STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAMURIEL A. ORLINO, Petitioner, vs. JUPITER MEDICAL CENTER, Respondent.	)	Case No. 05-2171

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings, on May 1 and 16, 2006, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Ramuriel A. Orlino, pro se
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For Respondent: Gregory D. Cook, Esquire
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STATEMENT OF THE ISSUE

Whether Jupiter Medical Center committed the unlawful employment practices alleged in the employment discrimination

charge filed by Petitioner and, if so, what relief should the Florida Commission on Human Relations grant Petitioner.

PRELIMINARY STATEMENT

On May 24, 2004, Petitioner, whose employment with Jupiter Medical Center (JMC) was terminated on June 6, 2003, filed an employment discrimination charge with the Florida Commission on Human Relations (FCHR), alleging that JMC had discriminated against him "because of his race (Asian)." On May 18, 2005, following the completion of its investigation of Petitioner's charge, the FCHR issued a Notice of Determination: No Cause, advising that a determination had been made that "there [was] no reasonable cause to believe that an unlawful employment practice ha[d] occurred." Petitioner, on or about June 11, 2005, filed a Petition for Relief with the FCHR. On June 16, 2005, the FCHR referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge to conduct a hearing on the allegations of employment discrimination made by Petitioner against JMC.

On December 7, 2005, the originally-assigned administrative law judge issued an Order Granting Motion to Dismiss, Relinquishing Jurisdiction, and Closing File, in which he returned the instant matter to the FCHR "inasmuch as there [were, in his view,] no longer any disputed issues of material fact in this case."

On February 24, 2006, the FCHR entered an Order Remanding Petition for Relief from an Unlawful Employment Practice, in which it referred the matter back to DOAH because, in its opinion, there were "disputed issues of material fact . . . requir[ing] a formal administrative hearing to resolve." The remand was accepted, and the DOAH file in this case was reopened. Thereafter, the undersigned was reassigned the case.

As noted above, the undersigned conducted the final hearing in this case on May 1 and 16, 2006. Seven witnesses testified at the hearing: Jeanne Wiley, Kathleen Rogers, William Myers, Bertha Valdez, Petitioner, Sherry Miller, and Gail O'Dea. In addition, the following exhibits (Petitioner's Exhibits 1A through Q and 2, and Respondent's Exhibits 1 through 5 and 7 through 27) were offered and received into evidence. At the close of the evidentiary portion of the hearing on May 16, 2006, the undersigned established the deadline for filing proposed recommended orders 45 days from the date of the filing of the complete hearing transcript with DOAH.

The Transcript of the final hearing consists of two volumes. The first volume was filed with DOAH on May 26, 2006. The second volume was filed with DOAH on June 9, 2006. Accordingly, proposed recommended orders had to be filed no later than July 24, 2006.

Petitioner and JMC timely filed their Proposed Recommended Orders on July 20, 2006, and July 24, 2006, respectively. On August 1, 2006, Petitioner filed a Supplemental Proposed Recommended Order.

FINDINGS OF FACT

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

1. Petitioner is from the Philippines and is a Filipino citizen. He is now, and has been since approximately February 2000, a legal resident of the United States.

2. JMC operates a 156-bed hospital (Hospital) located in Jupiter, Florida, which has a medical laboratory (Laboratory) that is "open twenty-four hours a day, seven days a week."

3. At all times material to the instant case, Kathleen Rogers was the director of the Laboratory and Sherry Miller was the assistant director of the Laboratory.

4. Petitioner was hired by JMC in October 2000, as a medical technologist to work in the Laboratory.

5. He worked in the Laboratory as a medical technologist, under Ms. Rogers' supervision, from October 2000, until his employment was terminated on June 6, 2003 (Employment Period).

6. During the Employment Period, Jeanne Wiley also worked as a medical technologist in the Laboratory under Ms. Rogers' supervision. Ms. Wiley did not exercise any supervisory

authority over Petitioner, nor was she part of the JMC management team.

7. Ms. Rogers was responsible for Petitioner's hiring. She "hired him at the maximum [salary] that anybody coming in at th[at] level could be paid" under JMC's race/religion/gender-blind pay scale.

8. Petitioner received pay raises during the time that he worked for JMC.

9. There were other Laboratory employees who were paid less than Petitioner. None of these employees was Asian.

10. John Lambiase was hired by JMC as a medical technologist to work in the Laboratory in 2003, shortly before Petitioner's termination. At the time of his hiring, Mr. Lambiase had less education and experience than did Petitioner. Nonetheless, Mr. Lambiase's starting salary of $17.80 per hour was $0.38 per hour more than Petitioner was making.[2] This disparity in pay was the product of market conditions and had nothing to do with either Mr. Lambiase's or Petitioner's race. The position that Mr. Lambiase filled had been vacant for approximately eight months despite JMC's recruiting efforts. "[D]esperate" to fill the vacancy, Ms. Rogers requested and obtained from JMC's human resources department "special permission" to hire Mr. Lambiase at the going market rate.

11. During the Employment Period, JMC had a human resources administrative policy and procedure manual (Manual), which was made available to all employees, including Petitioner. The Manual contained, among other things, an anti-discrimination and anti-harassment policy, a grievance procedure, a "Time and Attendance" policy, and a progressive discipline policy.

12. The progressive discipline policy stated, in pertinent part, substantially the following with respect to "Verbal Warning[s]," "Written Conference Records," and terminations:

> Verbal Warning:
>
> "Informal counseling" will be regarded as a daily on-going process through which management may communicate necessary information to his/her staff. Such information may include both positive comments and/or areas in need of improvement. In either case, management may wish to utilize "Employee Action Assessment" for the following purposes:
>
> a. To justify pay for performance adjustment decisions and to confirm performance appraisal accuracy.
> b. To document excellence for promotional opportunities.
> c. To document "reoccurring" performance/behavior/work habit problems that individually do[] not yet require formal documentation, (i.e.) "Written Conference Record."
>
> Employee Action Assessment entries will be shared with the employee within a reasonable time of management's observation or date of discovery. Employee Action Assessments need not be shared with Human Resources but

rather maintained by the appropriate manager to be used as outlined above.

<u>Written Conference Records</u>:

1. Unless immediate suspension pending investigation or termination is necessary, an employee will receive a documented "Written Conference Record" which will delineate steps toward correction of the problem.

The completed Written Conference Record process should take place within (3) three business days of the date of discovery, unless the employee has been temporarily suspended pending investigation or if interrupted by a Medical Center holiday. In the case of the latter, the process should be completed by the next business day.

2. The Chief Human Resource Officer or Assistant Director of Human Resources will review and approve all "Written Conference Records" prior to management meeting with the employee.

3. All employee "Written Conference Records" shall be documented on a Jupiter Medical Center "Conference Record" form and ultimately filed in the Human Resources Department. The employee is encouraged to review and record personal comments and sign the form. While employees are encouraged to respond [to] and sign the form, responding to, or signing the form merely indicates that the action was discussed with the employee, not that the employee agrees or disagrees with the corrective action.

4. All completed "Written Conference Record" forms should be received by the Human Resources Department within (3) business days. A completed "Written Conference Record" form will be appropriately signed and dated by the manager, employee, if agreeable, and a

managerial witness from the same department. A witness's signature will acknowledge that the information was thoroughly discussed with the employee in an appropriate manner.

5. Any combination of three appropriately documented "Written Conference Records" within an eighteen-month (18) period will constitute grounds for termination unless otherwise noted on the "Written Conference Record." In such instances, fewer than (3) repetitions of some violations may [warrant] termination. . . .

6. No department, other than the Human Resources Department will maintain formal "Written Conference Records" in their files. Informal documentation such as "employee action assessments" and/or employee attendance record may be kept within individual department files.

7. A "Written Conference Record" should be available to support any performance appraisal standard scored as "needs improvement."

Suspension and Termination:

*   *   *

5. Terminations reviewed and approved by the Senior Manger will be forwarded to the Chief Human Resource Officer or the Assistant Director of Human Resources for review and final approval. A letter of termination must be coordinated through the Asst. Dir. of Human Resource[s] outlining all documentation used to justify the termination and to act as a notice to the terminated employee regarding [his or her] grievance rights and need to return certain Medical Center property.

*   *   *

13. Petitioner's employment with JMC was terminated, consistent with the above-referenced progressive discipline policy, because, in less than 18 months, he had accumulated three "Written Conference Records" (all of which were given to him by Ms. Rogers and, before becoming a part of Petitioner's permanent record, were reviewed and approved by JMC's human resources department). Petitioner's race played no role whatsoever in his receiving these three "Written Conference Records"[3] or in his being terminated. There has been no showing that any other employee at the Hospital received three "Written Conference Records" within an 18-month period and remained employed.

14. Petitioner received the first of these three "Written Conference Records" in September 2002. It read as follows:

> REASON FOR CONFERENCE: . . . .
>
> On August 23, 2002, Ramuriel reported out a 7.3mmol/L potassium result.[[4]] Ramuriel did not meet laboratory competency standards because he did not follow the attached laboratory procedure: NOTIFICATION OF LABORATORY VALUES. Procedures specifically not followed are:
>
> -2.1.1 "Verify the quality of the specimen" and "Recollect specimens immediately if specimen is suspect"
> 2.1.3 "Notify the physician/patient care personnel when patient is outside the hospital."
>
> Ramuriel failed to meet Human Resources 6.7a, a Class II violation, "Performance of

> duties below standard that continue after a reasonable period of appraisal and training."
>
> ACTION PLAN FOR IMPROVEMENT: . . .
>
> Ramuriel will immediately improve his technical skills and follow all laboratory policies, especially G.4.2 "Notification of Laboratory Values." Failure to meet JMC standards of competency will lead to further disciplinary action, up to and including termination.

Ms. Rogers learned of the violation cited in this "Written Conference Record" as a result of a "physician complaint" (and not from Ms. Wiley).[5] In giving Petitioner this "Written Conference Record," she did not treat him any differently than she treated other medical technologists who committed similar violations. Petitioner did not grieve his receipt of this "Written Conference Record," nor did he write anything on this "Written Conference Record" in the space provided for "[e]mployee [c]omments."

15. The next "Written Conference Record" Petitioner received concerned an on-duty verbal altercation Petitioner had in January 2003, with another medical technologist working in the Laboratory, Susan Goldstein. Ms. Goldstein also received a "Written Conference Record" from Ms. Rogers for her participation in the altercation. Petitioner's "Written Conference Record" read as follows:

> REASON FOR CONFERENCE: . . . .
>
> On January 17, 2003, Ariel requested another employee to work in the coagulation section. The fellow employee stated she was busy helping a new employee with chemistry. The workload did not justify his request (see attached report). The coworker stated Ariel called her lazy when she refused to leave chemistry. Coworkers and supervisors do not feel Ariel is a patient focused team player and are unable to discuss workflow and cooperation with him. It is the policy of the Laboratory and Jupiter Medical Center to complete all tasks and work as a team to the benefit of our patients. Ariel violated Personnel Policy 6.7 group II.y "Other actions determined by management to not be in the best interest of the Medical Center."
>
> ACTION PLAN FOR IMPROVEMENT: . . .
>
> Ariel will immediately put the patient first, and remain focused on patient testing. The evening shift must work together as a team, and Ariel needs to be a member of this team.

Petitioner grieved his receipt of this "Written Conference Record." Petitioner's grievance was ultimately presented to JMC's Chief Operating Officer, who reached the following "conclusion," which she reduced to writing on March 25, 2003:

> This investigation has revealed substantial agreement about the facts of the incident itself by all parties. The facts regarding the incident do merit a Written Record of Conference in accordance with Jupiter Medical Center Policy. The Record should be amended to show that the lack of teamwork referenced was agreed by the Department Man[a]ger to be primarily limited to the one employee involved in this incident and does not extend to the entire Department. With

> the amendment, the Written Record of Conference should be a permanent part of the employment file of Mr. Orlino.

Following his receipt of the Chief Operating Officer's written "conclusion," Petitioner took no action to "continue with [his] grievance." As a result, pursuant to the grievance procedure set forth in the Manual, the Chief Operating Officer's written "conclusion" became the final resolution of Petitioner's grievance.

16. The last of the "Written Conference Records" Petitioner received was for repeatedly violating, after being warned on "multiple occasions" to stop,[6] that portion of JMC's "Time and Attendance" policy, which provided that "employees will not badge in more than seven minutes prior to the start of their shift." This "Written Conference Record," which was given to Petitioner on June 6, 2003, read as follows:

> REASON FOR CONFERENCE: . . . .
>
> See attached list of dates and times of Ramuriel's timeclock punches. Beginning on March 17, 2003 through May 24, 2003, Ramuriel has failed to badge in at the correct time. Ramuriel is establishing an unacceptable pattern of badging in for work early and leaving early. Ramuriel has violated Human Resources Policy 6.7.a, "Insubordination- refusal or failure to follow instruction or established practices of the Medical Center," a Class I violation. Ramuriel was informed of the correct badging practice verbally on March 3, 2003 and by mailbox on March 17, 2003. Again the policy was reviewed at the April 2, 2003 general

> laboratory meeting, which Ramuriel attended, and [he] reviewed and initialed the minutes which included the time clock policy.
>
> ACTION PLAN FOR IMPROVEMENT: . . .
>
> See associated letter.

There has been no showing that any other Laboratory employee engaged in similar insubordinate conduct and did not receive a "Written Conference Record." Petitioner did not grieve his receipt of this "Written Conference Record" because he knew that he was in the wrong; nor did he write anything on this "Written Conference Record" in the space provided for "[e]mployee [c]omments."

17. The "associated letter" in the "Written Conference Record" was a June 6, 2003, letter to Petitioner from Ms. Rogers, advising Petitioner of his termination. It read as follows:

> On August 23, 2002, you failed to meet laboratory competency standards or follow laboratory procedure. This is a Class II violation of Human Resources Policy 6.7-Discipline (a) "Performance of duties below standard that continue[s] after a reasonable period of appraisal and training."
>
> On October 23, 2002, you failed to meet laboratory competency standards or follow laboratory procedure. This is a Class II violation of Human Resources Policy 6.7-Discipline (a) "Performance of duties below standard that continue[s] after a reasonable period of appraisal and training."[7]

> On January 17, 2003, you failed to work as part of a team. This is a Class II violation of Human Resources Policy 6.7-Discipline (y) "Other actions determined by management to not be in the best interest of the Medical Center."
>
> Beginning on March 17, 2003 through May 24, 2003, you failed to badge in at your scheduled time, which is a violation of Human Resources Policy 6.7- Discipline, "Insubordination - refusal or failure to follow instructions or established practices of the Medical Center."
>
> Mr. Orlino, as a result of your actions, as denoted above, Jupiter Medical Center is terminating your employment effective immediately.
>
> You have the prerogative to utilize Jupiter Medical Center's grievance procedure; human resource policy 4.1, if you feel your termination is unjust. If you decide to grieve such a decision should be made within five (5) business days of June 6, 2003. In your absence, Jupiter Medical Center has elected to hand deliver this correspondence to ensure your complete understanding of the above events.
>
> Any compensation that you are eligible to receive will be paid to you on the hospital's next regularly scheduled payday. Please be aware that any hospital property, such as your ID badge, employee handbook, keys, uniform, etc. should be returned to the Human Resources Department.

The final decision to terminate Petitioner was made, in accordance with JMC policy, by JMC's human resources department. Ms. Wiley did not provide any input in the making of this decision.

18. Petitioner did not grieve his termination.

19. At no time during the Employment Period did Petitioner ever utilize the procedures available to him under the Manual to complain that he was being discriminated against or harassed on the basis of his race; and there is no indication in the evidentiary record that, as a JMC employee, he was ever the victim of race-based discrimination or harassment.[8]

20. On May 24, 2005, almost a year after his termination, Petitioner filed an employment discrimination charge with the FCHR, alleging for the first time that he was the victim of anti-Asian discrimination.

21. There are currently three or four Asian employees working in the Laboratory. They were all hired by Ms. Rogers following Petitioner's termination. None of these employees has received a "Written Conference Record."

CONCLUSIONS OF LAW

22. The Florida Civil Rights Act of 1992 (Act) is codified in Sections 760.01 through 760.11, Florida Statutes, and Section 509.092, Florida Statutes. It "is patterned after Title VII of the [federal] Civil Rights Act of 1964, 42 U.S.C. §2000e-2" and therefore "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).

23. Among other things, the Act makes certain acts "unlawful employment practices" and gives the FCHR the authority, if it finds following an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, that 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."[9] §§ 760.10 and 760.11(6), Fla. Stat.

24. To obtain such relief from the FCHR, a person who claims to have been the victim of an "unlawful employment practice" must, "within 365 days of the alleged violation," file a complaint ("contain[ing] a short and plain statement of the facts describing the violation and the relief sought") with the FCHR, the Equal Employment Opportunity Commission, or "any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80." § 760.11(1), Fla. Stat. This 365-day period within which a complaint must be filed is a "limitations period" that can be "be equitably tolled, but . . . only [based on the] acts or circumstances . . . enumerated in section 95.051," Florida Statutes. Greene v. Seminole Electric Co-op., Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997).

25. "[O]nly those claims that are fairly encompassed within a [timely-filed complaint] can be the subject of [an

administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes]" and any subsequent FCHR award of relief to the complainant. Chambers v. American Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994).

26. The "unlawful employment practices" prohibited by the Act include those described in Section 760.10(1)(a), Florida Statutes, which provides as follows:

> It is an unlawful employment practice for an employer:[[10]]
>
> 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.

27. In the instant case, Petitioner has alleged in his employment discrimination charge that JMC committed such "unlawful employment practices" inasmuch as, "during [his] employment at Jupiter Medical Center as a [m]edical [t]echnologist, [he] was exposed to harassment, unfair wages, and unfairly disciplined because of [his] race (Asian)."

28. Intentional race-based discrimination, in the form of "unfair[] discipline," "unfair wages," and harassment "so severe or pervasive that it adversely affect[s] the terms or conditions of the employee's employment,"[11] constitute "unlawful employment practices" in violation of Section 760.10(1)(a), Florida

Statutes. Speedway SuperAmerica, 2006 Fla. App. LEXIS 8251 *19. Petitioner had the burden of proving, at the administrative hearing held in this case, that he was the victim of such intentional discrimination. 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.'"); Hong v. Children's Memorial Hospital, 993 F.2d 1257, 1261 (7th Cir. 1993)("To ultimately prevail on a disparate treatment claim under Title VII, the plaintiff must prove that she was a victim of intentional discrimination."); 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.").

29. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001); see also United States Postal Service Board of Governors v. Aikens, 460

U.S. 711, 714 (1983)("As in any lawsuit, the plaintiff [in a Title VII action] may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves.").

30. "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 (Fla. DOAH February 19, 2003)(Recommended Order). "If the [complainant] offers direct evidence and the trier of fact accepts that evidence, then the [complainant] has proven discrimination." Maynard v. Board of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

31. "[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).

32. "[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 intentional 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).

33. 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 employer to 'articulate' a legitimate, non-discriminatory reason for its action.[[12]] If the employer 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, 168 F.3d at 1267 (citations omitted). "The analysis of pretext focuses only on what the decisionmaker, and not anyone else, sincerely believed." Little v. Illinois Department of Revenue, 369 F.3d 1007, 1015 (7th Cir. 2004); see also Schaffner v. Glencoe Park

District, 256 F.3d 616, 622 (7th Cir. 2001)("[T]the Park District stated that it did not promote Schaffner because it believed she was unable to work well with others. Schaffner argues that there is a genuine issue of material fact regarding whether she could work well with others. The district court agreed with her, based on the affidavit of one of her co-workers and the affidavits of several parents whose children had participated in the Kids' Club. However, the issue is not whether Schaffner worked well with others, but whether the Park District honestly believed that she did not. In order to rebut the Park District's articulated reason, Schaffner must present evidence that it did not believe its own assessment. . . . The affidavits of parents and of Schaffner's coworkers simply do not contradict whether the Park District honestly believed Schaffner worked well with others. . . . Because Schaffner did not present any evidence to contradict the Park District's honest, albeit possibly mistaken belief (as opposed to the underlying truth of that belief), she may not overcome the Park District's second articulated reason for not promoting her."); Komel v. Jewel Cos., 874 F.2d 472, 475 (7th Cir. 1989)("[T]he fact that the employee takes issue in general terms with the employer's overall evaluation is not sufficient to create a triable issue on pretext. As we have recently stated, the employee's 'own self-interested assertions [even where accompanied by the

conclusory statements of a co-worker] concerning her abilities are not in themselves sufficient to raise a genuine issue of material fact.'"); and Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980)("Smith, of course, testified that he had versatility, and that his competence as an analyst was not confined to the field of logistics. Smith's perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant.").

34. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the [complainant]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Brand v. Florida Power Corp., 633 So. 2d 504, 507 (Fla. 1st DCA 1994)("Whether or not the defendant satisfies its burden of production showing legitimate, nondiscriminatory reasons for the action taken is immaterial insofar as the ultimate burden of persuasion is concerned, which remains with the plaintiff.").

35. "A prima facie case of [race-based] discipline may be established if the [complainant] proves by a preponderance of the evidence that (1) the [complainant] is a [member of a racially-defined class], (2) the [complainant] was disciplined by the employer, and (3) the employer imposed the discipline under circumstances giving rise to an inference of racial

discrimination. . . . One of the ways this third prong may be met . . . is by attempting to show that the employer treated similarly situated employees differently." Jones v. Denver Post Corp., 203 F.3d 748, 753 (10th Cir. 2000)(citations omitted). "To show that employees are similarly situated, the [complainant] must establish that the employees are 'similarly situated in all relevant respects.' The comparator must be [shown to be] 'nearly identical' to the [complainant] to prevent [tribunals] from second-guessing a reasonable decision by the employer." Hammons v. George C. Wallace State Community College, No. 05-14962, 2006 U.S. App. LEXIS 6396 *10 (11th Cir. March 16, 2006)(citation omitted). "This normally entails a showing that the two employees [the complainant and the comparator] dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617-618 (7th Cir. 2000).

36. "In order to make out a prima facie case of [raced-based] unequal pay for equal work, [a complainant] must show: (1) [he is a] member[] of a [racially-defined] class; (2) [he was] paid less than non-members of the[] class for work requiring substantially the same responsibility; and (3) evidence of discriminatory animus. A showing of disparate

treatment -- that is, a showing that the employer treated [the complainant] less favorably than a similarly situated employee outside [the complainant's] group- is a recognized method of raising an inference of discrimination for purposes of making out a prima facie case."). Kazmierczak v. Hopevale, No. 02-CV-0003A(Sr), 2006 U.S. Dist. LEXIS 36723 *44 (W.D. N.Y. June 6, 2006)(citation and internal quotations omitted).

37. "To make out a prima facie case of . . . racial harassment . . . , [a complainant] must show (1) that he belongs to a [racially-defined] group, (2) that he was subjected to unwelcome racial harassment, (3) that the harassment was based on his race, (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment [that the complainant perceived as such], and (5) a basis for holding [the employer] liable. To determine whether harassment objectively alters an employee's terms or conditions of employment, the following four factors are considered: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. Jefferson v. Casual Restaurant Concepts, Inc., No. 8:05-cv-809-T-30MSS, 2006

U.S. Dist. LEXIS 54178 (M.D. Fla. August 4, 2006)(citation and internal quotations omitted).

38. Where the administrative law judge does not halt the proceedings "for lack of a prima facie case and the action has been fully tried, it is no longer relevant whether the [complainant] actually established a prima facie case. At that point, the only relevant inquiry is the ultimate, factual issue of intentional discrimination. . . . [W]hether or not [the complainant] actually established a prima facie case is relevant only in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination." Green v. School Board of Hillsborough County, 25 F.3d 974, 978 (11th Cir. 1994)(citation omitted); see also Aikens, 460 U.S. at 713-715 ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non. . . . [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection [as a candidate for promotion], the factfinder must then decide whether the rejection was discriminatory within the meaning of

Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.' After Aikens presented his evidence to the District Court in this case, the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience. The District Court was then in a position to decide the ultimate factual issue in the case. . . . Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'")(citation omitted); Beaver v. Rayonier, Inc., 200 F.3d 723, 727 (11th Cir. 1999)("As an initial matter, Rayonier argues it is entitled to judgment as a matter of law because Beaver failed to establish a prima facie case. That argument, however, comes too late. Because Rayonier failed to persuade the district court to dismiss the action for lack of a prima facie case and proceeded to put on evidence of a non-discriminatory reason--i.e., an economically induced RIF--for terminating Beaver, Rayonier's attempt to persuade us to revisit whether Beaver established a prima facie case is foreclosed by binding precedent."); and Carmichael v. Birmingham Saw Works,

738 F.2d 1126, 1129 (11th Cir. 1984)("The plaintiff has framed his attack on the trial court's findings largely in terms of whether the plaintiff made out a prima facie case of discrimination. We are mindful, however, of the Supreme Court's admonition that when a disparate treatment case is fully tried, as this one was, both the trial and the appellate courts should proceed directly to the 'ultimate question' in the case: 'whether the defendant intentionally discriminated against the plaintiff.'").

39. The instant case was "fully tried." Following Petitioner's evidentiary presentation, JMC presented persuasive evidence that legitimate business considerations were the sole motivating forces behind Petitioner's being "written up" and ultimately terminated (the allegedly "unfair[] discipline[]" complained about in Petitioner's employment discrimination charge) and behind Mr. Lambiase's being hired at a higher hourly wage than Petitioner was receiving at the time (the allegedly "unfair wages" complained about in Petitioner's employment discrimination charge). The evidence Petitioner offered was insufficient to overcome this persuasive evidence and to establish that these actions were rather the product of anti-Asian animus, as he had alleged in his employment discrimination charge. Petitioner's evidence also fell short of establishing that he was the victim of any race-based harassment anytime

during the Employment Period,[13] much less race-based harassment of the type that is remediable under the Act.[14]

40. Under the foregoing circumstances, JMC cannot be found to have committed the unlawful employment practices alleged in the employment discrimination charge filed by Petitioner, and said charge should therefore be dismissed.

RECOMMENDATION

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

RECOMMENDED that the FCHR issue a final order finding JMC not guilty of the unlawful employment practices alleged by Petitioner and dismissing his employment discrimination charge.

DONE AND ENTERED this 14th day of August, 2006, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of August, 2006.

ENDNOTES

1 All references to Florida Statutes in this Recommended Order are to Florida Statutes (2005).

2 It was also more than some non-Asian Laboratory employees were being paid.

3 Only the last of these three "Written Conference Records" was received by Petitioner within 365 days of the date that he filed his employment discrimination charge with the FCHR.

4 This was a "critical value," "highly incompatible with life."

5 Ms. Wiley did "report" other "mistakes" Petitioner made in the Laboratory (but not all such "mistakes" of which she was aware). She also reported "mistakes" made by others in the Laboratory who were not Asian (but, again, not all such "mistakes" of which she was aware). Whether she reported a "mistake," be it one of Petitioner's or that of another Laboratory employee, was based on her perception of the "clinical significance" of the "mistake."

6 For instance, on March 17, 2003, Ms. Rogers sent Petitioner an e-mail, which read as follows:

> Ariel, please use the time clock correctly. You are to punch in no sooner than 2:23. When you punch in early, it creates unnecessary overtime.
>
> Thank you for your cooperation.

Also, at a meeting of Laboratory employees held on April 2, 2003, at which Petitioner was present, Ms. Rogers said (as the minutes of that meeting reflect) the following:

> Please review the time and attendance badging policy. You cannot badge in any earlier than 7 minutes prior to your scheduled time to begin your shift. Badging in early causes unnecessary overtime.

In addition, Ms. Rogers gave Petitioner "at least three verbal [warnings]" to cease his practice of "badging in" earlier than

seven minutes prior to the time his shift was scheduled to start.

7 This violation (which resulted in Petitioner receiving, not a "Written Conference Record," but a verbal warning) was mistakenly referenced in the letter.

8 By Petitioner's own admission, no one at the Hospital, in his presence, ever "refer[ed] to the fact, either directly or indirectly, that [he was] of either Asian heritage or nationality." Petitioner did elicit testimony from William Myers, a former JMC employee, that Ms. Wiley once, on an unspecified date during the Employment Period, derisively referred to Petitioner as an "Oriental bastard"; however, this name-calling did not occur in Petitioner's presence.

9 The FCHR, however, has no authority to award monetary relief for non-quantifiable damages. See Simmons v. Inverness Inn, No. 93-2349, 1993 Fla. Div. Adm. Hear. LEXIS 5716 *4-5 (Fla. DOAH October 27, 1993)("In this case, petitioner does not claim that she suffered quantifiable damages, that is, damages arising from being terminated from employment, or from being denied a promotion or higher compensation because of her race. Rather, through argument of counsel she contends that she suffered pain, embarrassment, humiliation, and the like (non-quantifiable damages) because of racial slurs and epit[he]ts made by respondents. Assuming such conduct occurred, however, it is well-settled in Florida law that an administrative agency (as opposed to a court) has no authority to award money damages. See, e. g., Southern Bell Telephone & Telegraph Co. v. Mobile America Corporation, Inc., 291 So.2d 199 (Fla. 1974); State, Dept. of General Services v. Biltmore Construction Co., 413 So.2d 803 (Fla. 1st DCA 1982); Laborers International Union of N.A., Local 478 v. Burroughs, 541 So.2d 1160 (Fla. 1989). This being so, it is concluded that the Commission cannot grant the requested relief, compensatory damages.").

10 An "employer," as that term is used in the Act, 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."

11 The "harassment [must] be more than merely insulting or rude and boorish behavior. . . . [Furthermore,] [t]he adverse effect on the employee must be subjective, as well as objective. Not

only must the employee suffer from the harassment, but it is also required that a reasonable person in the shoes of the employee would likely have suffered from such conduct." Speedway SuperAmerica, LLC v. Dupont, No. 5D04-14, 2006 Fla. App. LEXIS 8251 *19-20 (Fla. 5th DCA May 26, 2006). In addition, there must be "a basis for holding the employer liable." Accordingly, "[i]n the case of [alleged] co-worker harassment, the employee must establish that the employer knew or should have known about the harassment and took no (or insufficient) remedial action." Speedway SuperAmerica, 2006 Fla. App. LEXIS 8251 *8-9 n.5.

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

13 It was Petitioner's burden to establish that at least one incident of actionable harassment occurred within 365 days of the May 24, 2004, filing of Petitioner's employment discrimination charge. See Mahgoub v. Miami Dade Community College, No. 05-11520, 2006 U.S. App. LEXIS 9291 *2-3 (11th Cir. April 13, 2006).

14 There was evidence of a stray disparaging comment having been made (on an unspecified date during the Employment Period) about Petitioner being an "Oriental bastard." The comment was made by one of Petitioner's co-workers, Ms. Wiley, to another co-worker, Mr. Myers, outside the presence of Petitioner, and there is no evidence that Petitioner was made aware of the comment or complained about it to management at any time during the Employment Period.

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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.