STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MELVIN WILLIAMS, Petitioner, vs. CONSULATE HEALTHCARE OF TALLAHASSEE, Respondent.	)	Case No. 08-4554

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on May 5, 2009, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Melvin Williams, pro se
Post Office Box 364
Lloyd, Florida 32337

For Respondent: Ryan Scott Callen, Esquire
Foley & Lardner LLP
106 East College Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Respondent committed an unlawful employment practice against Petitioner by terminating her on the basis of her race.

PRELIMINARY STATEMENT

On March 21, 2008, Petitioner timely-filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). On July 30, 2008, FCHR entered a Notice of Determination: No Cause. Petitioner timely-filed her Petition for Relief, which was referred to the Division of Administrative Hearings (DOAH) on or about September 17, 2008.

DOAH's file reflects all pleadings, notices, and orders intervening before the disputed-fact hearing on May 5, 2009.

At hearing, Petitioner testified on her own behalf. Her Exhibits P-1 through P-3, P-6 through P-10, and P-12 through P-13, were admitted in evidence. Respondent presented the testimony of Robert Walker and Elaine Leslie and had Exhibits R-1 and R-2 admitted in evidence. A two-volume Transcript was filed on May 26, 2009.

Only Respondent elected to timely-file a Proposed Recommended Order on June 12, 2009. Petitioner waived the opportunity to file a Proposed Recommended Order.

FINDINGS OF FACT

1. Petitioner, an African-American female, was employed by Respondent in the position of Certified Nursing Assistant (CNA) from April 21, 2007, to February 21, 2008, when she was terminated.

2. Respondent Employer is a provider of long-term and rehabilitative care to elderly patients and patients recovering from surgery. The majority of Respondent's patients range from 60-to-90 years old.

3. Upon hiring, Petitioner received a copy of the Employer's Handbook.

4. CNAs are responsible for patients' basic needs, which include feeding, bathing, dressing, and turning. They are responsible for performing vital sign checks and providing reports to nurses on each patient's health condition. CNAs are supervised by nurses, including Nurse Practitioners, Registered Nurses (RNs), and Licensed Practical Nurses (LPNs).

5. The majority of nurses and CNAs employed by Respondent are African-American.

6. At all times material, Petitioner regularly worked night shifts, beginning at 11:00 p.m. and ending at 7:00 a.m. the following day.

7. Typically, fewer CNAs are scheduled to work the night shifts as compared to shifts scheduled between 7:00 a.m. and 11:00 p.m. The assignment of fewer CNAs to these shifts means that there is a greater need for those employees assigned to the night shifts to be alert and responsive to patients' status, needs, and requests.

8. Petitioner was scheduled to work a shift beginning at 3:00 p.m. on February 7, 2008, and then another shift from 11:00 p.m. February 7, 2008, to 7:00 a.m. February 8, 2008. She admitted that she worked a double shift spanning February 7, 2008, and February 8, 2008. The Employer's records show that she had been paid for the period of time from 11:00 p.m. February 7, 2008, to 7:00 a.m. February 8, 2008.

9. According to employee disciplinary reports admitted in evidence, Michelle Hatcher, LPN, an African-American female who was the night shift Charge Nurse, observed Petitioner and a Caucasian female CNA sleeping on the job on February 8, 2008. The two sleeping CNAs were not attending to patient call lights, which was an unsafe situation. Nurse Hatcher's observation was confirmed by two separate, dated written statements provided by female African-American Nurse Felicia Rockett against each named CNA. "Discharge" was the proposed disciplinary action.

10. Serious injury or death of a patient may result when a CNA fails to perform required job responsibilities.

11. Respondent's Employee Handbook describes "sleeping or inattention on the job" as a serious infraction which is subject to immediate discharge.

12. Petitioner testified that she knew that sleeping on the job was a cause for immediate discharge and that it warrants

termination “on the spot,” without prior warnings or progressive discipline. She denied ever sleeping on the job.

13. Nurse Hatcher did not have authority to immediately terminate Petitioner and the sleeping Caucasian LPN “on the spot.” Nurse Hatcher was required to provide a written disciplinary report of the incident to the Director of Clinical Services, a/k/a the Director of Nursing, which she did.

14. In turn, the Director of Clinical Services was responsible for reporting any termination of employment issue to Employer's Regional Director of Human Resources for review and a final decision on the appropriate course of action.

15. Laura Register, a Caucasian female, had been appointed Acting Director of Clinical Services on or about February 7, 2008. She was new to the position, and there were many pending matters when she assumed the position, including disciplinary matters.

16. Elaine Leslie, a Caucasian female and Respondent’s Regional Director of Clinical Services, visited Respondent’s Tallahassee facility two or three days per week for awhile to help acclimate Ms. Register to her new position and to assist her with pending matters. Mesdames Leslie and Register triaged resident care issues ahead of disciplinary actions. Therefore, there was a delay in addressing the two CNAs' disciplinary action forms.

17. To ensure consistency and protect against bias, discrimination, and personality problems, Robert Walker, Respondent's Regional Director of Human Resources, reviews and makes the final decisions with respect to all termination actions. This process is designed to ensure that uniform policies are applied to one and all equally.

18. Ms. Leslie and Ms. Register contacted Mr. Walker, a Caucasian male, to review the disciplinary reports related to the charges of sleeping on the job. The three executives then reviewed the disciplinary reports of Nurses Hatcher and Rockett and believed their reports of Petitioner's and the Caucasian CNA's sleeping-on-the-job to be credible.

19. Mr. Walker made the final decision to terminate Petitioner and the Caucasian CNA. He held a termination meeting with Petitioner, rather than terminating her by telephone. Petitioner's termination date reflects when the termination actually occurred, on February 21, 2008, not the date of the offense or when the offense was reported to management.

20. Respondent offered evidence of Petitioner sleeping on the job as the sole motivating factor in terminating her employment.[1/]

21. Respondent has a firm anti-discriminatory policy, of which Petitioner was aware because she signed a copy thereof

upon her date of hire. However, Petitioner never complained to Mr. Walker about perceived racial discrimination, before or after her termination. At hearing, she denied any discriminatory treatment or any racial slurs or comments by any of Respondent's employees at any time before, during, or after the incidents previously related.

22. On February 29, 2008, which was after Petitioner's February 21, 2008, termination, Respondent hired three new CNAs: one Caucasian and two African-American. Ten of the eleven CNAs hired by the Employer from February 5, 2008, to March 26, 2008, were African-American females.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause, pursuant to Sections 120.569, 120.57(1) and Chapter 760, Florida Statutes (2008).

24. The shifting burdens of proof in discrimination cases have been cogently explicated in the seminal case of Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991), which stated:

> Pursuant to the [Texas Department of Community Affairs v.] Burdine, [450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)] formula, the employee has the initial burden of establishing a prima facie case of intentional discrimination, which

> once established raises a presumption that the employer discriminated against the employee. If the presumption arises, the burden shifts to the employer to present sufficient evidence to raise a genuine issue of fact as to whether the employer discriminated against the employee. The employer may do this by stating a legitimate, nondiscriminatory reason for the employment decision, a reason which is clear, reasonably specific, and worthy of credence. Because the employer has the burden of production, not of persuasion, which remains with the employee, it is not required to persuade the trier of fact that its decision was actually motivated by the reasons given. If the employer satisfied its burden, the employee must then persuade the fact finder that the proffered reason for the employment decision was a pretext for intentional discrimination. The employee may satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. If such proof is adequately presented, the employee satisfies his or her ultimate burden of demonstrating by a preponderance of the evidence that he or she has been a victim of intentional discrimination.

25. Herein, Petitioner failed to establish a prima facie case of employment discrimination.

26. Petitioner is a member of a protected class, but she established no nexus between her race and her Employer's decision to terminate her. Petitioner was confused over the dates she worked. Her mistrust in her superiors' motivation hinged on her termination occurring 12-13 days after the

sleeping infraction/report and is not reasonably related to discrimination. Proof that amounts to no more than mere speculation and self-serving belief concerning the motives of the employer (in this case, two African-American supervisors and three Caucasian executives) are insufficient to establish a prima facie case. See Little v. Republic Refining Co. Ltd., 924 F.2d 93 (5th Cir. 1991.) Petitioner established no different treatment by the Employer of any similarly situated employee of a different race than Petitioner. Petitioner did not establish any actual or purported racial animus by any superior.

27. Assuming arguendo, but not ruling, that Petitioner did establish a prima facie case, Respondent Employer articulated a legitimate, non-discriminatory reason for its employment action: a good-faith belief that Petitioner was sleeping on the job in violation of the Employer's policies and general safety practices, which non-discriminatory reason Petitioner did not refute. Even if Respondent's executives were wrong in their reliance on African-American Nurses Hatcher and Rockett's reports, or wrong in their belief that Petitioner was asleep so as to offend the Employer's rules, an honest mistake does not constitute discriminatory conduct. See Damon v. Fleming Supermarkets, Inc. 196 F.3d 1354, 1363 n. 3 (11th Cir. 1999).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a Final Order dismissing Petitioner's Charge of Discrimination and Petition for Relief.

DONE AND ENTERED this 31st day of July, 2009, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of July, 2009.

ENDNOTE

1/ Both the African-American Petitioner and the same Caucasian CNA were written-up for failure to take vital signs of patients on February 10, 2008. This write-up was also authored by LPN Hatcher and witnessed by LPN Rockett, but these subsequent write-ups did not enter into management's final decision to terminate both the African-American CNA and the Caucasian CNA.

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.