

City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, Third Floor, Chicago, IL 60610
(312) 744-4111 [Voice], (312) 744-1081 [Facsimile], (312) 744-1088 [TTY]

IN THE MATTER OF

Maribel Hernandez,)	
COMPLAINANT,)	Case No. 05-E-14
AND)	
)	Date of Order: November 28, 2006
Colonial Medical Center & Dr. Carlos Correa,)	Date Mailed: December 3, 2006
RESPONDENTS.)	

FINAL ORDER

TO: J. Chris Goodman	Mario Correa
Pomper & Goodman	Law Offices of Marion Correa, P.C.
111 W. Washington St., Ste. 1000	3010 W. Diversey
Chicago, IL 60602	Chicago, IL 60647

YOU ARE HEREBY NOTIFIED that, on February 15, 2006, the Chicago Commission on Human Relations issued a ruling in favor of Respondents in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, this case is hereby DISMISSED.

Pursuant to Commission Regulations 100(14) and 250.150, Complainant may seek review of this Order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law.

CHICAGO COMMISSION ON HUMAN RELATIONS
Clarence N. Wood, Chair/Commissioner

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FINAL RULING

Statement of the Case

On February 16, 2005, Complainant Maribel Hernandez filed a complaint against Respondents Colonial Medical Center and Dr. Carlos Correa alleging that Respondents discriminated against her on the basis of color and ancestry. Specifically, the complaint alleged that Complainant is black and Panamanian; that she was employed by Respondents from October 10, 2002 until her termination on January 26, 2005; that on a regular basis, Complainant's coworker Carmen Arciga called her "Chinga Mayate," which means "fucking nigger" in Spanish; that Complainant complained of the harassment to Dr. Correa but he took no action; that on January 25, 2005, Ms. Arciga accused Complainant of pushing her, which was not true; and that on January 26, 2005, Respondents terminated Complainant because it would be easier for Complainant to find another job than Ms. Arciga due to Ms. Arciga's immigration status.

By Order mailed November 7, 2006, the Commission found substantial evidence with respect to the claim of harassment on the basis of color but no substantial evidence with respect to the claims or harassment based on ancestry and discharge based on ancestry and color. The Commission dismissed the claims for which it found no substantial evidence.

A hearing was held on July 23 and 24, 2007. Both parties submitted their cases on oral closing arguments.

On September 5, 2007, the hearing officer issued his First Recommended Decision. No party filed objections to the decision.

Findings of Fact

1. Complainant is dark-skinned and was born in Panama (Tr. 10). She began employment with Respondent Colonial Medical Center on October 10, 2002 (Tr. 11). Her employment terminated on January 26, 2005 (Tr. 32-33).
2. At all times relevant to this case, Colonial Medical Center was located at 1045 West Belmont in Chicago (Tr. 12). The first floor of the building housed a reception area and treatment rooms while the second floor housed offices (Tr. 12-13). Respondent, Dr. Carlos Correa, was one of the owners of Colonial Medical Center and one of Complainant's supervisors. Dr. Correa is light skinned and of Cuban ancestry.
3. Complainant's job responsibilities included answering the telephone, greeting patients, taking down their complaints, weighing patients, drawing their blood, and maintaining the

files (Tr. 13). When she first began her employment, three other employees performed the same functions. They were Maria Martinez, Carmen Arciga, and Lucia Armas (Tr. 13). Ms. Martinez left about six months after Complainant's employment began (Tr. 14), while Ms. Armas and Ms. Arciga remained employed throughout Complainant's employment. Ms. Arciga was born in Mexico and is light skinned.

4. Complainant testified that, beginning about six months into her employment, Ms. Arciga called her "pinche mayate," "chingao," and "chinga mayate." Ms. Arciga would use these terms when Complainant would ask her for test results or other information. According to Complainant, Ms. Arciga did not use such language when others were present, only when she and Complainant were alone (Tr. 15-18, 22, 49). Complainant testified that she would respond by trying to ignore the derogatory language because she needed to work (Tr. 18-19). She characterized her feelings of having to listen to such language as "uncomfortable" (Tr. 19).
5. Complainant testified that initially she discussed Ms. Arciga's behavior with Ms. Armas but after a week and a half, she raised the subject with Dr. Correa (Tr. 21). She estimated that she spoke to Dr. Correa about the situation on five occasions. Usually, they were alone but on occasion Ms. Armas was also present (Tr. 25). According to Complainant, the first time she complained, Dr. Correa told her it was no big deal and that she should ignore it. After several complaints, Dr. Correa stated that he was going to conduct a meeting with Complainant and Ms. Arciga but that never occurred (Tr. 26-28). Complainant testified that Ms. Arciga would laugh at her saying, "I am illegal and you are American citizen, but I will keep the job." (Tr. 28). Complainant testified that despite Ms. Arciga's treatment of her, she was able to perform her job (Tr. 50-51).
6. Complainant testified that on January 25, 2005, Dr. Simonelli, who also worked at Colonial Medical Center, was unable to find test results for a patient. According to Complainant, Dr. Simonelli asked Complainant for assistance but she was unable to locate the results so she asked Irene Cortez, who worked in the office on the second floor. Complainant testified that Ms. Cortez called down to Ms. Arciga, Ms. Arciga went to the second floor and spoke with Ms. Cortez, then Ms. Arciga came down to the first floor and threw the results at Complainant. Complainant testified that while she gave the results to Dr. Simonelli, Ms. Arciga went back upstairs. When Ms. Arciga came back down, Complainant testified, she said, "How come, Chingao, that the results were not there?" (Tr. 29-31). Complainant testified that on January 25, 2005, Ms. Arciga used the terms "Chingao," and "Chinga Mayate" but not "Pincha Mayate" (Tr. 47-48).
7. Complainant testified that in the ensuing altercation, Ms. Arciga poked Complainant on the forehead with her finger. Ms. Armas then came between the two coworkers and Ms. Arciga went to Dr. Correa, who came to the area and told both Complainant and Ms. Arciga to go home and return the following morning (Tr. 31). Complainant testified that when she returned the following morning, Dr. Correa told her that she was terminated (Tr. 32).
8. The Complaint (Resp. Ex. 1) alleges that Ms. Arciga regularly called Complainant "Chingy Mayate," and "Chinga Mayate," but does not refer to "Pincha Mayate" or "Chingao." Complainant testified that the complaint was drafted by Commission staff (Tr. 93, 97). When Complainant came to the Commission's offices, she completed a Background Form for employment discrimination cases (Resp. Ex. 3). Complainant testified that she dictated

to her sister in Spanish and her sister completed the form in English (Tr. 61, 97-98). On the form, in answer to the question, "Check each type of discrimination you believe is involved," "Color" is checked and "Panamanian" is handwritten. In response to the question, "Check each type of action that is the basis for the complaint," "Termination/Layoff" is checked but "Harassment Other Than Sexual" is not checked.

9. Following her termination, Complainant applied for unemployment compensation, Respondent opposed her application and benefits were denied. Complainant filed with the Illinois Department of Employment Security an Application for Reconsideration of Claim Adjudicator's Determination (Resp. Ex. 2). Her narrative, handwritten in Spanish, mentions being called "Chingados" but does not expressly mention "Pincha Mayate." Complainant testified that she only mentioned the last thing that Ms. Arciga said to her on the day before her termination (Tr. 59).
10. Complainant's husband, Rodolfo Hernandez, testified that a couple of times Complainant came home from work depressed and crying over Ms. Arciga's harassment (Tr. 108-09). He further testified that a couple of times, Complainant told him that she and Ms. Armas had spoken to Dr. Correa about the harassment and that Complainant reported to him that Dr. Correa responded that he would speak to Ms. Arciga and that all employees should get along (Tr. 109-111). According to Mr. Hernandez, Complainant asked him what Pinche Mayate and Chinga Mayate meant and he explained that these were terms Mexicans used to refer to black people (Tr. 113). Mr. Hernandez testified that he frequently spoke with Dr. Correa when he would arrive early to pick up his wife at the end of her shift but that he never mentioned the harassment to Dr. Correa (Tr. 117-118). He also did not advise Complainant to look for another job (Tr. 122-123). When asked whether his wife's lack of fluency in English made it difficult for her to find employment, Mr. Hernandez replied, "No, not really, because she's capable at working and easy going and get directions on whatever the facility to do the job." (Tr. 124-125).
11. Ms. Armas testified that at no point prior to January 25, 2005, did she hear or witness Ms. Arciga insult or argue with Complainant. She also testified that she never observed Ms. Arciga refer to Complainant's color or use the term "Pincha Mayate" (Tr. 138-139).
12. Ms. Armas denied ever seeing Complainant complain to Dr. Correa. On direct examination, she testified that on two occasions, Complainant told her that she had complained to Dr. Correa about Maria Martinez, the employee who left six months after Complainant's employment began (Tr. 139). On cross-examination, Ms. Armas testified that Complainant twice told her that she had spoken to Dr. Correa about Ms. Arciga's attitude (Tr. 150-151). When asked what attitudes of Ms. Arciga Complainant complained about in her conversations with Ms. Armas, Ms. Armas responded, "She would say sometimes she didn't want to do a few things and she would leave more work for Maribel and things like that." (Tr. 151). When asked whether Complainant ever told her that Ms. Arciga called her names, Ms. Armas replied, "No." (Tr. 151).
13. Ms. Armas testified that on January 25, 2005, she was waiting on patients in the reception area. She heard an argument develop between Complainant and Ms. Arciga over Complainant's inability to locate a paper for Dr. Simonelli. Ms. Armas related that because of her need to concentrate on the patients and because a medical representative was present, she closed the door to the room where Ms. Arciga and Complainant were arguing.

According to Ms. Armas, when she closed the door, Complainant was sitting down, Ms. Arciga was standing and pointing her finger at Complainant, and Complainant was asking Ms. Arciga to stop. After the need to attend to patients diminished, Ms. Armas testified, she opened the door intending to try to intercede between the two coworkers. She observed Complainant standing and Ms. Arciga continuing to point her finger at Complainant, when Complainant extended her arms prompting Ms. Armas to grab her just as Complainant pushed Ms. Arciga (Tr. 129-132, 148-150, 155-162, 176-177, 178-179). Ms. Armas testified that after Dr. Correa sent Complainant and Ms. Arciga home, she told Dr. Correa that Complainant had pushed Ms. Arciga (Tr. 132-134).

14. Ms. Arciga testified that when Complainant began working for Respondents, her relationship with Complainant was good. However, the relationship deteriorated, which Ms. Arciga attributed to Complainant not wanting to do certain tasks, such as weighing patients (Tr. 182-183). She denied ever using harsh words or swearing at Complainant, other than on the date of the incident that led to Complainant's termination (Tr. 185, 187).¹ She denied ever using the terms "Pincha Mayate" or "Chinga Mayate" (Tr. 186).
15. Ms. Arciga testified that the incident of January 25, 2005, began when the gynecologist in the clinic was looking for lab results. Because the results had yet to be received, it became necessary to call the lab and to locate the paperwork ordering the tests. According to Ms. Arciga, Ms. Hernandez was supposed to locate the paperwork but Ms. Cortez asked Ms. Arciga to find it and told Ms. Arciga that Ms. Hernandez had accused Ms. Arciga of hiding it. Ms. Arciga testified that she located the paperwork in its proper location two to three feet away from Ms. Hernandez (Tr. 189-199, 233).
16. Ms. Arciga testified that she was angry at Ms. Hernandez. Ms. Hernandez was seated in a chair with a tablet arm in the room where they would draw blood from patients. According to Ms. Arciga, she placed the paperwork on the tablet arm and called Ms. Hernandez, "Chingao," which Ms. Arciga characterized as a word used in frustration comparable to the "F word." (Tr. 185, 199-202).
17. Ms. Arciga testified that Ms. Hernandez called her a "big shit" and threatened to call the police. At that point, according to Ms. Arciga, Ms. Armas came into the room and Ms. Hernandez pushed Ms. Arciga above Ms. Armas' shoulders. Ms. Arciga testified that she hit the chair with her back and her head hit a cupboard or bookcase. Ms. Arciga testified that she dialed 9-1-1 but hung up after two rings and went to the treatment room where Dr. Correa was with a patient (Tr. 202-204). Ms. Arciga testified that she told Dr. Correa what had happened in Ms. Hernandez's presence and Ms. Hernandez did not deny any of Ms. Arciga's report (Tr. 204-207). Ms. Arciga testified that she sought medical attention for her back (Tr. 208-209; see also Resp. Ex. 6).
18. Ms. Arciga denied ever pointing her hands at Complainant and denied throwing the paperwork at Complainant. She maintained that she placed the paperwork on the tablet arm

¹Respondents' counsel asked Ms. Arciga whether Ms. Arciga swore or used harsh words other than on the date of Complainant's termination. However, I infer that what counsel and the witness meant was other than the date of the incident which was one day prior to Complainant's termination as there was no interaction at all between Ms. Arciga and Complainant on the date of Complainant's termination.

while Ms. Hernandez was sitting in the chair (Tr. 230-231). She denied that Ms. Armas ever closed the door to the room where she and Complainant were arguing, maintaining that there was no door to close. According to Complainant, Ms. Armas came into the room only once (Tr. 239-240).

19. Ms. Arciga testified that the following Friday, on the advice of a friend who was a police officer, she went to the police station and filed a report. She related that she was afraid that something might happen to herself or her family (Tr. 218-222). On cross examination, she conceded that during the three days between Complainant's termination and the filing of the police report, she had not seen Complainant near her house and had not been threatened by Complainant but related, "I know they are violent people . . . but I have no proof." By "they," Ms. Arciga explained, she was referring to Complainant and her husband (Tr. 222-225).
20. Dr. Correa testified that he sought to have a family atmosphere among the employees at the Respondent clinic and he witnessed no employee show disrespect to any other employee (Tr. 283). He related that he discharged Maria Martinez because she "created an uncomfortable work environment" and "tension within the office" (Tr. 284). He denied ever hearing any racial slurs used in the clinic (Tr. 284).
21. Concerning Complainant, Dr. Correa testified, "I liked her a lot." (Tr. 285). He related that he and Complainant conversed all of the time (Tr. 286). Dr. Correa testified that on one occasion, between six months and a year after Complainant began working for Respondents, Complainant asked to speak with him privately and then requested a schedule change to accommodate English classes that she was going to take. Dr. Correa accommodated her request (Tr. 287-288). The only other instances of private conversations initiated by Complainant that Dr. Correa recalled concerned illnesses that Complainant's children were experiencing (Tr. 288-289).
22. Dr. Correa testified that he observed little things, such as Complainant and Ms. Arciga not eating lunch together and their being more quiet and more formal when around each other, that led him to ask Complainant whether she had any problems with Ms. Arciga (Tr. 310). According to Dr. Correa, "99 percent of the time I could say that they were happy, comfortable --" (Tr. 286).
23. Dr. Correa testified that on January 25, 2005, he was administering to a patient when Mr. Arciga knocked on the door and said she needed to see him immediately. He followed her to the lab where he saw Complainant standing there and Ms. Armas in the reception area. According to Dr. Correa, Ms. Arciga was pale. Ms. Arciga, Dr. Correa related, stated that Complainant pushed or hit her and Complainant started cursing in Spanish but never denied hitting Ms. Arciga (Tr. 293-294). Dr. Correa testified that he told Complainant and Ms. Arciga to go home, that they would be paid and that they would discuss the situation the following day (Tr. 295).
24. Dr. Correa testified that after Complainant and Ms. Arciga left, he asked Ms. Armas what had occurred. According to Dr. Correa, Ms. Armas "stated Maribel with one hand took Carmen and threw her out of the room. She is like laughing and giggling because Maribel was her good friend. And, you know, like in nervousness, she said with one hand she took her and just threw her. Maribel is so strong. . . ." (Tr. 296).

25. Dr. Correa testified that he decided to terminate Complainant after consulting with several other people, because of his concern that there had been an incident of workplace violence, that it could happen again, and that he did not want to set a precedent for retaining someone in his employ who had instigated violence. He decided not to terminate Ms. Arciga because he regarded her as a victim of the violence (Tr. 298-302). On cross-examination, he conceded that he never discussed with Complainant what had occurred (Tr. 305).
26. On direct examination, Dr. Correa testified that he assisted Complainant in finding another job by recommending her to another doctor who was opening an office (Tr. 291). On cross-examination, he conceded that he opposed Complainant's unemployment compensation, that he knew his unemployment tax rate would increase if Complainant received unemployment compensation, and that eventually Complainant was awarded unemployment benefits. When asked whether his referral of Complainant to the doctor opening an office occurred after he learned that Complainant had been awarded unemployment compensation, he replied, "I don't know the timeline." (Tr. 306-307).
27. During Complainant's case-in-chief, Mr. Hernandez testified that within five days following Complainant's termination, Ms. Armas called to talk to her and he answered the phone (Tr. 111-112). During Respondents' case-in-chief, Ms. Armas testified that she spoke with Mr. Hernandez on the phone and that Mr. Hernandez expressed the opinion that it was unfair that Complainant had been the only one terminated (Tr. 140). On cross-examination, Ms. Armas testified that she told Mr. Hernandez what she had witnessed on January 25, 2005, and that Complainant should not have done what Complainant did and that both Complainant and Ms. Arciga were wrong (Tr. 167-170). She further testified that Mr. Hernandez expressed the view that Dr. Correa should have fired both Complainant and Ms. Arciga and she agreed with him (Tr. 170).²
28. Complainant called Mr. Hernandez in rebuttal. Mr. Hernandez testified that Ms. Armas told him on the phone that Dr. Correa had asked her to write a statement and that she asked Dr. Correa if he wanted her to write everything because Ms. Arciga had been always harassing Complainant and that she and Complainant had come to talk with Dr. Correa about it five times (Tr. 324-325). Mr. Hernandez testified that the telephone conversation was recorded on his answering machine (Tr. 327). At this point, Respondents' counsel objected that no tape recording had been produced in response to Respondents' discovery request. Complainant's counsel replied that he was not seeking to offer the tape into evidence but I ruled that he was required to produce the tape to Respondents. A recess was taken so that Complainant could produce the tape, after which Respondents' counsel objected, *inter alia*, that the tape produced was incomplete. Complainant's counsel, after conferring with Mr. Hernandez, represented that the tape as produced was all that existed. Testimony then continued (Tr. 326-336).

²The transcript reflects Ms. Armas testifying that Mr. Hernandez told her "that he[Dr. Correa] shouldn't have fired both of them." Tr. 170, lines 6-7. However, it is clear from my notes and from the other references to this testimony in the record that Ms. Armas quoted Mr. Hernandez as saying that Dr. Correa "should have fired both of them."

29. Mr. Hernandez testified that in the telephone conversation, Ms. Armas told him that Ms. Arciga was pushing Complainant around, calling Complainant nicknames including pinche mayate (Tr. 340). Mr. Hernandez further testified that Ms. Armas told him that she had told Dr. Correa that on January 25, 2005, Ms. Arciga pushed Complainant first, with a finger to Complainant's face (Tr. 342).
30. At the conclusion of Complainant's rebuttal case, Respondents' counsel requested and was granted a recess so that he could play the tape for Ms. Armas. Respondents then recalled Ms. Armas in surrebuttal. Ms. Armas testified that after listening to the tape she did not wish to change any part of her prior testimony. She further testified that neither she nor Mr. Hernandez mentioned the words pinchya mayate or chinga mayate in the telephone conversation.

Discussion and Findings as to Credibility

There is no dispute that Complainant and Ms. Arciga did not get along. All witnesses agreed on that point. Of critical significance are whether Ms. Arciga referred to Complainant with racially derogatory comments – pincha mayate and chinga mayate – and whether Complainant complained about such conduct to Respondent Dr. Correa. There is considerable conflict among the witnesses with respect to these matters. These conflicts require an assessment of relative witness credibility.

Dr. Correa's credibility is problematic. Not only does his business face liability in this action but he faces personal liability as well. His interest in the outcome of this proceeding is obvious.

More significantly, Dr. Correa's account of Ms. Armas' report of the events of January 25, 2005, is corroborated by none of the other witnesses. According to Dr. Correa, after Complainant and Ms. Arciga left on January 25, 2005, Ms. Armas told him that Complainant threw Ms. Arciga out of the room with one hand. Ms. Armas, however, testified that she told Dr. Correa that Complainant pushed Ms. Arciga. Ms. Armas further testified that when she entered the room a second time on January 25, she saw Complainant extend her arms, which prompted Ms. Armas to grab Complainant just as Complainant pushed Ms. Arciga. Ms. Armas' testimony is completely inconsistent with Dr. Correa's contention that Ms. Armas told him Complainant had thrown Ms. Arciga out of the room with one hand. Most significantly, in this regard, Ms. Arciga's testimony contradicted Dr. Correa's. Ms. Arciga testified that Complainant pushed her above Ms. Armas' shoulders. Ms. Arciga's testimony is inconsistent with the alleged report by Ms. Armas that Complainant threw Ms. Arciga out of the room with one hand. Dr. Correa's testimony in this regard reflects a tendency to embellish to portray himself and his case in the most favorable light possible.

Further concerns with Dr. Correa's credibility arise from his testimony concerning his relationship with Complainant. Dr. Correa testified that he liked Complainant and that she was a good worker. According to Dr. Correa, he terminated Complainant because he believed he had no other choice but even after doing so, he helped her secure other employment by recommending her to a physician he knew was starting a new practice. Dr. Correa's testimony in this regard is inconsistent with his actions and did not withstand probing on cross-examination. Dr. Correa admitted that when he sent Complainant home on January 25, 2005, he told her they would discuss the situation the following day. Yet, despite giving Complainant such an assurance and despite claiming to like her and despite his professed positive evaluation of her work, on the following day,

Dr. Correa terminated Complainant without asking for her version of the events of the altercation with Ms. Arciga. He then chose to oppose Complainant's unemployment compensation. Furthermore, on cross-examination, he conceded that he knew that Complainant's receipt of unemployment benefits would adversely affect his tax rate, and when asked point blank if his assisting Claimant in finding another job occurred after Complainant was awarded unemployment benefits over his opposition, he could only state that he was not sure of the time frame. Following cross-examination, what Dr. Correa portrayed on direct examination as a magnanimous act of assistance to Complainant in obtaining another job degenerated into an effort to preserve his experience rating with the Department of Employment Security and avoid a tax increase. Dr. Correa's testimony in this regard further reflects his tendency to embellish to portray himself in the best light possible. Because of these concerns, I am unable to credit Dr. Correa's testimony with much probative value.

Mr. Hernandez's testimony also raises significant credibility concerns. If Mr. Hernandez is to be believed, Complainant complained to him about Ms. Arciga's use of racially derogatory terms toward her and of her futility in trying to get Dr. Correa to intervene. Yet, he did not advise her to seek other employment even though he did not believe that her lack of fluency in Spanish would hinder her in finding another job. His only advice was to try to get along with her coworkers. Furthermore, according to Mr. Hernandez, although he frequently arrived early to pick his wife up and frequently chatted with Dr. Correa, he never mentioned anything about the situation with between his wife and Ms. Arciga or his wife's futile efforts to obtain Dr. Correa's intervention.

Mr. Hernandez's testimony concerning his telephone conversation with Ms. Armas and the handling of the tape recording is also very troubling. Respondents' document request sought:

REQUEST NO. 6

Copies of any and all statements previously made by any person other than Complainant concerning the subject matter of this lawsuit, including any written statement signed or otherwise adopted or approved by the Complainant hereto and any stenographic, mechanical, electrical or other type of recording . . .

The tape recording of the telephone conversation between Mr. Hernandez and Ms. Armas was clearly covered by Respondents' document request. It was not produced until Respondents objected to references to it in Mr. Hernandez's testimony in rebuttal and the hearing officer ordered that it be produced. Even then, Complainant sought to avoid production on the irrelevant ground that the tape would not be offered into evidence. Complainant offered no explanation for the failure to produce the tape prior to the latter part of the final day of hearing. Mr. Goodman represented that he personally first became aware of the tape on the first day of hearing but offered no satisfactory explanation for his failure to notify Respondents' counsel at that time in accordance with his continuing duty to update discovery responses. See Commission Reg. 240.442.³ Mr. Hernandez's

³Mr. Goodman represented on the first day of hearing that that was his "first day on the case" (Tr. 69). However, there was no explanation concerning the conduct of other counsel in his law firm who were handling the case. Three possibilities may explain Complainant's failure to produce the tape recording: (1) Complainant's counsel knew of the recording and did not produce it; (2) Complainant's counsel did not know of the recording but failed to make proper inquiry in preparing responses to Respondents' Request No. 6; (3) Complainant's counsel made proper inquiry but Complainant and/or her husband failed to disclose the recording to counsel. None of these possibilities reflect favorably on Complainant's case.

version of the telephone conversation was in direct contradiction to Ms. Armas' version. After having had an opportunity to listen to the tape, Ms. Armas testified, forcefully as characterized by the hearing officer, that she saw no reason to change her prior testimony and directly denied that the terms *piche mayate* and *chinga mayate* came up in the telephone conversation with Mr. Hernandez. Had the tape impeached Ms. Armas' testimony in surrebuttal, one would have expected Complainant to confront Ms. Armas with it on cross-examination, but Complainant did not cross-examine Ms. Armas on this point at all. Considering the entire record concerning the tape and the Hernandez-Armas telephone conversation, it appears more likely than not that the reference to the tape recording was a misguided effort to falsely bolster Mr. Hernandez's credibility. However, rather than bolster his credibility it calls his credibility into serious question. Because of the serious concerns with his credibility, Mr. Hernandez's testimony is not entitled to much probative value.

Ms. Arciga's credibility suffers from concerns similar to those with Dr. Correa's. Although she is not named as a respondent and faces no personal liability in this matter, Ms. Arciga has a direct interest in the outcome of this proceeding as it is her conduct that is at issue. Ms. Arciga certainly had reason to be concerned for her job were there a finding that she harassed Complainant concerning her skin color.

As with Dr. Correa's testimony, Ms. Arciga's testimony reflects embellishment in an effort to portray herself in the best light possible. For example, Ms. Arciga asserted that after being falsely accused by Complainant of hiding the papers related to the lab work that Dr. Simonelli was seeking, and despite being angry over the accusation and cursing Complainant, Ms. Arciga simply placed the papers on the tablet arm of the chair where Complainant was sitting. She further asserted that she never raised her hands or pointed a finger at Complainant. Her testimony in this regard is contradicted not only by Complainant but also by Ms. Armas who, as discussed below, the hearing officer found to be the most credible witness in the proceeding. Similar embellishment occurred when Ms. Arciga testified that she knew that Complainant and her husband were violent people but had no proof. Because of concerns with Ms. Arciga's credibility, her testimony cannot be credited with much probative value.

Like Dr. Correa, Complainant has an obvious interest in the outcome of this proceeding. Respondents attack Complainant's credibility on several grounds that the hearing officer and Commission find unpersuasive. Respondents point out that "harassment other than sexual" was not checked on the Complainant's Background Form. However, the form expressly states that its purpose is to provide background and statistical information only and that it is not a Complaint.⁴ Complainant dictated to her sister in Spanish and her sister completed the form in English. Furthermore, the fact that the Complaint itself, as drafted by Commission staff, alleged harassment based on skin color reflects that Complainant reported the alleged harassment to Commission staff even if she did not check it on the form. Neither the hearing officer nor the Commission attributes any significance to the failure to check harassment on the background form.

Respondents also urge that Complainant's testimony not be credited because the Complaint does not mention the term *pinche mayate*. The Complaint, however, does allege use of the term *chinga mayate* and does allege that the term is racially derogatory. Furthermore, the complaint was

⁴In the context of a staff-assisted Complaint filing, as in this case, the Complainant completes a Background Form before being interviewed by the staff person who will prepare a proposed Complaint for signature.

drafted in English by Commission staff following an intake interview with Complainant in which a translator was used. The Commission attributes no significance to the omission of one of two racially derogatory terms which differs by only one word from the term that was included in the Complaint.

Respondents also attack Complainant's credibility on the ground that her IDES Application for Reconsideration did not mention Ms. Arciga's alleged use of the terms *chinga mayate* or *pincha mayate* toward Complainant. However, Complainant's Application for Reconsideration dealt with IDES's denial of her request for unemployment benefits, which was based on Respondents' opposition to the benefits. It is quite logical that Complainant's statement to IDES would, as it did, focus on the events that gave rise to her termination and not on other matters that occurred during her employment.

Nevertheless, Complainant's testimony with respect to the critical matters in dispute, i.e., whether Ms. Arciga continuously referred to her in derogatory terms implicating her skin color and whether she complained of racial harassment to Dr. Correa, is not corroborated by any credible witness.⁵ Moreover, it is disputed by the testimony of Ms. Armas who, as discussed below, the hearing officer found to be the most credible of the witnesses. For example, although Complainant testified that Ms. Armas was present at least two times when Complainant complained about Ms. Arciga to Dr. Correa, Ms. Armas testified that she never witnessed such a complaint.

Ms. Armas has no direct interest in the outcome of this proceeding. Although she remains employed by Respondents, which might cause her to slant her testimony in their favor to protect her job, her actual testimony at various points was unfavorable to Respondents' case. As discussed above, her testimony contradicted Dr. Correa's with respect to what she reported to him after he sent Complainant and Ms. Arciga home on January 25. She also contradicted her boss with respect to whether Complainant ever complained to him about Ms. Arciga. Whereas Dr. Correa testified that the only time Complainant's relationship with Ms. Arciga came up in his conversations with Complainant was when he raised it and Complainant did not report any problems, Ms. Armas testified that Complainant reported to her on two occasions that she had complained to Dr. Correa about Ms. Arciga's attitude.

The hearing officer, who was able to observe the demeanor of the witnesses, found that Ms. Armas' testimony did not appear to be embellished in any way, in marked contrast to the testimony of other witnesses. The hearing officer stated that she testified in a manner that appeared to be direct, forthright, and plausible, and found that her testimony was highly credible and entitled to the most probative value of any of the witnesses.

Considering the relative credibility of the witnesses and the record as a whole, the hearing officer found that it is more likely than not that Ms. Arciga irritated Complainant and treated her rudely but did not do so in a racially derogatory manner. The hearing officer further found that Complainant complained to Dr. Correa about Ms. Arciga's conduct and Dr. Correa failed to take any action to investigate or remedy the situation, but that Complainant's complaints did not involve allegations of racially derogatory words or conduct.

⁵To the extent that her husband's testimony corroborates Complainant's, the hearing officer rejected reliance on his testimony because of significant concerns with his credibility.

Commission Reg. 240.620(a) provides that the Board of Commissioners shall adopt the final recommendation of the hearing officer if it is not contrary to the evidence presented at the administrative hearing. It is the hearing officer who is able to observe the bias and demeanor of a witness, for example. *Poole v. Perry & Assoc.*, CCHR No. 02-E-161 (Feb. 15, 2006). The hearing officer may also consider such factors as a witness' interest in the outcome of the case. *McGee v. Chicon*, CCHR No. 96-H-26 (Dec. 30, 1997). The Commission will not re-weigh a hearing officer's recommendation concerning witness credibility unless it is against the manifest weight of the evidence. *Stovall v. Metroplex et al.*, CCHR 94-H-87 (Oct. 16, 1996); *Wiles v. The Woodlawn Org. & McNeal*, CCHR No. 96-H-1 (Mar. 17, 1999). This hearing officer has carefully evaluated the credibility of each witness and explained his credibility determinations. The Commission finds that his determinations are consistent with the evidence presented.

Conclusions of Law

Section 2-160-030 of the Chicago Human Rights Ordinance prohibits discrimination in "hiring, classification, grading, discharge, discipline, compensation or other term or condition of employment because of the individual's race, color [and other protected classes]." Respondents are persons covered by Section 2-160-030. Complainant is an employee because she was "an individual who [was] engaged to work in the city of Chicago for or under the direction and control of another for monetary or other valuable consideration." Chicago Human Rights Ordinance § 2-160-020(d).

Respondents had a duty to maintain a working environment free of harassment on the basis of race or color. Commission Reg. 345.100. Ms. Arciga was not a supervisor or manager. Consequently, Respondents' responsibility for Ms. Arciga's conduct, if such conduct constituted racial or color harassment, arises only if Respondents knew or should have known of the conduct and failed to take reasonable corrective action. Commission Reg. 345.130. Commission Reg. 345.110 defines workplace harassment as follows:

Slurs or other verbal or physical conduct relating to an individual's membership in a protected class constitutes harassment when this conduct:

- a) has the purpose or effect of creating an intimidating, hostile or offensive working environment;
- b) has the purpose or effect of unreasonably interfering with an individual's work performance; or
- c) otherwise adversely affects an individual's employment opportunities.

See also *Guy v. First Chicago Futures, Inc.*, CCHR No. 97-E-32 (Feb. 18, 2004); and *Luckett v. City of Chicago Department of Aviation*, CCHR No. 97-E-115 (Oct. 18, 2000).

Harassment that is not based on or otherwise discriminatory as to membership in a protected class does not violate the Chicago Human Rights Ordinance. As the Commission observed in another case:

It is difficult to imagine a more unpleasant manager than Nancy Grossman, and it is somewhat amazing that employees stay at Yvette's for any length of time, or that the restaurant stays in business. As in many industries, however, employees with limited employment options have little choice but to put up with abuse. (As long as the abuse is not

discriminatory as to race, sex, religion, sexual orientation, or another protected category, it is usually not illegal.) This was apparently true at Yvette's, for the pay was relatively good, especially for lunch-time work. For Osswald, having his evenings free to pursue other interests, including painting, was an important factor, and so he persevered (I-22, 72).

Osswald v. Yvette Wintergarden Restaurant, CCHR No. 93-E-93 (July 19, 1995).⁶ See also *Escobedo v. Homak Mfg. Co.*, CCHR No. 93-E-7 (May 15, 1996) (observing in dicta that "brainwashed chimpanzees" is not an explicitly anti-Mexican slur and may not have related to complainant's ancestry).

"It is the Commission's responsibility to assess witness credibility and weigh the evidence before it." *Page v. City of Chicago*, 299 Ill. App. 3d 450, 486, 701 N.E.2d 218, 229 (1998), leave to appeal denied, 182 Ill.2d 552, 707 N.E.2d 1240 (1999). Consequently, the hearing officer and the Commission determine witness credibility, choose among conflicting inferences, and may disregard the testimony of any witness determined not to be telling the truth. See, e.g., *Guy, supra*; and *Bray v. Sandpiper Too, Inc.*, CCHR No. 94-E-43 (Jan. 10, 1996). Because Complainant's testimony was found not credible and not supported by other credible evidence in the record with respect to whether alleged harassment involved her membership in a protected class (*Guy, supra*) or whether the alleged incidents of harassment occurred (*Little v. Tommy Gun's Garage, Inc.*, CCHR No. 99-E-22 (Jan. 23, 2002)), Complainant has failed to carry her burden of proof.

As discussed above, Complainant has proven at most that Ms. Arciga treated her in an irritating manner and rudely and that she complained of such treatment to Dr. Correa on at least two occasions but he failed to take any reasonable steps to remedy the situation. Complainant has failed to prove that Ms. Arciga used slurs derogatory of her race or color or otherwise acted toward Complainant because of her race or color. Complainant has also failed to prove that when she complained to Dr. Correa, she complained of harassment based on her race or color as opposed to complaining of rude or irritating treatment generally.

Conclusion

For these reasons, the Commission adopts the hearing officer's recommendations, finds for Respondents, and so **DISMISSES** the Complaint.

CHICAGO COMMISSION ON HUMAN RELATIONS

By:



Clarence N. Wood, Chair/Commissioner

⁶In *Osswald*, the Commission found actionable harassment due to manager Grossman's constant use of homophobic slurs when supervising Osswald.