STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRUNEL DANGERVIL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-4873
	)	
TRUMP INTERNATIONAL BEACH RESORT,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case before J. D. Parrish, a duly-designated administrative law judge of the Division of Administrative Hearings, on December 9, 2008, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Erwin Rosenberg, Esquire
Post Office Box 416433
Miami Beach, Florida 33141

For Respondent: Warren Jay Stamm, Esquire
Trump International Beach Resort
18001 Collins Avenue, 31st Floor
Sunny Isles Beach, Florida 33160

STATEMENT OF THE ISSUE

Whether Respondent committed the unlawful employment practice alleged in the Employment Complaint of Discrimination filed with the Florida Commission on Human

Relations (FCHR) and, if so, what relief should Petitioner be granted.

PRELIMINARY STATEMENT

On April 22, 2008, the Petitioner, Brunel Dangervil, filed an Employment Complaint of Discrimination with the FCHR, alleging that his former employer, the Respondent, Trump International Sonesta Beach Resort, had discriminated against him based on his national origin (Haitian). According to the complaint, which contained the following "discrimination statement," the "most recent discrimination took place" on April 22, 2007:

> I believe I was subjected to disparate terms and conditions, harassment, and wrongfully terminated because of my National Origin (Haitian). My supervisor Elisabeth Cortez (Hispanic) removed me from my 6 am work shift, and replaced me with Luis who is Hispanic, and had less seniority. On numerous occasions, I heard security officer Curtis (Black-American), use the phrase "fucking Haitian" when I walked by. On April 22, 2008, Assistant Manager Luis Santana (Hispanic) terminated me. Mr. Santana did not give me a reason for my termination. He told me to never come back on the hotel premises, and had security escort me off the property.

On September 10, 2008, following the completion of its investigation of Petitioner's complaint, the FCHR issued a Notice of Determination: No Cause, advising the Petitioner that a determination had been made that "no reasonable

cause exists to believe that an unlawful employment practice occurred." Thereafter, on or about September 29, 2008, the Petitioner filed a Petition for Relief. The case was forwarded to the Division of Administrative Hearings for formal proceedings on September 30, 2008.

At the hearing, the Petitioner testified in his own behalf and presented testimony from: Wilfrid Lazarre, a former co-worker; Curtis Butler, a security guard; Elizabeth Cortes, a former director of housekeeping for the Trump Resort; Lewis Saldana, the housekeeping manager at the Trump Resort; Eddie Lugo, a security supervisor at the Trump Resort; and Esther Sandino, director of human resources for the Respondent who also testified on behalf of the Respondent. The Respondent's Exhibits 1-6 were admitted into evidence.

In accordance with the directions of the undersigned at the conclusion of the hearing, the parties' proposed recommended orders were to be filed within ten days of the hearing. By Order entered December 16, 2008, the parties were granted leave until December 31, 2008, to file their proposed orders. The Respondent timely filed a proposed order. The Transcript of the final hearing (consisting of one volume) was filed on December 31, 2008.

The Petitioner did not file a proposed order but filed a Motion for Judicial Notice of March 13, 2008 Decision of Appeals Referee on January 6, 2009. Thereafter, the Respondent filed a Response to that request on January 29, 2009. Judicial review of the ruling of another tribunal unrelated to the issues of this case is immaterial. Presuming the Petitioner was entitled to unemployment compensation does not, as a matter of law, establish the necessary criteria to support a claim of employment discrimination. The burden of proof and the requisites of proof pertinent to this case are more fully addressed in the conclusions of law below.

FINDINGS OF FACT

1. The Petitioner began his employment with the Respondent on or about April 9, 2004. The Petitioner worked as a houseman. This job description was within the Respondent's housekeeping section. His original schedule required him to work a shift that ran from 6:00 a.m. until 2:00 p.m.

2. In October or November of 2004, the Petitioner's work schedule changed and he was directed to work the overnight shift. The overnight shift personnel reported for duty from 11:00 p.m. until 7:30 a.m. The Petitioner

accepted this re-assignment. The change in shift assignment was requested by Elizabeth Cortes' predecessor.

3. Some time after December 2004, the Petitioner's supervising manager changed and Elizabeth Cortes became the director or manager for housekeeping. The Petitioner asked Ms. Cortes if he could return to the 6:00 a.m. to 2:00 p.m. shift. That request was not approved. The Petitioner accepted this decision and continued to work as scheduled. Ms. Cortes told the Petitioner at that time that she did not have another employee who would be available to take the night shift.

4. In 2007 the Petitioner enrolled in school and requested that his shift be changed to a 9:00 p.m. to 5:00 a.m. shift so that he could attend school at Miami Dade. That request was approved. From the time of approval, the Petitioner was permitted to work three days from 9:00 p.m. to 5:00 a.m. (his school days) and two days from 11:00 p.m. to 7:30 a.m. The modification of the schedule allowed the Petitioner sufficient time to get to school in the morning. The Petitioner continued to work these shift times without complaint or issue.

5. In November or December of 2006, the Petitioner made an application to become a banquet server for the Respondent's restaurant. He alleged that he gave the

application to Elizabeth Cortes who was to sign it and forward it to Human Resources. According to Esther Sandino, the Petitioner did not file an application for restaurant server. Further, Ms. Cortes did not recall the matter. The Petitioner did not file a claim of discrimination for this alleged incident but presumably alleged that this incident demonstrates an on-going disparate treatment. There was no evidence that a non-Haitian was hired for the job as banquet server. There was no evidence any banquet servers were hired. Ms. Cortes did not hire banquet servers. Her responsibilities were directed at housekeeping.

6. During the time Ms. Cortes was the housekeeping supervisor, the Respondent employed approximately 90 employees within the housekeeping section. Of those employees approximately 70 were Haitian. The remainder were Hispanic, Jamaican, Filipino, and other. Of the five persons who held supervisory positions, one was Haitian, two were Hispanic, one was from Czechoslovakia, and the country of origin of the fifth supervisor was unknown to Ms. Cortes.

7. Ms. Cortes did not have the authority to terminate the Respondent's employees. Standard procedure would cause any allegation of improper conduct to be referred to the

Human Resources office for follow up and investigation. There were two incidents referred for investigation regarding the Petitioner prior to the incident of April 22, 2007. Neither of them resulted in suspension or termination of the Petitioner's employment with the Respondent.

8. On April 22, 2007, a security officer reported to the hotel manager on duty, Bingina Lopez, that the Petitioner was discovered sleeping during his work shift. Based upon that report, Ms. Lopez sent an e-mail to the housekeeping department to alert them to the allegation. When the Petitioner next reported for work, Mr. Saldana told the Petitioner to leave the property and to report to the Human Resources office the next day to respond to the allegation. The Petitioner did not report as directed and did not return to the property.

9. Mr. Saldana did not have the authority to suspend or terminate the Petitioner's employment. Moreover, the Respondent did not send a letter of suspension or termination to the Petitioner. In fact, the Respondent assumed that the Petitioner had abandoned his position with the company.

10. Ms. Cortes presumed the Petitioner abandoned his position because all of his uniforms were returned to the

company. To avoid having the final paycheck docked, the Respondent required that all uniforms issued to an employee be returned upon separation from employment. The Petitioner acknowledged that he had his brother return the uniforms to the Respondent for him. The Respondent considered turning in uniforms to be an automatic resignation of employment.

11. To fill the Petitioner's position (to meet housekeeping needs), the Respondent contacted an agency that provides temporary staffing. The person who came from the agency for the assignment was a male Hispanic. The male (who may have been named Lewis Diaz) arrived at the Trump Resort for work about ten days after the Petitioner left. The replacement employee's schedule was from 4:00 p.m. to midnight or 1:00 a.m. The temporary replacement remained with the Respondent until a permanent replacement for the Petitioner could be hired. It is unknown how long that was or who the eventual permanent employee turned out to be.

12. Because the Petitioner never returned to the Trump Resort as directed, he was not disciplined for any behavior that may have occurred on April 22, 2007.

13. The Petitioner's Employee Return Uniform Receipt was dated April 25, 2007.

14. Prior to the incident alleged for April 22, 2007, the Petitioner had been investigated in connection with two other serious charges. Neither of those incidents resulted in discipline against the Petitioner. Both of the incidents claimed improper conduct that was arguably more serious than the allegation of April 22, 2007.

15. Of the 400 plus employees at the Respondent's resort, the majority are Haitians. The Respondent employs persons from 54 different countries.

16. The Petitioner's claim that he was referred to as a "fucking Haitian" by a security guard has not been deemed credible. The Petitioner was unable to indicate when the comment was made. Moreover, the Petitioner did not complain to anyone at the time the comment was allegedly made. Finally, no other employee could corroborate that the comment was made. One former employee testified that the Petitioner told him about the alleged comment. At best it was one offensive statement made on one occasion.

17. There is no evidence that the Petitioner was treated in a disparate or improper manner based upon his national origin.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter

of, these proceedings. §§ 120.57(1) and 760.11, Fla. Stat. (2008).

19. The Florida Civil Rights Act of 1992 (the Act) is codified in Sections 760.01 through 760.11, Florida Statutes (2008). "The Act, as amended, was [generally] patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Federal case law interpreting [provisions of] Title VII and the ADEA is [therefore] applicable to cases [involving counterpart provisions of] the Florida Act." Florida State University v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996); see also Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)("The [Act's] stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964.").

20. The Act makes certain acts prohibited "unlawful employment practices," including those described in Section 760.10, Florida Statutes (2008), which provides:

> (1) It is an unlawful employment practice for an employer:
> (a) 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.
(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(2) It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, national origin, age, handicap, or marital status or to classify or refer for employment any individual on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.

(3) It is an unlawful employment practice for a labor organization:
(a) To exclude or to expel from its membership, or otherwise to discriminate against, any individual because of race, color, religion, sex, national origin, age, handicap, or marital status.
(b) To limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
(c) To cause or attempt to cause an employer to discriminate against an

individual in violation of this section.

(4) It is an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of race, color, religion, sex, national origin, age, handicap, or marital status in admission to, or employment in, any program established to provide apprenticeship or other training.

(5) Whenever, in order to engage in a profession, occupation, or trade, it is required that a person receive a license, certification, or other credential, become a member or an associate of any club, association, or other organization, or pass any examination, it is an unlawful employment practice for any person to discriminate against any other person seeking such license, certification, or other credential, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, national origin, age, handicap, or marital status.

(6) It is an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee to print, or cause to be printed or published, any notice or advertisement relating to employment, membership, classification, referral for employment, or apprenticeship or other training, indicating any preference,

limitation, specification, or discrimination, based on race, color, religion, sex, national origin, age, absence of handicap, or marital status.

(7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

(8) Notwithstanding any other provision of this section, it is not an unlawful employment practice under ss. 760.01-760.10 for an employer, employment agency, labor organization, or joint labor-management committee to:
(a) Take or fail to take any action on the basis of religion, sex, national origin, age, handicap, or marital status in those certain instances in which religion, sex, national origin, age, absence of a particular handicap, or marital status is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.
(b) Observe the terms of a bona fide seniority system, a bona fide employee benefit plan such as a retirement, pension, or insurance plan, or a system which measures earnings by quantity or quality of production, which is not designed, intended, or used to evade the purposes of ss. 760.01-760.10. However, no such employee benefit plan or system which measures earnings shall excuse the failure to hire, and no such

seniority system, employee benefit plan, or system which measures earnings shall excuse the involuntary retirement of, any individual on the basis of any factor not related to the ability of such individual to perform the particular employment for which such individual has applied or in which such individual is engaged. This subsection shall not be construed to make unlawful the rejection or termination of employment when the individual applicant or employee has failed to meet bona fide requirements for the job or position sought or held or to require any changes in any bona fide retirement or pension programs or existing collective bargaining agreements during the life of the contract, or for 2 years after October 1, 1981, whichever occurs first, nor shall this act preclude such physical and medical examinations of applicants and employees as an employer may require of applicants and employees to determine fitness for the job or position sought or held.

(c) Take or fail to take any action on the basis of age, pursuant to law or regulation governing any employment or training program designed to benefit persons of a particular age group.

(d) Take or fail to take any action on the basis of marital status if that status is prohibited under its antinepotism policy.

(9) This section shall not apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public accommodation to members of that religious corporation, association, educational institution, or society or to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious corporation,

> association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities.
>
> (10) Each employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice provided by the commission setting forth such information as the commission deems appropriate to effectuate the purposes of ss. 760.01-760.10.

21. The Act gives the FCHR the authority to issue an order prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay, if it finds following an administrative hearing that an unlawful employment practice has occurred. See § 760.11, Fla. Stat (2008). To obtain 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. § 760.11(1), Fla. Stat. (2008). It is concluded the Petitioner filed a complaint within the statutory time limitation.

22. The Plaintiff's complaint alleged that he was subjected to "disparate terms and conditions, harassment,

and wrongfully terminated because of" his national origin. As each claim may stand alone as a basis for discriminatory conduct, each claim is addressed individually.

23. It is concluded the Petitioner was not subjected to disparate terms and conditions of his employment. There is no evidence that the Petitioner was paid differently or given conditions disparate than other employees within his category of employment. The Respondent demonstrated a strong record of hiring and retaining Haitian employees at the pertinent period of time. Additionally, one of five supervisors was Haitian. Although he was originally scheduled to the night shift to meet the employer's needs, the Petitioner was retained on his work schedule to accommodate his desire to attend school. The Petitioner did not complain regarding the work schedule assignment, and there is no evidence that Haitian employees were scheduled in a disparate manner. To the contrary, employees on the night shift received a higher hourly rate of pay.

24. Next, as to a claim of harassment, the Petitioner has failed to present any credible evidence that he was harassed at the work site. "A hostile work environment cannot be identified by a mathematically precise test, but rather must be determined from the totality of the

circumstances taking into consideration such factors as the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance and whether it unreasonably interferes with an employee's work performance." Smith v. Mount Sinai Medical Center of Greater Miami, Inc., 36 F. Supp. 2d 1341 (So. Dist. Fla. 1998). One alleged insult that did not impact the Petitioner's work performance hardly qualifies as a hostile, harassing environment. Assuming, arguendo, the alleged incident occurred, the Petitioner did not complain that the security guard had insulted him. Even if true the conduct did not rise to the level that the Respondent would be held accountable for the rude behavior of a single employee for a single incident. Racial or ethnic slurs must be commonplace, overt and denigrating in order to create an atmosphere of hostility. See E.E.O.C. v. Beverage Canners, Inc., 897 F.2d 1067, 1068 (11th Cir. 1990).

25. As to the Petitioner's claim that he was wrongfully terminated because of his national origin, that allegation also fails. Simply stated, the Respondent did not terminate the Petitioner. The Petitioner's assumption that he had been terminated is not supported by the weight of the credible evidence presented in this cause. Further,

that another tribunal might have determined Petitioner should collect unemployment compensation does not address the standards of law applicable to this matter.

26. Petitioner has the burden of proving the allegations asserted. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001).

27. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption." See Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004)("Direct evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.'"). "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). In this case, the Petitioner failed to prove discrimination either by direct or indirect evidence. He proved he is Haitian but little else.

28. Moreover, although victims of discrimination may be "permitted to establish their cases through inferential and circumstantial proof," the Petitioner similarly failed

to present credible inferential or circumstantial proof. See Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997).

29. Had the Petitioner established circumstantial evidence of discrimination, the burden would have shifted to the Respondent to articulate a legitimate, non-discriminatory reason for its action. If the employer successfully articulates a reason for its action, then the burden shifts back to the complainant to establish that the proffered reason was a pretext for the unlawful discrimination. See Malu v. City of Gainesville, 270 Fed. Appx. 945; 2008 U.S. App. LEXIS 6775 (11th Cir. 2008). In this case, the persuasive evidence established that the Petitioner was not terminated. Under the guidelines of this employer, the Petitioner was presumed to have abandoned his job. He returned his uniforms, he failed to report to the human resources office, and he failed to report for work. The replacement employee was a temporary person supplied through an agency. A non-Haitian was not given preferred treatment to the Petitioner's detriment. The vast majority of the housekeeping workers are Haitian. A Haitian was also a housekeeping supervisor. The Petitioner did not establish anyone treated him differently based upon his national origin.

30. In light of the foregoing, Respondent's employment discrimination complaint must 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 no cause for an unlawful employment practice as alleged by the Petitioner, and dismissing his employment discrimination complaint.

DONE AND ENTERED this 27th day of February, 2009, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.