STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| DR. PHILLIPS ST. LOUIS,<br><br>Petitioner,<br><br>vs.<br><br>FLORIDA PHYSICIAN MEDICAL GROUP,<br><br>Respondent. | ) | Case No. 10-9141 |

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on May 4 and 5, 2011, in Orlando, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jerry Girley, Esquire
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For Respondent: Alan M. Gerlach, Esquire
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## STATEMENT OF THE ISSUE

Whether Respondent, Florida Physician Medical Group (Respondent or FPMG), violated Florida law by engaging in discriminatory, disparate treatment of Petitioner, Dr. Phillip St. Louis (Petitioner). Petitioner maintains that Respondent refusal to employ him constitutes discrimination based upon his race or national origin.

## PRELIMINARY STATEMENT

On or about April 6, 2010, Petitioner filed a complaint with the Florida Commission on Human Relations (FCHR) that alleged Respondent had subjected Petitioner to disparate treatment constituting discrimination based upon Petitioner race or national origin. More specifically, Petitioner alleged:

> I applied to become an employee of The Florida Physician Medical Group, in March of 2009. Following my application, an extended amount of time transpired without me hearing anything regarding their decision. On November 25, 2009 I finally had a follow up meeting with Mr. Bryan Stilz and Mr. David Middag, both gentlemen are representatives of F.P.M.G. They advised me that a decision was made not to hire me because of past medical malpractice claims filed against me. On its face, this claim presents as reasonable but it is suspect and discriminatory, because they have hired several non-Black, non-Trindadian Neurosurgeons who have more malpractice claims than I have. The following are just a few names of individual surgeons hired by F.P.M.G. who also have past malpractice claims: Dr. William Lu, Dr. Paul Douglas Sawin and Dr. Christopher Joseph.

The FCHR conducted an investigation of the complaint and issued its Determination of No Cause dated August 27, 2010.

Thereafter, Petitioner timely filed a Petition for Relief that was forwarded to the Division of Administrative Hearings (DOAH) for formal proceedings. The case was promptly scheduled for hearing (hearing date, November 19, 2010), but was continued on two occasions in order to provide sufficient discovery opportunities.

At the hearing, Petitioner testified on his own behalf and presented the testimony of Stacy Prince, Bryan Stiltz, Dr. Paul Sawin, Dr. Christopher Baker, Dr. William Lu, Dr. Eric Trumble, and Dr. Jay Redan. By stipulation, Petitioner's Exhibits 1 through 8, and 12 through 15, were admitted into evidence. In addition to testimony from the previously named witnesses, Respondent presented testimony from Sandra Johnson. Respondent's Exhibits 1, and 5 through 25, were admitted into evidence. Respondent's Exhibits 2 through 4, were admitted solely to establish the jurisdictional process by which the case came to DOAH.

The Transcript of the hearing was filed on May 24, 2011. The parties were granted 20 days from the date of the filing within which to file proposed recommended orders. Both timely filed proposed orders on June 13, 2011. The proposals have been fully considered in the preparation of this Recommended Order.

This Recommended Order is entered to complete the DOAH proceedings in this cause.

## FINDINGS OF FACT

1. Petitioner is a black male born in Trinidad. He is fully educated and qualified to practice medicine in the State of Florida, and has done so for a number of years. Petitioner specialty is neurosurgery. He has practiced at a number of hospitals in the greater Orlando area for over ten years.

2. The instant case arose when Petitioner was denied employment with Respondent. Petitioner maintains he is fully competent and qualified to become employed by Respondent and that the company has denied him employment based upon his race (black) and national origin.

3. Prior to March 2009, Respondent considered hiring Petitioner for employment. With that end as the objective, Petitioner submitted an application for malpractice coverage through an entity that insures Respondent's physicians. That entity, described in the record as (the Trust), reviews applications for coverage and considers whether it can provide malpractice coverage for a physician based upon a number of factors, including but not limited to, past work history, education and training, and past malpractice claims made against and paid by the subject physician.

4. Approval for medical malpractice coverage by Adventist Health System (AHS) through the Risk Management Department (Risk Management) was a prerequisite to employment with Respondent.

5. The requirement to obtain professional liability coverage was pursuant to the company-wide policy CW RM 220. At all times material to his application, Petitioner knew or should have known that Respondent required medical malpractice coverage. As of the time of the hearing and for at least nine years prior thereto, Petitioner has performed neurosurgery without malpractice coverage. This practice, known in the record as working "bare," is disfavored by Respondent.

6. All physicians who seek to be employed by Respondent must submit an application for review and approval for professional liability coverage under the self-insured Trust.

7. Personnel employed with AHS's Risk Management review applications and recommend disposition of the requests for coverage. Stacy Prince joined AHS as a director of Risk Management in 2005.

8. Stacy Prince and Sandra Johnson were responsible for deciding whether Petitioner would qualify for medical malpractice coverage. The decision to deny coverage for Petitioner was reached without regard for Petitioner's race or national background. At the time that Petitioner was being considered for medical malpractice coverage with the Trust,

Stacy Prince and his supervisor (Sandra Johnson) did not know the Petitioner's race or national origin.

9. The Risk Management decision was based on Petitioner's malpractice claims history, as is more fully explained below.

10. Neurosurgery is a high-risk medical practice. It is possible that this specialty group of physicians are exposed to more claims and more serious claims than other specialty physicians. Nevertheless, in determining whether a physician can be covered, Risk Management must look at the totality of the circumstances to evaluate whether a candidate can be covered by the Trust.

11. Most physicians covered by the Trust do not have any malpractice claims. Of those who do have malpractice claims, the vast majority have had only one or two incidents of alleged malpractice.

12. Because each candidate's application for coverage was reviewed on a case-by-case basis, the factual circumstances surrounding a malpractice claim may be pertinent to the decision of whether a physician may be covered.

13. An example of a malpractice claim that would not be given much gravity would be one that occurred while a physician was in training under the supervision of a licensed physician. In such instances, the training physician is named incidentally to the primary supervising physician. Such "shotgun" claims

typically name everyone who provided care for the patient, regardless of the personal interaction or level of care actually rendered. None of Petitioner's claims fell within this category.

14. A second type of malpractice claim that might be discredited would be one that did not result in any monetary award or damages to the patient. None of Petitioner's claims fell within this category.

15. Based upon Stacy Prince's review of Petitioner's history of claims, Petitioner was deemed too great a risk to provide medical malpractice coverage. The malpractice history reviewed included four claims disclosed by Petitioner and a fifth claim that was not reported by Petitioner, but was discovered by Risk Management. The fact that the fifth claim was not disclosed to Risk Management in the application process was also a concern to Mr. Prince and influenced his decision.

16. No physician, regardless of specialty, with claims similar to Petitioner's has been insured by the Trust. Additionally, although unknown to Petitioner at the time of application, a sixth medical malpractice claim was made against Petitioner. The potential for additional claims (that could be also unknown to Petitioner) was a concern in determining whether to provide coverage for Petitioner.

17. With regard to Petitioner's claims, at least two of the claims were unresolved, as of the time of review of Petitioner's application. Additionally, a parallel investigation and administrative action by the Florida Department of Health regarding one claim was also a concern for Risk Management. Whether or not Petitioner practices within the standard of care expected of physicians in Florida is of significant importance to Respondent.

18. No other candidate for employment presented to Respondent with similarly-serious claims. Petitioner's lack of candor regarding the number of claims against him and the severity of claims was also a concern to the undersigned. No physician was given preferential treatment by Respondent who was similarly situated, as no other physician reviewed in this record had similar claims.

19. The factors resulting in the denial of coverage were: the number of claims, the open claims, the history of damages awarded, the unknown amount of future damages based upon unresolved claims, the lack of malpractice coverage, and Petitioner's failure to fully and accurately disclose information needed to review his application.

20. None of the physicians who Petitioner identified as comparably situated, and who allegedly received more favorable treatment, had the number or severity of claims, the level of

damages associated with the claims, or were practicing "bare" for the period of time Petitioner has chosen to practice. All of the doctors were eligible for medical malpractice coverage at all times material to this case or during employment with Respondent.

21. In contrast, Petitioner practiced "bare" for almost nine years since his insurer canceled his insurance coverage due to the "Nature of Claim" in July of 2000. Petitioner was cancelled by his insurer after the insurer had to pay its policy limits of $500,000.

22. An example of a malpractice claim associated with Petitioner was his operation on the wrong side of a patient's head. That surgery resulted in a $1.75 million dollar settlement.

23. Petitioner presented no evidence to establish that any of Respondent's actions or inactions were based upon his race or national origin. Respondent articulated bona fide business reasons for why the Trust denied medical malpractice coverage for Petitioner.

24. More important, had Risk Management agreed to provide coverage for Petitioner, then Bryan Stiltz, Respondent's CEO, would have hired Petitioner.

25. The decision not to hire Petitioner due to his failure to qualify for medical malpractice coverage was not based on

Petitioner's race or national origin and was consistent with Respondent's employment policy.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.57(1) and 760.11, Fla. Stat. (2010).

27. The Florida Civil Rights Act of 1992 (the Act) is codified in sections 760.01 through 760.11, Florida Statutes (2009). "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." FSU v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996); see Joshua v. Cty 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.").

28. The Act makes certain acts prohibited "unlawful employment practices," including those described in section 760.10, 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.

29. 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. 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). It is concluded that Petitioner filed a complaint within the statutory time limitation.

30. Petitioner's complaint alleged that he was subjected to discrimination based upon his race and national origin. Each

claim stands alone as a basis for discriminatory conduct; therefore, each claim is addressed individually.

31. For purposes of a claim of discrimination based upon race, Florida courts have recognized that actions under the Act are analyzed under the same framework as the federal law. Accordingly, Petitioner must establish that he is a qualified individual who was denied employment on account of his race while others not within the protected class received favorable treatment. Petitioner failed to present any evidence that race was a motivating factor in why he was not employed by Respondent. Respondent employs persons from Petitioner's race. A non-black person was not hired over Petitioner. In fact no physician was hired instead of Petitioner. Had Petitioner obtained malpractice coverage, Respondent would have hired him. Petitioner's race was a non-issue.

32. Similarly, Petitioner's national origin played no part in the decision not to hire him. No less-qualified or otherwise unprotected person, of any national origin, was hired instead of Petitioner. No such physician was treated more favorably than Petitioner. Petitioner's national origin had no bearing on Respondent's decision.

33. 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). 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). In this case, Petitioner failed to prove discrimination either by direct or indirect evidence.

34. Moreover, although victims of discrimination may be "permitted to establish their cases through inferential and circumstantial proof," Petitioner similarly failed to present credible inferential or circumstantial proof. See Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

35. Had Petitioner established circumstantial evidence of discrimination, the burden of proof would have shifted to 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. Cty of Gainesville, 270 Fed. Appx. 945; 2008 U.S. App. LEXIS 6775 (11th Cir. 2008). In this case, the persuasive evidence established that Petitioner was not hired by Respondent because he could not obtain medical malpractice coverage through the Trust. There is no proof, direct or otherwise, that Petitioner could obtain medical malpractice coverage from any source. Respondent

required that all physicians be covered. Respondent did not treat Petitioner any differently than other physician hired. All were required to have coverage. If the question were whether Risk Management treated Petitioner differently than other physicians who sought coverage were treated, the answer would be the same. No physician similarly situated was treated more favorably than Petitioner, because no physician was similarly situated. No physician who was afforded coverage had the history of claims and damages and lack of candor demonstrated by Petitioner. Had Petitioner been approved by Risk Management, Respondent would have hired him. Petitioner's effort to attribute the decisions of a third, non-party entity (Risk Management) to Respondent is not persuasive. Even so, Risk Management articulated bone fide reasons for the denial of coverage.

36. In light of the foregoing, Respondent's discrimination complaint must be dismissed.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding no cause for an unlawful employment practice as alleged by Petitioner, and dismissing his employment discrimination complaint.

DONE AND ENTERED this 3rd day of August, 2011, 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
Division of Administrative Hearings
this 3rd day of July, 2011.

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.