burrell v. Board of Trustees of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir. 1997). Temporal proximity between the remark and the challenged decision is also required. See Grant v. Delco Oil, Inc., 259 B.R. 742, 750 (M.D. Fla. 2000).

51. "Racially derogatory statements can be direct evidence of discrimination if the comments were (1) made by the decision maker responsible for the alleged discriminatory act and (2)

made in the context of the challenged decision." See Vickers v. Federal Express Corp., 132 F. Supp. 2d 1371 (S.D. Fla. 2000).

52. "If the Plaintiff makes a showing of direct evidence of discrimination, the burden shifts to the defendant where it must prove that it would have made the same decision anyway absent the discriminatory motive." See Harrington v. The Children's Psychiatric Center, Inc., 17 Fla. L. Weekly Fed. D 353 (S.D. Fla. 2003)(citing Wright v. Southland, 187 F.3d 1287 (11th Cir. 1999).

53. In this case, Petitioner has not made a showing of racial discrimination by direct evidence. There is no persuasive evidence that Erin Pigneri made a racial slur in reference to Petitioner on December 18, 2004. However, even if Erin Pigneri had used a racial slur, James Pigneri and not Erin Pigneri, made the decision not to fire Petitioner on December 20, 2004. Respondent did not involuntarily terminate Petitioner's employment.

54. "Employee resignations are presumed to be voluntary." See Slatterly v. Neumann, 200 F. Supp. 2d 1367 (S.D. Fla. 2002). Resignations are not involuntary simply because the only perceived alternative is an unpleasant one. See Id., at 1373. In this case, Petitioner decided to voluntarily abandon his job rather than talk with Erin Pigneri about their problems at work.

55. The greater weight of the evidence indicates that James Pigneri wanted Petitioner and Erin Pigneri to work out their problems. James Pigneri's decision in this regard was warranted in light of Petitioner's health code violation and insubordination on December 18, 2004, and the resulting heated confrontation with Erin Pigneri. James Pigneri had a legitimate non-discriminatory reason to make that decision absent any discriminatory motive. Petitioner elected not to take advantage of the opportunity to talk to Erin Pigneri.

Circumstantial Evidence of Unlawful Discharge

56. In order to show a prima facie case of unlawful discharge by circumstantial evidence, Petitioner must establish the following: (a) he is a member of a protected class; (b) he is qualified for the job; (c) he was terminated from employment; and (d) Respondent treated similarly situated non-black employees more favorably. See Holified v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

57. If Petitioner presents a prima facie case of discrimination, Respondent must articulate a legitimate, nondiscriminatory reason for the challenged employment action. See Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997).

58. If Respondent presents one or more such reasons, the presumption of discrimination is eliminated and Petitioner must

prove beyond a preponderance of the evidence that Respondent's reasons for the adverse action were a pretext for intentional discrimination. See Id.

59. During the hearing, Petitioner admitted that Respondent did not terminate his employment. According to Petitioner, James Pigneri specifically told him that he was not being fired and that he needed to work things out with Erin Pigneri.

60. Petitioner also failed to present any evidence that Respondent treated white employees more favorably. Petitioner did not show that Respondent's management allowed any employee, regardless of race, to violate health code regulations and then to respond insubordinately when corrected about that violation.

61. Petitioner has not presented a prima facie case of unlawful discharge by circumstantial evidence. On the other hand, James Pigneri was justified in requiring Petitioner to talk to Erin Pigneri so the two of them could work out their problems. Petitioner's health code violation and his insubordination were not pretexts for discrimination. Petitioner has presented no evidence to the contrary.

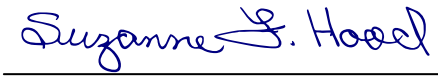
RECOMMENDATION

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

RECOMMENDED:

That FCHR enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 23rd day of March, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 23rd day of March, 2006.

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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.