STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOYDA R. MICHAEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-3879
	)	
DELTA HEALTH GROUP,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

In accordance with notice this matter came on for formal administrative proceeding and hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted July 24, 2007, in Pensacola, Florida. The appearances were as follows:

APPEARANCES

Petitioner: R. John Westberry, Esquire
1308 Dunmire Street, Suite B
Pensacola, Florida 32504

Respondent: Mark E. Levitt, Esquire
Allen, Norton & Blue, P.A.
324 South Hyde Park Avenue, Suite 101
Tampa, Florida 33606

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Respondent committed an unlawful employment practice

by termination of the Petitioner for discriminatory reasons, based upon her national origin (Panamanian/Hispanic).

PRELIMINARY STATEMENT

This cause arose when a Charge of Discrimination was filed by the above-named Petitioner with the Florida Commission on Human Relations (Commission) in which she alleged that she had been discriminated against by termination from employment, by Delta Health Group, Inc., the Respondent. The Petitioner, in essence, alleged that she was terminated from her position as a certified nursing assistant based upon her national origin and, incorporated within that charge, are allegations that other co-employees, similarly situated, who were not of her protected group (Panamanian/Hispanic) were given disparate and more favorable treatment for similar conduct. The Commission investigated the matter and ultimately issued a "No Cause Determination" on August 28, 2006. The Petitioner thereafter filed a timely Petition for Relief to contest the No Cause Determination and the matter was referred to the Division of Administrative Hearings and ultimately the undersigned Administrative Law Judge.

The cause came on for hearing as noticed on July 24, 2007, in Pensacola, Florida. The Petitioner presented one witness, herself, and the Respondent presented four witnesses and nine exhibits. The Petitioner's Exhibits one through seven and nine

were admitted into evidence and Respondent's Exhibit eight was excluded as irrelevant. The Respondent moved for an award of attorney's fees and costs based upon Sections 120.595 and 57.105, Florida Statutes (2006). That motion is treated in the conclusions of law, infra.

Upon conclusion of the proceeding a transcript thereof was ordered and the parties elected to submit proposed recommended orders, requesting an extended period, 30-days post-transcript, for their submission, which was granted. The Proposed Recommended Orders were timely filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is an Hispanic female of Panamanian origin. She began working for the Delta Health Group, the Respondent, as a Certified Nursing Assistant (CNA) on or about May 5, 2000. She was generally described by her supervisors as being a good worker.

2. During times pertinent hereto, the Petitioner worked on an evening shift at the Respondent's nursing care facility. One of the residents assigned to her care was L.M., an elderly person. The Petitioner cared for Ms. M. for approximately one year.

3. The Respondent is an employer with more than 15 employees. During times pertinent to this case it operated a

nursing care facility located in the vicinity of Destin, Florida, at which the Petitioner was employed as a CNA. The Respondent, in its nursing facility operation, is closely regulated by the State of Florida, Agency for Health Care Administration and, as to its licensed personnel (CNA's, RN's, LPN's, etc.) are subject to licensure and practice standards and regulations of the Department of Health, Board of Nursing, etc. The operative regulations include, as to AHCA, requirements to report any incident involving harm or injury to a nursing home resident, as well as departures from nursing home operational regulation standards and nursing practice standards. There are extensive charting and record- keeping requirements with regard to all care and incidents involving residents.

4. On or about the evening of January 2, 2006, the Petitioner was caring for Ms. M., when Ms. M. told her she wanted to wear some earrings that her grandson had given her. She asked the Petitioner to help her place the earrings in her ears. The Petitioner asked Ms. M. if her ears had been pierced and Ms. M. apparently told her that they had been. The Petitioner put the earrings in Ms. M.'s ears as requested. One went in easily, but the left earring felt somewhat tight. Ms. M. wore the earrings to dinner that night.

5. At bedtime, the Petitioner asked her if she wanted to remove the earrings, but Ms. M. wanted to keep them in. She did

ask the Petitioner to remove the earring from her left ear and purportedly asked her to put a string through the hole. The Petitioner maintains that the pierced hole in Ms. M.'s left ear was not opened well enough, and was "clogged-up and dirty."

6. The Petitioner concedes that she put a string through Ms. M.'s left ear by tying it to the left earring and passing the string through the hole, through use of the earring, as Ms. M. purportedly requested. The evidence is conflicting somewhat on this. The Respondent's version of events, it purports to have gleaned from Ms. M., was to the effect that the Petitioner used a needle which she sterilized with a cigarette lighter before passing it through Ms. M.'s ear with the string. The Respondent relies on the out-of-court statement purportedly made by Ms. M., the resident, to its investigating personnel concerning the facts surrounding the piercing (or not) of the ear in question, how the string was inserted, and for what purpose. A hearsay objection was raised about testimony which relied on this statement and the Respondent relies on the hearsay exception for elderly or disabled adults contained in Section 90.803(24), Florida Statutes.[1/]

7. Starla Lindaas, LPN, came on duty on January 3, 2006, and noticed the string in Ms. M.'s left earlobe. Ms. Lindaas stated that Ms. M. told her that the Petitioner had pierced her ears. When she examined Ms. M.'s ears, however, she did not

notice any redness, irritation, discharge or other issues indicating that any medical problem was occurring.

8. The Risk Manager, Connie Hamilton, knew of and investigated the so-called ear piercing incident, but did not report it to the Department of Children and Family Services, or the Agency for Health Care Administration, because the Petitioner caused no abuse, neglect, or harm to the resident, nor did she intend to do so.

9. The Petitioner was interviewed during the investigation of the incident by the Respondent, on January 3, 2006. The Petitioner related the version of events concerning the ear issue as first described above. The resident, Ms. M., purportedly described them to the Respondent's supervisory personnel as involving the Petitioner "piercing" her ear or ears, by the use of a needle for piercing of her earlobe, inserting the string, or both. CNA's are allowed to place earrings in pierced earlobes for residents, if the ears are already pierced. They are not authorized, and it is beyond their scope of practice, to carry-out ear piercing, however. In any event, the Respondent elected to rely on the version of events related by the resident in her statement, which therefore amounted, in the view of the Respondent, to the Petitioner acting beyond the scope of her CNA practice. She was therefore terminated from her employment on January 3, 2006.

10. The Petitioner's salary at the time of her termination was $31,825.14 annually. During the year of her termination, after her termination, she earned from part-time employment $5,513.28 and also received $6,999.00 in unemployment compensation benefits.

11. The Petitioner adduced testimony concerning a number of instances of what she maintains were disparate treatment occurrences, which she claims amount to national origin discrimination against her status as a Panamanian. She, in essence, claims that the comparator employees, who were all white, or non-Hispanic, were treated disparately by being treated more favorably in purportedly similar instances of employee misconduct and discipline. This testimony applies to both one element of her prima facie case of discrimination based upon national origin, regarding disparate treatment as compared to other employees not of her protected classification, as well as to an attempt to establish an ongoing pattern or pervasiveness of discrimination against Hispanics, as it relates to her attempt to establish discriminatory intent or motivation underlying the employment action of which she complains. This evidence relates to her ultimate burden of persuasion and her burden to show that the employer's reasons were pretextual.

12. In this connection, in May 2004, the Petitioner was reprimanded ("written-up") for cutting a resident's hair, some

three months after the event. She maintained that the nurse supervising her asked her to cut the resident's hair. She was written-up for cutting the resident's hair, because it is against policy at the Respondent's facility and beyond the range of practice for a CNA. A beautician is used for all haircutting and similar cosmetic duties at the facility. The Petitioner maintains that one Megan Teibo, a white female, also cut a resident's hair. The Petitioner states that she reported Ms. Teibo to her supervisors, and to the facility's management, but that Ms. Teibo was not disciplined.

13. The Petitioner also contends that it was common practice for employees to be tardy arriving at work for their shift because of the very heavy traffic between Ft. Walton and Destin, the location of the Respondent's facility. She testified that it was routine for employees to call ahead and inform the supervisors that they would be late for work. The Petitioner maintains that she had to do this a number of times and yet she was written-up for being tardy, while other employees who are white were not so reprimanded. Additionally, in February 2004 she was out sick for six days. She had a doctor's excuse justifying her missing work for illness. When she returned to work, however, she contends she was written-up by the administrator and that four or five non-Hispanic employees who where out sick for six or seven days were not

written-up. Additionally, Sandy Port, a nurse, was out sick and had a doctor's excuse and was not purportedly written-up.

14. The Respondent's witnesses maintain that all employees, regardless of race or national origin, etc., were treated the same. If they were tardy they were counseled or written-up depending on the situation and the same was true if they were absent from work. They were counseled or "written-up" depending on the circumstances such as repetitiveness and severity.

15. In this connection, the Petitioner only testified to these matters based upon her own opinion and undocumented, uncorroborated conversations she maintained she had with her co-workers, thus purportedly learning that those others who were absent or tardy were not reprimanded or disciplined for it. She offered no evidence, as for instance, obtained through discovery of the Respondent's employee records, that any non-Hispanic, non-Panamanian employees were treated differently for similar conduct involving tardiness (magnitude or degree, etc) and were treated more favorably. The same is true with regard to the category of absences from work for sickness or other reasons. Thus the record testimony in favor of the Petitioner is only the Petitioner's own unsupported opinion concerning these matters. The testimony adduced by the Respondent demonstrates that the Petitioner could not have known directly of any circumstances or

details regarding the other employees' disciplinary situations regarding their tardiness or absence records, because she had no access to their records. Thus her testimony is only based on her own subjective opinion and, at most, out-of-court hearsay declarations by non-present, non-appearing, declarants.

16. In July 2004, according to the Petitioner, the Respondent's facility needed CNA's to work the morning shift, which was shorthanded. The Petitioner asked her administrator if she could move from the evening shift to the morning shift and he told her that there were no openings at that time. She contends that white, non-Hispanic employees were, however, allowed to move to those positions, while she was not.

17. In June or July of 2005, Caroline Gatewood, a resident of the Respondent's facility, suffered a fall. Nurse Toni Acosta grabbed her or picked her up without doing an assessment. She started pushing the resident, apparently trying to get her back to her room according to the Petitioner. The incident was reported to the Director of Nursing, and Ms. Acosta was suspended for several days during an internal investigation conducted by the Director of Nursing. The results of that were reported to the Agency for Health Care Administration. Ultimately, however, the nurse was determined to have not been at fault, and was restored to duty and paid for the days she had

been suspended without pay. Thus no discipline was actually imposed against her.

18. The Petitioner maintained that about one month after that incident nurse Acosta was accused of verbally abusing the same resident, but no action was taken against her. Ms. Acosta is a white female. The Petitioner merely stated her opinion or her subjective, hearsay-based knowledge regarding the situation, and had no corroborative evidence to show that Ms. Acosta was actually determined to have been guilty of any misconduct about either the pushing incident or the alleged verbal abuse one month later. Thus, it was not persuasively established that Ms. Acosta was disparately and more favorably treated than the Petitioner. In fact, it was not shown that the employees, Acosta and the Petitioner, were similarly situated, by committing similar purported acts of misconduct, concerning which they were allegedly disparately disciplined, or not disciplined, for that matter.

19. In March 2005, the Petitioner was verbally accosted by a cook at the facility by the name of Mark. He apparently became angry and yelled at the Petitioner, using obscenities directed at her. She reported the conduct to the Assistant Director of Nursing, the Director of Nursing, and the Administrator. She maintains that no action was taken against the cook. Here again she is testifying of her own subjective

knowledge or belief. She did not establish that she was aware of all facts concerning whether counseling or other disciplinary action may have been taken against the cook. In any event, even if no action was taken, it was not established that the Respondent condoned such conduct or allowed it to recur, once the Respondent knew of it. Such an isolated incident does not constitute the condonation of discriminatory conduct by a co-employee, on the part of a supervisor.

20. Finally, in October 2005 the Petitioner had to go to Panama for several weeks for the funeral of her father and her brother. When she returned to work she maintains that she was written-up for a tardy instance "for three minutes," which occurred approximately a month before that. She maintains that employees "Todd," "Shauna," "Art," and "Deena" had come to work late and were not written-up. Here again this is her unsupported, subjective opinion without reference to any documentation from the Respondent's employee records, for instance. In fact, witness Nicole Coffield, for the Respondent, rebutted this testimony by establishing that these employees, indeed, were disciplined for their tardiness. Moreover, it was not shown that their degree or repetitiveness of tardiness, or the other circumstances surrounding it, were the same or similar to the Petitioner's. It was thus not established that these purported comparator employees indeed were similarly situated to

the Petitioner in the circumstances of their conduct and any discipline (or the degree thereof).

21. Additionally, the Petitioner recounted an instance in which she was accused of stealing cash donations, and was suspended for several days. She was accused of taking a "donation bucket" from a nurses station, and the money it contained, for her personal use. The matter was investigated and the Respondent concluded it by accepting the Petitioner's explanation. She had taken the money, with her supervisor's approval, to buy flowers or a gift for a co-worker, who was absent and gravely ill. The Petitioner was exonerated by the Respondent, restored to duty, and paid for the days she was suspended. The suspension during the pendency of the investigation was a routine practice according to the Respondent's established, normal policy concerning disciplinary procedures.

22. In summary, the Petitioner admitted putting the string through the resident's ear and that she did not ask her supervisor for permission. The Respondent investigated the report purportedly made by Ms. M., the resident. The investigation was conducted by the Director of Nursing, the Risk Manager, and the Director of Human Resources. The Petitioner was suspended pending the results of the investigation, according to the Respondent's regular stated policy.

23. In its investigation the Respondent determined to accept the version of events attributed to the statement or statements of Ms. M., the resident, as corroborated by the testimony of Ms. Lindaas, the LPN. Whether or not the resident's statement was true and whether or not it is inadmissible hearsay, the Respondent established that it relied upon that report in deciding the outcome of its investigation. Since the Respondent relied on the statement after corroborating it by Ms. Lindaas's reporting of the events, it established that it had a reasonable basis at the time for believing that the relevant events involving the Petitioner occurred in that way.

24. The Respondent thus determined that the Petitioner had departed from the proper practice and appropriate conduct of a CNA and that this was a "category one offense" under the Respondent's corporate polices and disciplinary procedures. A category one offense requires suspension pending an investigation, and then either termination, or restoration of employment, with payment for the suspended period of time, depending on whether the allegations are determined true or not. In this instance, based largely on Ms. M.'s statement, corroborated by the statements of other personnel, who had observed or conversed with Ms. M., the Respondent determined that the Petitioner had not merely placed the earrings in the resident's ear, but had actually pierced the resident's ear with

a needle. This was an inappropriate departure from the standards of conduct and practice of a CNA, which the Respondent established was a category one violation in its disciplinary policy, for which she was therefore terminated.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2006).

26. Section 760.10(1)(a), Florida Statutes (2006), provides that:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or fail or refuse to hire any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

27. Chapter 760, Florida Statutes, the "Florida Civil Rights Act," is essentially a reflection of Title VII of the Federal Civil Rights Act of 1964. Florida courts have therefore used the same analysis when considering claims under the Florida Act as is used in decisions employed in resolving claims under Federal Title VII. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Castleberry v. Chadbourne, Inc., 810 So. 2d 1028 (Fla. 1st DCA 2002).

28. In order for the Petitioner to establish a prima facie case of national origin discrimination under Title VII or Chapter 760, Florida Statutes, she must prove that: 1) she is a member of a protected class (Panamanian national origin; Hispanic); 2) that she was qualified for her former position of CNA; 3) that she suffered an adverse employment action; and 4) that she was either replaced by a person outside her protected class or was treated less favorably than a similarly situated individual outside her protected class (that is a person similarly situated in terms of the conduct that person committed when compared to the conduct and other circumstances of the Petitioner's disciplinary situation). See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 526 (1993).

29. The Petitioner is a member of a protected class by virtue of her Panamanian national origin and Hispanic ethnic category. There is no question also that she suffered an adverse employment action because the Respondent terminated her for the incident in question. She also demonstrated that, aside from the incident at issue, that she was generally qualified and performed adequately in the position as CNA. Thus, the establishment of her prima facie case, in essence, depends on whether she demonstrated the fourth element referenced above, that she was either replaced by a person outside her protected class after her termination, or that she was treated less

favorably, in a disciplinary sense, from individuals outside her protected class who were similarly situated in terms of the conduct they may have committed when compared to that for which the Petitioner was disciplined.

30. In this regard, concerning the specific conduct involved in the alleged ear-piercing incident, there was no other comparator employee shown to have committed similar conduct, involving a departure from practice standards, who was disparately disciplined. There was no evidence to show that the Petitioner was replaced by a new employee from outside her protected category.

31. In view of the reasons delineated in the above findings of fact concerning the Petitioner's lack of knowledge of sufficient of the circumstances and details of the other employees' instances of absence or tardiness, or concerning the alleged hair cutting incident by another employee, and so forth, it has not been shown that the other employees subjectively referenced in the Petitioner's testimony, concerning her opinion that they received more favorable, disparate treatment, were in fact similarly-situated comparative employees. Thus, in the final analysis, the above-referenced fourth element of the Petitioner's prima facie case has not been persuasively established.

32. Even had a prima facie case been established, the Respondent advanced a legitimate, non-discriminatory business reason for the employment action taken. Argument was made that the statement by the resident, Ms. M., was hearsay and inadmissible and, as referenced in the above endnote, the hearsay exception contained in Section 90.803(24), Florida Statutes, does not apply to such attempted evidential use of Ms. M.'s statement. The fact remains, however, that the Respondent could still rely, in the employment decision, upon that statement and the observances and the reporting of Ms. M.'s version of events by the co-employee or supervisor. It was based on this type of reporting and statement during its investigation that the Respondent arrived at a good-faith belief that the events had actually occurred as Ms. M. purportedly related them (involving actual ear piercing instead of mere insertion of the earring and the string in "already pierced" ears). Put another way, even though Ms. M.'s statement and the statements of certain witnesses relying on it and testifying at hearing, might be hearsay, the statements still served at the time of the termination decision as a reasonable basis for the employer's decision concerning the investigation and the termination.

33. If the employer establishes a legitimate, non-discriminatory reason for the adverse employment action (in

effect that it reasonably believed that the Petitioner departed from the requirements of practice of a CNA by using a needle and actually piercing the resident's ears) then the burden shifts back to the employee to show that the purported non-discriminatory reason is not the real reason for the employment action, but really was a pretext for discrimination. See Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997). In the face of a legitimate, non-discriminatory reason for the termination, the Petitioner must introduce probative evidence showing that the asserted reason is merely a pretext for discrimination. Brooks v. County Commission, 446 F.3d 1160, 1163 (11th Cir. 2006). In proving pretext "a plaintiff is not allowed to recast an employer's proffered non-discriminatory reasons or substitute her business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet the reason head-on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Carter v. Diamond Back Golf Club, Inc., 2006 WL 229304, 6 (M.D. Fla. 2006) (quoting Chapman v. A1 Transport, 229 F.3d 1012, 1037 (11th Cir. 2000). The issue is not whether the employment decision was prudent, or even fair, to the employee in question, but rather whether an unlawful discriminatory animus motivated the employer

in making the decision. See Damon v. Flemming Supermarkets of Florida, Inc., 196 F.3d 1354, 1361 (11th Cir. 1999).

34. Put another way, it does not matter whether the Petitioner was actually innocent of the charges placed against her by her employer in arriving at the termination decision. The relevant inquiry rather is whether the Respondent reasonably believed that she engaged in those acts which led to the adverse employment action. "An employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct." Id. at 1363. The employer need not prove the underlying facts, only that it honestly and reasonably believed that the misconduct had been engaged in by the Petitioner. Thus the resident's statements even if hearsay, are still such that the Respondent could rely on in reaching its decision. Thus, the hearsay argument concerning the resident's statement in this case is immaterial in terms of arriving at a decision as to whether a legitimate, non-discriminatory reason has been established by the Respondent, because the hearsay statement does not have to be admitted for purposes of establishing the truth of the statement, but rather only that it was the primary motivating factor for the employer's decision.

35. The Respondent demonstrated that it followed its stated policies in good faith by conducting an investigation.

The Respondent's investigation showed that the resident reported that the Petitioner pierced her ear. The investigation further showed that, when the LPN on duty examined the resident, she had a string through her ear. The Petitioner admitted that she put the string through the resident's ear. The Petitioner asserted that the resident asked her to put the earring in her ear. The Petitioner did not ask permission from her supervisor before placing the string in the resident's ear. Standing alone, that omission is a violation of the Respondent's policy. Based upon the statements from staff, the examination of the resident, and conversation with the Petitioner, the Respondent, in its investigation, reasonably concluded that the Petitioner had actually pierced the resident's ear. Moreover, the Respondent reasonably concluded that the Petitioner violated corporate policy and acted outside the scope of a CNA's practice. This was the sole reason for the termination, and, as the Petitioner offered no persuasive evidence regarding pretext, her claim of discrimination must fail.

36. Although the instances cited in the Petitioner's evidence: concerning being disciplined for tardiness and absence, concerning the donation collection bucket for an ill co-worker, the hair cutting incident, and the incidents occurring with the cook and concerning Nurse Acosta, were part of the Petitioner's attempt to establish an ongoing pattern of

discrimination against persons of her national origin, by a pattern of disparate and more favorable treatment accorded to people who were not Panamanian or Hispanic in the employer's work force, the Petitioner did not establish that those employees were truly similarly situated. She did not adduce probative evidence that they had committed the same or similar conduct and yet were disciplined in a less severe way. See Burke-Fowler v. Orange County, Florida, 447 F.3d 1319, 1323 (11th Cir. 2006). The Petitioner did not establish any employees who were outside of her protected class who were accused of the same category of offense, of the same severity, and who did not suffer a similar investigation and discipline.

37. The Petitioner attempted to demonstrate that employees outside of her protected class were treated differently than she was with respect to the enforcement of the tardiness and absenteeism polices. There was no persuasive evidence, however, other than the Petitioner's opinion, that would show that those employees, as to the tardiness or absenteeism they may have committed, were similarly situated in terms of severity, repetition, etc., to the Petitioner, in terms of whether or not they were "written-up" at all or the severity of the discipline that might have been imposed. The evidence is simply insufficient to establish, based only upon the Petitioner's subjective opinion, that they were indeed similarly situated in

terms of their conduct to the Petitioner, nor even that their discipline was actually disparate from that of the Petitioner's.

38. The Petitioner also testified regarding other unrelated incidents. For example, she described a June 2005 incident were she was suspended pending an investigation regarding the donation collection bucket maintained at her place of work. This was a collection being made to assist a seriously ill co-employee. The Petitioner's testimony actually shows that the Respondent adhered to its stated policy, the Petitioner was indeed suspended pending an investigation, but then she was returned to work, with pay for the suspension days, following the investigation because the investigation revealed that the Petitioner was correct. She had not stolen any money, but had done what she and her supervisor had agreed to do about her obtaining custody of the donation collection bucket in order to buy flowers or a gift for the ill employee.

39. The Petitioner also described in her testimony the alleged incident involving the derogatory remarks allegedly made by the cook concerning the Petitioner's national origin. Significantly, the alleged remarks were not made by a member of management of the Respondent. Moreover, the Petitioner maintains that she reported this incident to the Director of Nursing, but this could not be the case because the individual named by the Petitioner was no longer employed by the Respondent

after 2004 and certainly not by March 2005. Moreover, as found above, there was no showing that the Respondent or any of its supervisory staff condoned or allowed any such derogatory or offensive conduct by the cook or any other person employed by the Respondent to recur.

40. Thus, the Petitioner did not establish that she was treated less favorably than any similarly situated individuals outside her protected class. She failed to establish this last element of her prima facie case for national original discrimination, but she also failed to establish that there was an ongoing pattern in terms of disparate discipline for similar conduct, as probative of a hostile working environment for persons particularly herself, of her protected class and, therefore, that the Respondent's reason advanced for the discharge was pretextual. Thus, the Petitioner has failed to establish a prima facie case of national origin discrimination; has not established that the actual employment action at issue, was done for discriminatory reasons; and has not established national origin discrimination, indirectly and circumstantially, based upon any pattern of such discriminatory conduct being allowed or condoned in the work place. Thus, her claim has not been established.

41. The Respondent has moved for award of attorney's fees and costs pursuant to Sections 57.105 and 120.595(1)(e)1.,

Florida Statutes (2006). The undersigned has considered the motion, the charge and the Petition for Relief and the evidence of record, as well as the candor and demeanor of the Petitioner in advancing this action. It is determined that the action was not prosecuted for an improper purpose, to harass, to cause delay or for frivolous purposes. It is not a part of multiple actions filed against the Respondent. It has not been demonstrated that the Petitioner, or her counsel, filed and prosecuted this action under other than a reasonable, good faith belief that the material facts necessary to establish the claim would be proven and that the claim would be supported by application of extant law to those facts. It was not shown that the Petitioner or her counsel knew or should have known, under the circumstances, that such would not be the case. The motion is denied.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the Petition in its entirety.

DONE AND ENTERED this 28th day of November, 2007, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of November, 2007.

ENDNOTES

1/ It is determined that this hearsay exception does not apply to any out-of-court statement of Ms. M. It was not demonstrated that she was subjected to abuse or neglect and even the Respondent's witnesses' testimony establishes that no abuse or neglect occurred or was reported. Further, there was obviously no aggravated assault or other violent act, etc., on the declarant, elderly person, Ms. M. Accordingly, for this reason the hearsay exception does not apply. The further reason that it does not apply is that it cannot be found that the content, circumstances and time of the statement provide sufficient safe-guards of reliability because there is conflicting evidence on Ms. M.'s mental state at the time. She was generally apparently well-oriented to time, place, and person, etc., but also was established by the evidence to suffer to some degree with dementia. Accordingly, the statement being hearsay, no sufficient establishment of reliability has been made to justify its admissibility. As will be seen, however, the admission of Ms. M.'s statement or statements into evidence and the truth and reliability of what they purport to contain is largely immaterial; rather, the use of them as a predicate for the investigation and ultimate determination made by the employer-

Respondent is what is material to a decision on the claims made pursuant to Section 760.10, Florida Statutes.

COPIES FURNISHED:

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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.