

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 10-CIV-23949-MORENO

LOUISE MOILERE,  
Plaintiff,

v.

PHYAMERICA GOVERNMENT  
SERVICES, INC.,  
Defendant.

\_\_\_\_\_ /

**MEDIATOR'S REPORT**

Neil Flaxman, Esq., the undersigned certified Mediator reports to this Honorable Court as follows:

The Mediation was held on the 23<sup>rd</sup> day of March, 2011 at 10:00 a.m.

\_\_\_\_\_

AN AGREEMENT WAS REACHED.

\_\_\_\_\_

The Agreement is attached with the consent of the parties.

  X   \_\_\_\_\_

NO AGREEMENT WAS REACHED; IMPASSE.

\_\_\_\_\_

The parties wish to continue settlement negotiations and shall reconvene for a continuation of the Mediation no later than Tuesday, March 29, 2011. The Mediator will file a final report on Tuesday, March 29, 2011 as to whether or not this matter has settled.

\_\_\_\_\_

Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

/s/ Neil Flaxman  
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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO.: 10-23949-CIV-MORENO**

**LOUISE MOILERE,**

Plaintiff,

vs.

**PHYAMERICA GOVERNMENT  
SERVICES, INC., A Foreign Profit  
Corporation,**

Defendant.

---

**PLAINTIFF'S RESPONSE IN OPPOSITION TO  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
AND SUPPORTING MEMORANDUM OF LAW**

COMES NOW, Plaintiff, LOUISE MOLIERE, by and through her undersigned counsel, and files this, her Response in Opposition to Defendant's, PHYAMERICA GOVERNMENT SERVICES, INC., (hereinafter "Defendant"), Motion for Summary Judgment, and states in support thereof as follows:

**I. INTRODUCTION**

Louise Moliere was employed by Defendant as a Certified Nursing Assistant associate. During her employment, Mrs. Moliere's supervisor, Laurie Alves, perpetuated a pattern of discriminatory conduct targeted Black Haitian employees,

such as Mrs. Moliere. The hostile work environment created by Alves' profane language and derogatory gestures constructively prevented Mrs. Moliere from receiving the full benefit of her employment and ultimately ended with her termination.

Mrs. Moliere adduces substantial evidence of disparate treatment for which Defendant is vicariously liable. Defendant alleges in its Motion for Summary Judgment (hereinafter "Def. Motion") that Mrs. Moliere's case is "based purely upon speculation" (Def. Motion p. 1.) but it is well settled law that even where there is no direct evidence of an employer's discriminatory motive, a plaintiff may establish her case through circumstantial evidence. *See McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973); *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265 (11th Cir. 2002).

Mrs. Moliere has filed claims of discrimination, hostile work environment, and retaliation under 42 U.S.C. §1981 and claims of national origin and race discrimination under the Florida Civil Rights Act. Mrs. Moliere's claim that she was subject to employment discrimination based on her race or national origin is governed by 42 U.S.C. § 1981; and the Florida Civil Rights Act, Fla. Stat. § 760.01 *et seq.* (FCRA). Section 1981 of Title 42 protects an individual's right to be free from racial discrimination in the "making, performance, modification, enforcement, and termination" of contracts, and has the same requirements of

proof and uses the same analytical framework as Title VII, 42 U.S.C. § 2000e-2(a). *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998).

Under Title VII, a plaintiff bears the ultimate burden of proving discriminatory treatment by a preponderance of the evidence. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990). Claims for retaliation, discrimination and hostile work environment under the FCRA and §1981 are analyzed under the same framework as those brought under Title VII. *Butler v. Ala. Dept. of Trans.*, 536 F.3d 1209, 1213 (11th Cir. 2008) (§1981 race discrimination); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (discrimination under FCRA). *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002) (§1981 hostile work environment); *Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1195 n.1 (11th Cir. 2004) (§1981 retaliation).

## **II. STATEMENT OF MATERIAL FACTS**

1. Plaintiff, Louise Moliere, was employed by Defendant, PhyAmerica, in December of 2006 as a Certified Nursing Assistant.
2. When Mrs. Moliere was initially recruited, she was told that she would be paid between eleven and twelve dollars per hour. However, when she was actually hired, she was only paid nine dollars per hour.  
(Moliere Dep. 18:20-19:5.)

3. Upon being hired, Mrs. Moliere was issued a large volume of documents outlining PhyAmerica's extensive corporate policies. She was not given time to review the documents, but was told she could read them in her own free time. (Moliere Dep. 39:19-40:16; 41:2-6; 42:2-6; 44:18-24.)
4. Despite supplying the official company policy documents, Alves indicated that, if there was any problem, she was the sole person that employees could consult in trying to resolve them. (Moliere Dep. 43:12-15.)
5. Over the course of her employment, Mrs. Moliere demonstrated exemplary execution of all her required job duties. (Moliere Dep. 27:5-6.)
6. During Mrs. Moliere's employment, her supervisor, Laurie Alves, repeatedly displayed discriminatory animus towards Mrs. Moliere and other Black Haitian employees. (Moliere Dep. 20:8-14.)
7. Alves frequently used profane language when speaking to and about Mrs. Moliere and other Black Haitian employees (often referring to them as "fucking Haitians"). (Moliere Dep. 20:8-11.)
8. Alves would also use derogatory gestures in the presence of Mrs. Moliere and other Black Haitian employees such as holding her hand

in front of her nose indicating that she did not want to “breathe Haitian.” (Moliere Dep. 20:11-14.)

9. At other times, Alves threatened to fire “all the fucking Haitians” and she blamed Black Haitian employees for a failed jobsite inspection. (Moliere Dep. 32:1-8.)
10. Alves’ interaction with Mrs. Moliere and other Black Haitian employees often involved a high level of anger and screaming. (Moliere Dep. 110:3-7, 115:8-15.)
11. All of the employees who were the target of Alves’ discriminatory conduct were both of the Black race and of Haitian national origin. (Moliere Dep. 122:9-10.)
12. In mid-April of 2007, Mrs. Moliere requested, in writing per company policy, two weeks of paid time off due to the death of a family member, which was granted. (Moliere Dep. 47:1-20; 59:14-18.)
13. Upon returning from Haiti, on May 20th, 2007, Alves called Mrs. Moliere into her office and advised her that she had not been placed back on the schedule and that she should not return to work until directed by Alves. (Moliere Dep. 61:6-13.)
14. After a few months of not being called back in, Mrs. Moliere attempted to contact Alves’ supervisor. Upon reaching someone

purporting to be Alves' supervisor, Mrs. Moliere was told that Alves was the only one in charge and that her authority was final. (Moliere Dep. 37:17-38:14.)

### **III. LAW AND ARGUMENT**

Summary Judgment is only entered if the record shows no genuine issue of material fact and that therefore the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Entering summary judgment in an employment discrimination case is especially disfavored, *Batey v. Stone*, 24 F.3d 1330, 1336 (11th Cir. 1994). Such cases almost always depend upon the employer's motive and intent which are more appropriately decided by a jury. *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 644 (11th Cir. 1987).

Summary judgment is proper if following discovery, the pleadings, depositions, answers to interrogatories, affidavits and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56. "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004). "An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id.* at 1260. All the evidence and factual inferences reasonably drawn

from the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1280 (11th Cir. 2004).

Once a party properly makes a summary judgment motion, the nonmoving party must designate specific facts showing that there is a genuine dispute. *Celotex*, 477 U.S. at 323-24. The Court must not weigh the evidence or make findings of fact. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). Rather, the Court's role is limited to deciding whether there is sufficient evidence upon which a reasonable juror could find for the non-moving party, in this case Mrs. Moliere. *Morrison*, 323 F.3d at 924.

A. **There Are Genuine Issues of Material Fact as to Plaintiff's National Origin Discrimination Claim.**

Mrs. Moliere adduces substantial evidence to support her claims of being subjected to disparate treatment and a hostile work environment. The evidence, when viewed in a light most favorable, raises issues that clearly warrant the consideration of a jury.

1. **There is a genuine issue of material fact that Plaintiff was subject to a hostile work environment.**

When evaluating whether the environment was hostile, courts are to "proceed with '[c]ommon sense, and an appropriate sensitivity to social context,' to distinguish between general office vulgarity and the 'conduct which a reasonable person in the plaintiff's position would find severely hostile.'" *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010) (*en banc*) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)). Both the Supreme Court and the Eleventh Circuit observed that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations,

and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” *Id.* at 810 (citing *Oncale*, 523 U.S. at 81-82). Indeed, “workplace conduct cannot be viewed in isolation, but rather is to be viewed cumulatively, and in its social context.” *Id.* at 807.

- a. A reasonable juror could find that Laurie Alves conduct was sufficiently severe or pervasive.

Mrs. Moliere recounts numerous instances when her supervisor, Laurie Alves, displayed discriminatory animus directed at Mrs. Moliere and other Black Haitian employees. The 11th Circuit has held “a plaintiff can prove a hostile work environment by showing severe or pervasive discrimination directed against her protected group, even if she herself is not individually singled out in the offensive conduct” *Reeves*, 594 F.3d at 807. Here, Mrs. Moliere was both the subject of and witness to Alves’ pervasive use of profane language and derogatory gestures. *See, e.g.*, Moliere Dep. 111:5-6 (Alves said she was going to fire “all the fucking Haitians”); (Moliere Dep 115:6-7) (“holds her nose like she doesn’t want to smell the Haitians at all”). Furthermore, Alves, without a factual basis, blamed the Black Haitian employees for a failed job site inspection and for leaving food in inappropriate places. (Moliere Dep. 110:22-111:24.) The record also shows that Alves’ interaction with Mrs. Moliere and other Black Haitian employees often involved a high level of anger and screaming. (Moliere Dep. 110:3-7, 115:8-15.)

Defendant alleges that, for want of specific and minute detail about every instance of Alves’ discrimination, the totality of conduct should be construed as “low frequency” and “low severity.” (Def. Motion p. 13.) Yet, this is clearly an issue for a jury because, when all the evidence is taken in a light most favorable to Mrs. Moliere, Alves’ behavior could readily be inferred as being severe or pervasive.

- b. A reasonable juror could find that Defendant is vicariously liable for the alleged conduct.

Defendant alleges that it took reasonable steps to prevent unlawful workplace conduct and that Mrs. Moliere's claims fail because she did not take advantage of its preventive or corrective measures. (Def. Motion p. 13.) Defendant further contends that it took reasonable steps by disseminating adequate anti-harassment policies to employees. *Id.* However, what Defendant takes for granted is that the record only shows that these materials were received by Mrs. Moliere and her coworkers. In fact, the record *does not* demonstrate whether Alves, herself, the source of discrimination in this case, was aware of or familiar with Defendant's anti-harassment policies. Moreover, the record *does* suggest that Alves was not in compliance with the policies as she indicated that "if there was any problem whatsoever that she was the sole person that [Defendant's employees] could consult in trying to resolve whatever problem they may have." (Moliere Dep 43:12-15.)

Additionally, this dictatorial atmosphere created by Alves is the very reason that Mrs. Moliere waited until she had already been terminated before she attempted to contact a superior about her issues (Moliere Dep. 43:20-23.) And even when Mrs. Moliere did finally speak with Alves' supervisor, she was told that "Alves was the one in charge at that facility and whatever she says or does she is the final authority." (Moliere Dep 38:12-14.) It is also unclear whether Defendant did anything other than issue a surplus of policy documentation to new employees such as posting hotline numbers around the facility which would be more readily available to distressed employees. (Moliere Dep. 135:12-17.) So, while it may be true that Defendant minimally attempted to educate its employees, it clearly failed in practice to provide adequate means of redress for unlawful workplace conduct. At the very least, this is an issue which deserves to be brought before a jury.

2. Plaintiff does present sufficient facts under the McDonnell Douglas frame to survive summary judgment.

Where there is no direct evidence of an employer's discriminatory motive, a plaintiff may establish his case through circumstantial evidence, using the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp v. Green*, 93 S. Ct. 1817 (1973). *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 (11th Cir. 2002). Usually under this framework, the plaintiff may establish a prima facie case of discrimination by showing that (1) she belongs to a racial minority; (2) she was subjected to adverse job action; (3) her employer treated similarly situated employees outside his classification more favorably; and (4) she was qualified to do the job. *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir.1997). If the plaintiff establishes a prima facie case, the defendant can rebut the presumption of discriminatory intent by producing a legitimate nondiscriminatory reason for the adverse employment action. *Id.* at 1564. The burden then shifts back to the plaintiff to establish the reason is pretext for discrimination. *Id.* at 1565. The plaintiff bears the ultimate burden of showing intentional discrimination. *Id.* Here, Defendant concedes that Mrs. Moliere has met the first and fourth elements of a prima facie case. However, Defendant fallaciously alleges that, because Mrs. Moliere did not point to a comparator who was treated more favorably nor suffer an adverse employment action, her claim ultimately fails. This is simply not the case.

The 11th Circuit has stated that “[d]emonstrating a prima facie case is not onerous; it requires *only* that the plaintiff establish facts adequate to permit an inference of discrimination.” *Holifield*, 115 F.3d at 1562 (emphasis added). The court in *Holifield* went on to say that even if a plaintiff fails to point to a similarly situated employee, summary judgment is *only* appropriate where “no other evidence of discrimination is present.” *Id.* (emphasis added). In this case, because of the number of years which has accrued since Mrs. Moliere's employment, she is

unable to name a *specific* employee outside her protected class who was treated more favorably; though, she does maintain generally that employees of Jamaican heritage were treated better by Alves than Haitian employees. (Moliere Dep. 119:17-20.) Yet, for the purposes of summary judgment, Mrs. Moliere need only to present sufficient evidence to raise the inference of discrimination. Here, the repeated discriminatory conduct by Alves and Defendant's failure to properly address the issues could undoubtedly lead a reasonable juror to the conclusion that Mrs. Moliere was the victim of unlawful employment action.

It is true that an employer may discipline or fire an employee for "a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Abel v. Dubberly*, 210 F.3d 1334, 1339 (11th Cir. 2000) And it is also true that Defendant proffers a reason for disallowing Mrs. Moliere's return to work following her leave of absence to treat a sick family member. But, as the court stated in *Abel*, it does not matter whether the evidence demonstrates that the reason was good, bad or false; instead, it only matters whether the evidence demonstrates that the reason was not based on a discriminatory motive. On this particular issue, the evidence is unclear. That being said, because the record *is* replete with instances of discriminatory animus, a reasonable juror could easily find in favor of Mrs. Moliere, that her constructive discharge was, as a matter of fact, the proximate result of Alves' obvious disfavor of Black Haitian employees.

**B. There Are Genuine Issues of Material Fact as to Plaintiff's Race Discrimination Claims.**

Mrs. Moliere maintains that the issue of race is sufficiently bound up with the issue of national origin and that all of the employees who were the target of Alves' discriminatory conduct were both of the Black race and of Haitian national origin. (Moliere Dep. 122:9-10.) Furthermore, as stated in the previous section, even if there are not any non-Black Haitian

employees to serve as comparators, Mrs. Moliere's claim still does not fail for the purposes of summary judgment. Additionally, as stated previously, given that claims of race discrimination are evaluated using the same standards as national origin discrimination, Mrs. Moliere would incorporate all of the foregoing evidence and reasoning to show that a reasonable juror could find that she suffered adverse employment action on the basis of her race.

**C. There Are Genuine Issues of Material Fact as to Plaintiff's Retaliation**

**Claim.**

1. Plaintiff does present sufficient facts to establish a prima facie case of retaliation.
2. Plaintiff does present sufficient facts such that a reasonable juror could find that Defendant's proffered reason for its action is pretextual.

**IV. CONCLUSION**

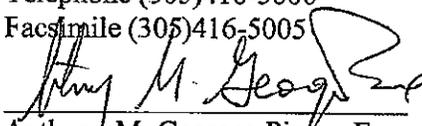
Based on the foregoing, Plaintiff, Louise Moliere, respectfully requests that this Court DENIES Defendants' Motion for Summary Judgment.

Dated this 6<sup>th</sup> day of April, 2011

Respectfully Submitted,

**REMER & GEORGES-PIERRE, PLLC**

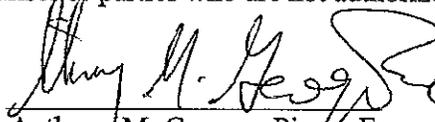
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Anthony M. Georges-Pierre, Esq.  
Florida Bar No.: 0533637

**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By:

  
Anthony M. Georges-Pierre, Esq.

**SERVICE LIST**

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UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
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LOUISE MOILERE,

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INC.,

Defendant.

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**ORDER OF CONTINUANCE AND ORDER REVISING PRETRIAL DEADLINES**

THIS CAUSE came before the Court upon a *sua sponte* review of the record.

THE COURT has considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

**ADJUDGED** that for good cause shown, the motion is **GRANTED** as follows.

(1) **TRIAL DATE** - The trial is **CONTINUED** from the two-week period of May 23, 2011, to the two-week period of **June 20, 2011**, in Miami, Florida.

(2) **CALENDAR CALL** - Counsel must appear at Calendar Call which shall take place before the undersigned at the Wilkie D. Ferguson Federal Courthouse, 400 North Miami Avenue, Courtroom 13-3, Miami, Florida 33128, on **Tuesday, June 14, 2011, at 2:00 P.M.**

The parties need not appear at Calendar Call. At Calendar Call counsel may bring all matters relating to the scheduled trial date to the attention of the Court.

(3) **PLAINTIFF'S WITNESS AND EXHIBIT LISTS** - Plaintiff shall provide Defendant, by either fax or hand delivery, a copy of Plaintiff's Witness List and a copy of

Plaintiff's Exhibit List no later than **Wednesday, June 1, 2011, at 5:00 P.M.**

(a) **PLAINTIFF'S WITNESS LIST** - Plaintiff's Witness List shall include all the witnesses, both lay and expert, that Plaintiff intends to call at trial. Plaintiff's Witness List shall briefly describe the nature of each witness's testimony and whether such witness will be testifying live or by deposition. Witnesses omitted from the list will not be allowed at trial.

(b) **PLAINTIFF'S EXHIBIT LIST** - Plaintiff's Exhibit List shall include all the exhibits that Plaintiff intends to use at trial. Plaintiff's Exhibit List shall in consecutively numbered paragraphs adequately describe the nature of each document listed. The actual exhibits shall be pre-marked with corresponding numbers (*e.g.* Plaintiff's Exhibit #1, P.E. #2, P.E. #3...) which numbers they will retain through the end of trial. The exhibit list shall refer to specific items and shall not include blanket statements such as *all exhibits produced during depositions* or *Plaintiff reserves the use of any other relevant evidence*. Exhibits omitted from the list will not be allowed at trial.

(4) **DEFENDANT'S WITNESS AND EXHIBIT LISTS** - Defendant shall provide Plaintiff, by either fax or hand delivery, a copy of Defendant's Witness List and a copy of Defendant's Exhibit List no later than **Friday, June 3, 2011, at 5:00 P.M.**

(a) **DEFENDANT'S WITNESS LIST** - Defendant's Witness List shall include only those additional lay and expert witnesses not included on Plaintiff's Witness List. Witnesses listed by Plaintiff will be available for both parties and should not be re-listed on Defendant's Witness List. Defendant's Witness List shall briefly

describe the nature of each additional witness's testimony and whether such witnesses will be testifying live or by deposition. Witnesses omitted from Defendant's Witness List and not listed on Plaintiff's Witness List will not be allowed at trial.

**(b) DEFENDANT'S EXHIBIT LIST** - Defendant's Exhibit List shall include only those additional exhibits that Defendant wishes to introduce at trial which are not on Plaintiff's Exhibit List. Defendant's Exhibit List shall in consecutively numbered paragraphs adequately describe the nature of each document listed. The actual exhibits shall be pre-marked with corresponding numbers (*e.g.* Defendant's Exhibit #1, D.E. #2, D.E. #3...) which numbers they will retain through the end of trial. The exhibit list shall refer to specific items and shall not include blanket statements such as *all exhibits produced during depositions* or *Plaintiff reserves the use of any other relevant evidence*. Exhibits omitted from Defendant's Exhibit List and not listed on Plaintiff's Exhibit List will not be allowed at trial.

**(5) PRETRIAL STIPULATION** - Pursuant to S.D. Fla. L.R. 16.1.E., the parties shall file a Pretrial Stipulation no later than **Tuesday, June 7, 2011**. The Pretrial Stipulation shall conform to the requirements of S.D. Fla. L.R. 16.1.E. The parties shall attach to the Pretrial Stipulation copies of the witness and exhibit lists along with any objections as allowed for under S.D. Fla. L.R. 16.1.E.9.

**(6) Pretrial Motions** - The parties shall file all other pretrial motions no later than **April 20, 2011**.

**(7) PREVIOUS SCHEDULING ORDERS** - This Order shall supercede only the

inconsistent provisions of previous Scheduling Orders.

DONE AND ORDERED in Chambers at Miami, Florida, this 5<sup>th</sup> day of April, 2011.

  
\_\_\_\_\_  
FEDERICO A. MORENO  
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel of Record

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO.: 10-23949-CIV-MORENO**

**LOUISE MOILERE,**

Plaintiff,

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**PHYAMERICA GOVERNMENT  
SERVICES, INC.,** A Foreign Profit  
Corporation,

Defendant.

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**DEFENDANT'S REPLY BRIEF**

Under Local Rule 7.1(c), Defendant, PhyAmerica Government Services, Inc. (PhyAmerica or Defendant), submits this reply to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment and Memorandum of Law in Support (Opposition Brief) and states as follows:

**I. BACKGROUND**

In this lawsuit, Plaintiff alleges that PhyAmerica discriminated against her on the basis of her race (black) and national origin (Haitian). Plaintiff also alleges that PhyAmerica retaliated against her for engaging in protected activity. She brought these causes of action under 42 U.S.C. § 1981 and the Florida Civil Rights Act, Fla. Stat. § 760 *et seq.* As set forth in PhyAmerica's Motion for Summary Judgment, these claims all fall within the analytical framework applied to Title VII discrimination and retaliation cases.

In summary, Plaintiff alleges that she was (1) subjected to a hostile work environment based upon both her race and national origin, (2) subjected to tangible adverse employment

actions on the basis of her race and national origin, and (3) retaliated against for engaging in protected activity. On March 15, 2011, PhyAmerica filed its Motion for Summary Judgment seeking summary judgment in its favor as to all claims in the Complaint. In support of its Motion, PhyAmerica established through sworn testimony that Plaintiff's claims failed for the following reasons:

Hostile Work Environment: Plaintiff failed to present credible evidence that she was subjected to severe or pervasive harassment. Additionally, Plaintiff failed to take advantage of the policies and procedures PhyAmerica put in place to remedy unlawful conduct.

Disparate Treatment: Plaintiff was generally subjected to no adverse employment action. Even to the extent she may have been, she failed to identify a single comparable employee outside of her protected classifications who received better treatment than she did under the same circumstances. Furthermore, PhyAmerica provided a legitimate non-discriminatory reason for each adverse employment action about which Plaintiff complained.

Retaliation: Plaintiff failed to establish that she engaged in any activity protected under § 1983, or even if she did, that her supervisor (the only decisionmaker in this case) knew about it. Furthermore, PhyAmerica provided a legitimate non-discriminatory reason for each adverse employment action about which Plaintiff complained.

Plaintiff's Opposition Brief begins by misstating the applicable law. Specifically, Plaintiff represents that summary judgment is "especially disfavored" in employment discrimination cases. See Opposition Brief at 6. The authority on which she relies, however, was expressly disapproved more than a decade ago by the Eleventh Circuit Court of Appeals sitting *en banc*. See *Chapman v. AI Transp.*, 229 F.3d 1012, 1025-26 (11th Cir. 2000) (*en banc*) (rejecting the same *Batey* and *Delgado* cases cited in Plaintiff's Opposition Brief and explaining

“the summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on either side of the scale”). Under the appropriate standard, Plaintiff’s Opposition Brief fails to present any credible evidence that would create a jury issue on the critical elements of her claims. As set forth in greater detail below, Plaintiff relies solely upon vague and conclusory allegations that she was subjected to discrimination. Plaintiff does not even attempt to refute the retaliation claim. Accordingly, PhyAmerica is entitled to summary judgment.

**A. Plaintiff’s Hostile Work Environment Claims Fail.**

In its Motion for Summary Judgment, PhyAmerica identified every specific act in support of Plaintiff’s claim that she was subjected to a hostile work environment as follows: (1) Plaintiff’s supervisor, Laurie Alves, allegedly threatened to fire all the Haitian employees after a failed inspection and (2) on one occasion, Alves allegedly held her hand under her nose. Otherwise, Plaintiff makes vague and generalized allegations that Alves frequently made derogatory comments about Haitians. Plaintiff cannot provide dates, times, or witnesses. Nor can she identify the persons to whom the statements were allegedly directed. When asked about her specific interactions with Alves, Plaintiff generally reports them to have been positive. Additionally, Plaintiff concedes that she saw Alves only a few times a month for less than 20 minutes total face time.

In attempting to avoid summary judgment, Plaintiff resorts to vague and generalized allegations that Alves continually harassed the Haitian employees. These allegations fall short of meeting her burden, particularly given her admission that she saw Alves so infrequently (less than 20 minutes per month). *See Ramsey v. Henderson*, 296 F.3d 264, 269 (5<sup>th</sup> Cir. 2002) (granting summary judgment and holding, the plaintiff “alleges that she ‘suffered ongoing racial harassment from black females’ but points to no concrete examples.” “This Court has cautioned

that ‘conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy’ the nonmovant’s burden in a motion for summary judgment.”) (citation omitted); *Woodward v. City of Worland*, 977 F.2d 1392, 1398 (10<sup>th</sup> Cir. 1992) (court dismissed hostile work environment claim, holding that the plaintiff could not survive summary judgment by relying upon “vague, non-time-specific, and conclusory allegations” that her supervisors sexually harassed her); *Bynog v. SL Green Realty Corp.*, 2007 WL 831740 at \*8 (S.D.N.Y. Mar. 20, 2007) (allegation that plaintiff was “continually harassed” insufficient to survive summary judgment).

Additionally, Plaintiff does not dispute that she failed to take advantage of PhyAmerica’s anti-harassment policies. She never complained about her supervisor despite being familiar with the company’s policies. Attempting to overcome this shortfall, Plaintiff alleges that she feared being terminated if she complained. The Eleventh Circuit has summarily rejected this argument. *Baldwin v. Blue Cross/Blue Shield*, 480 F.3d 1287, 1307 (11<sup>th</sup> Cir. 2007). “Every employee could say, as [the plaintiff] does, that she did not report the harassment earlier for fear of losing her job or damaging her career prospects.” *Id.* “The Supreme Court undoubtedly recognized as much when it designed the *Faragher-Ellerth* defense, but it nonetheless decided to require an employee to make the choice in favor of ending harassment if she wanted to impose vicarious liability on her employer.” *Id.* “Were it otherwise, the *Faragher-Ellerth* defense would largely be optional with plaintiffs, and it would be essentially useless in furthering the important public policy of preventing sexual harassment.” *Id.*

Plaintiff has failed to present credible evidence that she was subjected to severe or pervasive harassment. Additionally, Plaintiff unreasonably failed to take advantage of the many

procedures PhyAmerica put in place to prevent unlawful discrimination. Her hostile work environment claim fails.

**B. Plaintiff's Discrimination Claims Under The McDonald Douglass Framework Also Fail.**

1. Plaintiff failed to state a *prima facie* case of discrimination.

To state a *prima facie* of discrimination, a plaintiff must present evidence, among other things, that she was treated differently than a similarly situated person outside of her protected classification. *Holifield v. Reno*, 115 F.3d 1555, 1562 (11<sup>th</sup> Cir. 1997). Plaintiff concedes in her Opposition Brief that she cannot identify any similarly situated employees outside of her protected classifications who received different treatment. However, Plaintiff argues that she has presented enough other evidence of discriminatory intent that she can bypass her obligations under *McDonnell Douglass*. She cites *Holifield* in support.

In *Holifield*, the plaintiff failed to present evidence that he was treated differently than a comparable employee outside of his protected classification. *Id.* at 1563. The court did not rely exclusively on this fact in dismissing the plaintiff's lawsuit because the plaintiff held a unique position for which few comparables existed. *Id.* Out of an abundance of caution, the court considered the totality of evidence and reached the same conclusion that the case had no merit. *Id.* Similar to this case, the plaintiff attempted to establish racial animus through an alleged employee perception that the defendant harbored racial animus. *Id.* The court entered summary judgment against the plaintiff. *Id.* at 1564.

In this case, the concerns over not having a sufficient pool of people with whom to compare Plaintiff are not present. PhyAmerica presented evidence that it employed up to 60 CNAs at any one time. Plaintiff still could not identify one employee who allegedly received better treatment with respect to wages, hours, scheduling, or discipline. Thus, she has failed to

state a *prima facie* case. Moreover, the Court has no basis for evaluating a particular adverse employment action. Plaintiff makes wild allegations that she was denied pay, raises, overtime, and other benefits of employment, but fails to bring forward any specific facts. To the contrary, PhyAmerica has presented credible and un rebutted evidence that Plaintiff was treated the same or better than the other comparable CNAs.<sup>1</sup> The few isolated instances of inappropriate conduct she attributes to her supervisor are insufficient to create an inference that any employment actions were motivated by Plaintiff's race or national origin. Plaintiff simply cannot point to either a similarly situated comparator or any "other evidence" to suggest discrimination.

2. Plaintiff has failed to rebut Defendant's legitimate, non-discriminatory reasons for any applicable adverse employment actions.

Even if Plaintiff established a *prima facie* case of discrimination (she did not), her burden did not end there. She was also required to rebut PhyAmerica's stated reasons for any adverse employment actions about which she complains. *Holifield*, 115 F.3d at 1564-65. In her Opposition Brief, Plaintiff does not challenge any reason given by Defendant for a particular action. The only adverse employment action she discusses in her Opposition Brief is the termination for being a no-call, no show.

Defendant presented sworn testimony and documented evidence that Plaintiff's supervisor was upset with Plaintiff about the manner in which she scheduled leave. Before the leave issue, Plaintiff concedes that she had no problems with Alves, and that Alves even praised Plaintiff's work. Alves issued Plaintiff a written warning after she returned from her trip. Plaintiff does not dispute being disciplined or engaging in the conduct attributed to her by her supervisor. Plaintiff also does not dispute that she failed to return to work after receiving a

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<sup>1</sup> Plaintiff alleges that a recruiter unaffiliated with PhyAmerica told her that the job would pay between \$11-12 per hour, but concedes that Alves informed her during the interview that the starting pay was \$9.00 per hour. Pl. Tr. 18-19.

disciplinary warning on May 29, 2007. Alves testified under oath that Plaintiff was scheduled to work after the disciplinary meeting and failed to appear for two consecutive shifts. The fact that Plaintiff mistakenly believed that her supervisor permanently removed her from the schedule does not constitute evidence of discrimination.

**C. Defendant's Arguments In Favor Of Dismissing Plaintiff's Retaliation Claim Are Unchallenged.**

Plaintiff's Opposition Brief does not challenge the arguments raised by Defendant against Plaintiff's retaliation claim.

**II. CONCLUSION**

For all the reasons stated herein, as well as Defendant's Motion for Summary Judgment, Defendant respectfully requests that the Court grant summary judgment in its favor as to all claims in Plaintiff's Complaint.

DATED this 8th day of April, 2011.

**ROGERS TOWERS, P.A.**

By: s/René M. Fix  
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**ATTORNEYS FOR DEFENDANT PHYAMERICA  
GOVERNMENT SERVICES, INC.**

**CERTIFICATE OF SERVICE**

I hereby certify that on April 8, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/René M. Fix  
Attorney

**SERVICE LIST**

**LOUISE MOILERE vs. PHYAMERICA GOVERNMENT SERVICES, INC.**

**CASE NO.: 10-23949-CIV-MORENO**

**United States District Court, Southern District of Florida**

Jolima M. Caballero-Solis, Esq.  
Remer & Georges-Pierre, PLLC  
Biscayne Center  
11900 Biscayne Boulevard, Suite 288  
North Miami, Florida 33181

Neil Flaxman, Esq.  
Neil Flaxman, P.A.  
80 Southwest 8th Street  
Miami, Florida 33130

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division  
CASE NO: 10-23949-CIV-MORENO

LOUISE MOILERE,

Plaintiffs,

vs.

PHYAMERICAN GOVERNMENT SERVICES, INC.  
Defendant.

---

**PLAINTIFF'S COUNSEL'S MOTION TO WITHDRAW**

Remer & Georges-Pierre, PLLC and Anthony M. Georges-Pierre, Esq. (the "Firm") attorneys' for Plaintiff, LOUISE MOILERE, moves this Court to allow it to withdraw as counsel, pursuant to Local Rule 11.D.(3) and as grounds state:

1. The Firm has endeavored to render Plaintiff with efficient, effective and competent professional service. The Firm has exhaustively attempted to counsel and advise the Plaintiff of a reasonable and meaningful course of action in the litigation of this matter which would be in Plaintiff's best interest, however, Plaintiff fails to follow her attorneys' legal advice and Plaintiff fails to cooperate in the proper litigation of this matter. As a consequence, Plaintiff renders the Firm's good faith litigation of this matter impossible.
2. Moreover, without violating attorney-client confidences, **irreconcilable conflicts** have developed between the law firm and undersigned counsel and client.
3. Withdrawal can be accomplished without material adverse effect on the interests of the client.
4. Under the circumstances resulting in the urgent need to withdraw as counsel, the Firm

has done all in its power to protect Plaintiff's interest to date. Undersigned counsel has advised Plaintiff of the Firm's Motion to Withdraw as Counsel and Plaintiff's need to obtain substitute counsel as well as all pending matters. Prior to the filing of this motion, Plaintiff had previously indicated her desire to seek other counsel and/or proceed pro se if necessary.

5. Undersigned counsel would also request that the Plaintiff be given a reasonable amount of time within which to obtain new counsel.
6. The Firm can no longer represent Plaintiff due to the reasons set forth above.
7. Via Federal Express Next Day Service a copy of this motion has been served upon Plaintiff at the following last known address: Ms. Louise Moliere, 1040 N W. 198<sup>th</sup> Street, Miami Gardens, FL 33169.

#### MEMORANDUM OF LAW

S.D. Fla. L.R. 11.1 D 3 allows counsel for Plaintiff to withdraw by leave of court. The Firm requests that this Honorable Court allow it to withdraw as counsel. The parties will not be prejudiced by the Firm withdrawing from this matter since no motions are pending and discovery is now completed.

Consistent with Local Rules, no memorandum is required with a Motion to Withdraw, a Motion for Permission to Withdraw Representation is a matter which is the sound discretion of the Court. *Obermair v. Driscoll, Andrews V. Bechtel Corp.*, 780 F.2d 124, 135 (1<sup>st</sup> Cir. 1985).

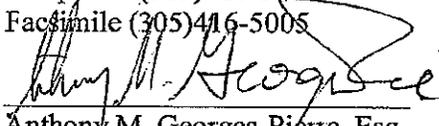
**WHEREFORE**, the Firm respectfully requests that this Court enter an order permitting Counsel to withdraw from representing the Plaintiff in this action; and entering a 30-day stay of proceedings in this action to permit the Plaintiff time to seek replacement counsel. A proposed order granting this motion is attached pursuant to S.D. Fla. L.R. 7.1 A(2).

May 9, 2011

Respectfully Submitted,

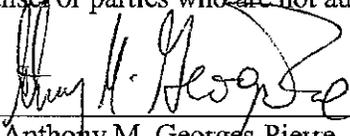
**REMER & GEORGES-PIERRE, PLLC**

BISCAYNE CENTRE  
11900 Biscayne Blvd., Suite 288  
North Miami, FL 33181  
Telephone (305)416-5000  
Facsimile (305)416-5005

  
\_\_\_\_\_  
Anthony M. Georges-Pierre, Esq.  
Florida Bar No : 0533637

**CERTIFICATE OF SERVICE**

I hereby certify that on May 9, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By:   
Anthony M. Georges-Pierre, Esq.

**SERVICE LIST**

Anthony M. Georges-Pierre, Esquire  
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Facsimile : (305) 416-5005

Rene M. Fix, Esq.  
ROGERS TOWERS, P A.  
*Counsel for Defendant*  
1301 Riverplace Boulevard, Suite 1500  
Jacksonville, Florida 32207

Louise Moliere  
1040 N.W. 198<sup>th</sup> Street  
Miami, Fl 33169

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division

**Case Number: 10-23949-CIV-MORENO**

LOUISE MOILERE,

Plaintiff,

vs.

PHYAMERICAN GOVERNMENT SERVICES,  
INC.,

Defendant.

---

**ORDER GRANTING PLAINTIFF'S COUNSEL'S MOTION TO WITHDRAW**

THIS CAUSE came before the Court upon Plaintiff's Counsel's Motion to Withdraw (D.E. No. 20), filed on May 9, 2011.

THE COURT has considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

**ADJUDGED** that the motion is GRANTED. Plaintiff shall proceed *pro se* unless she obtains new counsel.

DONE AND ORDERED in Chambers at Miami, Florida, this 16<sup>th</sup> day of May, 2011.

  
\_\_\_\_\_  
FEDERICO A. MORENO  
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel of Record

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO.: 10-23949-CIV-MORENO**

**LOUISE MOILERE,**

Plaintiff,

vs.

**PHYAMERICA GOVERNMENT  
SERVICES, INC., A Foreign Profit  
Corporation,**

Defendant.

---

**DEFENDANT PHYAMERICA GOVERNMENT SERVICES, INC.'S MOTION TO  
CONTINUE PRETRIAL DEADLINES AND MEMORANDUM OF LAW IN SUPPORT**

Under Fed. R. Civ. P. 16(b)(4) and Local Rules 7.1 and 7.6, Defendant, PhyAmerica Government Services, Inc, moves for an Order continuing pretrial deadlines by ninety (90) days.

In support of this Motion, Defendant states as follows:

1. On April 5, 2011, the Court *sua sponte* revised the pretrial deadlines previously set in the case. The case is currently set for trial term for the period of June 20, 2011. The calendar call is scheduled for June 14, 2011. Pretrial stipulations are due June 7, 2011. Plaintiff's witness and exhibits lists were due June 1, 2011, while Defendant's witness list was due June 3, 2011.

2. Defendant scheduled Plaintiff's deposition for March 4, 2011. Before the deposition, Plaintiff advised Defendant that she could not speak English and needed a translator. Defendant had to arrange for a Haitian translator to appear at the deposition.

3. On March 15, 2011, Defendant filed a Motion for Summary Judgment seeking dismissal of all claims. Defendant's motion provided sworn affidavits of current and former employees as well as properly authenticated documents establishing that no genuine issues of material fact exist.

4. While still represented by counsel, Plaintiff filed a brief in opposition to Defendant's motion on April 6, 2011. Plaintiff attached no affidavits to her brief and submitted no documentary evidence in support of her claims. Plaintiff's case is based solely upon speculation. The briefing on the Motion was completed on April 8, 2011 when Defendant filed its reply. The Motion is currently pending.

5. On May 16, 2011, this Court issued an Order Granting Plaintiff's Counsel's Motion to Withdraw. Plaintiff's former attorney cited irreconcilable differences between attorney and client as the basis for withdrawal. Plaintiff is currently litigating *pro se*. Plaintiff has not contacted Defendant since her attorney withdrew, and has not provided the Court or Defendant with updated contact information. Without counsel, it is unclear whether Plaintiff is capable of understanding any of the Court's orders, including the applicable scheduling order.

6. Defendant has attempted to communicate with Plaintiff by telephone concerning pretrial obligations as well as this Motion. Defendant has not been able to make contact. Defendant has two telephone numbers for Plaintiff, which Plaintiff previously provided to Defendant her employment. Those telephone numbers are both operational. Defendant's attorneys have called both numbers, but have not reached Plaintiff. A man answered one of the numbers. Defendant's attorney asked him to speak to Plaintiff, and he responded "No speak English" and hung up the phone after being unable to communicate. Plaintiff testified during deposition that she is married and living with her husband. Defendant's attorneys have tried the

other number multiple times and rolled into an illegible voice mail. A message was left asking Plaintiff to call Defendant's attorneys. No calls have been returned.

7. Plaintiff has failed to provide her witness list to Defendant, which was due June 1, 2011. Pretrial stipulations are due June 7, 2011. Defendant's attorneys are located in Jacksonville, Florida and have not been able to communicate with Plaintiff concerning the stipulations. To further complicate matters, such communication will require a translator.

8. In addition to issues with reaching Plaintiff, the undersigned attorney has a vacation scheduled for the week of June 20, 2011. This vacation was scheduled before the Court amended its initial scheduling order on April 5, 2011.

9. Defendant respectfully requests that the Court continue the trial of this matter for a period of ninety (90) days to allow additional time for Defendants to attempt to communicate with Plaintiff about the parties' pretrial obligations.

10. This Motion is being made before the expiration of any deadlines applicable to Defendant under the Court's revised scheduling order. Defendant brings this Motion in good faith and the continuance of the parties' pretrial obligations will not prejudice either party.

#### **Certifications**

11. In accordance with Local Rule 7.1, the undersigned certifies that Defendant has made several attempts to contact the pro se Plaintiff, but Plaintiff has not responded. Under Local Rule 7.6, Defendant has also provided an affidavit as well as a proposed order granting this Motion as Composite Exhibit "A" hereto.

#### **SUPPORTING MEMORANDUM OF LAW**

Fed. R. Civ. P. 16(b)(4) and Local Rule 7.1 authorize the Court to extend or continue pretrial deadlines upon a showing of good cause. By continuing the pretrial deadlines, Defendant will have a greater opportunity to communicate with Plaintiff, a *pro se* party,

concerning the relevant pretrial obligations. Without a continuance, Defendant will not have sufficient opportunity to negotiate pretrial stipulations (with the aid of a translator) and comply with the Court's scheduling orders. Indeed, at this point, Defendant does not know whether Plaintiff understands her obligations as directed by this Court and the Federal Rules of Civil Procedure. Under the circumstances, a continuance is reasonable.

WHEREFORE, Defendant respectfully requests that this Court continue the Pretrial Conference and related requirements and the Trial in this case for ninety (90) days.

DATED this 2nd day of June, 2011.

**ROGERS TOWERS, P.A.**

By: s/René M. Fix  
René M. Fix, Esq.  
Florida Bar No. 189545  
1301 Riverplace Boulevard, Suite 1500  
Jacksonville, Florida 32207  
(904) 398-3911 (telephone)  
(904) 396-0663 (facsimile)  
email: rfix@rtlaw.com

**ATTORNEYS FOR DEFENDANT PHYAMERICA  
GOVERNMENT SERVICES, INC.**

**CERTIFICATE OF SERVICE**

I hereby certify that on June 2, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/René M. Fix  
Attorney

**SERVICE LIST**

**LOUISE MOILERE vs. PHYAMERICA GOVERNMENT SERVICES, INC.**

**CASE NO.: 10-23949-CIV-MORENO**

**United States District Court, Southern District of Florida**

Louise Moilere, *pro se*  
1040 NW 198th Street  
Miami, FL 33169

**COMPOSITE  
EXHIBIT "A"**

**AFFIDAVIT OF RENÉ M. FIX**

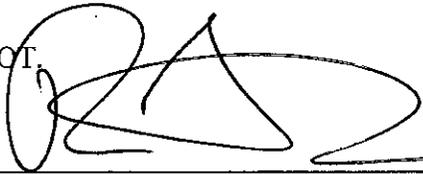
STATE OF FLORIDA     )  
  )  
COUNTY OF DUVAL     )

HAVING BEEN SWORN, AFFIANT STATES AS FOLLOWS:

1. My name is René Fix and I am one of the attorneys in the law firm of Rogers Towers who represents PhyAmerica Government Services, Inc. in this action. I am over the age of twenty-one and competent to testify to the matters set forth in this affidavit. The statements contained in this affidavit are based upon my personal knowledge.

2. I have reviewed the facts set forth in the Motion to Continue Pretrial Deadlines and attest that such facts accurately describe the circumstances leading to the filing of the Motion.

FURTHER AFFIANT SAYETH NOT

  
\_\_\_\_\_  
René M. Fix

STATE OF FLORIDA     )  
  )  
COUNTY OF DUVAL     )

The foregoing Affidavit was acknowledged before me this 2<sup>nd</sup> day of June, 2011 by RENÉ M. FIX, who is personally known to me or who has produced n/a as identification.

Notary Public, State of Florida



Print Name: Deborah W. Rossier  
Commission No.: 762508  
Commission Expires: 03/28/2012

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO.: 10-23949-CIV-MORENO

LOUISE MOILERE,

Plaintiff,

vs.

PHYAMERICA GOVERNMENT  
SERVICES, INC., A Foreign Profit  
Corporation,

Defendant.

---

**Proposed ORDER GRANTING CONTINUANCE**

This matter is before the Court on Defendant PhyAmerica Government Services, Inc.'s Motion to Continue Pretrial Deadlines and Memorandum of Law in Support ("Motion"). Having considered the Motion and the record in this case, the Court finds that the requested relief is warranted for good cause shown. Accordingly, it is hereby **ORDERED**:

1. Defendant PhyAmerica Government Services, Inc.'s Motion to Continue Pretrial Deadlines and Memorandum of Law in Support is **GRANTED**.

2. The Pretrial Conference and related requirements, the Trial in this case, and all other deadlines set forth in the Court's Order of Continuance and Order Revising Pretrial Deadlines (Doc. No. 18), are continued for a period of ninety (90) days.

**DONE AND ORDERED** in Chambers at Miami, Florida this \_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
United States District Judge

copies to:  
All counsel of record  
All *pro se* parties

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO.: 10-23949-CIV-MORENO**

**LOUISE MOILERE,**

Plaintiff,

vs.

**PHYAMERICA GOVERNMENT  
SERVICES, INC., A Foreign Profit  
Corporation,**

Defendant.

---

**DEFENDANT'S NOTICE OF SUPPLEMENTING ITS MOTION TO CONTINUE  
PRETRIAL DEADLINES AND MEMORANDUM OF LAW IN SUPPORT**

On June 2, 2011, Defendant PhyAmerica Government Services, Inc. filed a Motion to Continue Pretrial Deadlines and Memorandum of Law in Support ("Motion") through which it sought to extend all pretrial deadlines by ninety (90) days. Prior to filing the motion, Defendant had been unable to contact Plaintiff to discuss the requested relief. After filing its Motion, Defendant received additional contact information for Plaintiff and was able to communicate with her concerning the subject of the Motion. During the telephone call, Plaintiff's daughter served as a translator.

Plaintiff consented to the continuance of pretrial deadlines as requested in Defendant's Motion. Additionally, Plaintiff advised that she has been trying to retain additional counsel to replace her prior attorney, who withdrew from representation. Plaintiff advised Defendant that she needed additional time to ascertain whether she could find another attorney to represent her. Thus, the requested continuance would provide Plaintiff additional time needed to determine



**SERVICE LIST**

**LOUISE MOILERE vs. PHYAMERICA GOVERNMENT SERVICES, INC.**

**CASE NO.: 10-23949-CIV-MORENO**

**United States District Court, Southern District of Florida**

Louise Moilere, *pro se*  
1040 NW 198th Street  
Miami, FL 33169

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO.: 10-23949-CIV-MORENO

LOUISE MOILERE,

Plaintiff,

vs.

PHYAMERICA GOVERNMENT  
SERVICES, INC., A Foreign Profit  
Corporation,

Defendant.

---

**DEFENDANT'S UNILATERAL PRETRIAL STATEMENT**

Defendant, PhyAmerica Government Services, Inc. (PhyAmerica or Defendant) submits this Unilateral Pretrial Statement pursuant to Local Rule 16.1(e) and this Court's scheduling order. Plaintiff's attorney withdrew from representation on May 16, 2011. Plaintiff is appearing in this matter *pro se*. Plaintiff has represented to Defendant that she does not speak English. Plaintiff has not retained a certified Haitian translator through which the parties can communicate. Thus, Defendant has not been able to complete its pretrial obligations and has been required to file this statement unilaterally.

I. **STATEMENT OF THE CASE**

A. **Plaintiff's Statement**

Plaintiff has not provided a statement of her case.

B. **Defendant's Statement**

PhyAmerica provides health care services to government agencies, including for example, the Alexander Nininger State Veterans Nursing Home ("Nininger") at which Plaintiff

worked. Plaintiff was employed as a certified nursing assistant ("CNA"). After a counseling session with her supervisor, Plaintiff refused to sign the counseling forms, left the office, and never returned to work. Plaintiff was not fired. Employees who fail to appear for work are considered to have voluntarily resigned.

Plaintiff does not dispute the reasons that she was counseled. In short, she requested a two-week leave of absence but did not follow proper protocol in doing so. She was granted the leave, but received written counseling upon her return. After the counseling meeting, Plaintiff failed to return to work for her next scheduled shifts and was terminated as a no-call, no-show. Plaintiff alleges that she was subjected to race and national origin discrimination as well as retaliation for engaging in protected activity. All of the alleged discrimination is attributed to Plaintiff's supervisor, Laurie Alves. Plaintiff alleges that Alves treated her differently than similarly situated persons outside of her protected classifications. She also alleges that she was subjected to a hostile work environment. However, Plaintiff cannot identify one similarly situated employee outside of her protected classifications who was treated differently under the same or similar circumstances. Plaintiff makes various unsupported claims that she was denied overtime opportunities, promotions, and given unfavorable schedules, but has produced no evidence. Her claims are based on hearsay, conjecture, and speculation.

Plaintiff also cannot identify conduct that rises to the level of hostile work environment. Plaintiff alleges generally that her supervisor made derogatory comments about Haitians, but cannot identify any specifics other than a few isolated instances.. Plaintiff worked night shift and saw her supervisor only 3-5 times per month for a few minutes each time. Plaintiff concedes that most of her interactions with her supervisor were professional. This minimal exposure falls far short of the severe and pervasive standard essential in providing a hostile work environment.

Indeed, Plaintiff never complained to PhyAmerica about her supervisor, despite being familiar with the company's anti-harassment policies. When asked in deposition why she did not complain, Plaintiff testified that she did not believe her supervisor's conduct was sufficiently severe to merit a complaint.

With respect to her retaliation claim, Plaintiff has failed to present evidence that any employment action was based upon her engaging in protected activity. Furthermore, no evidence exists that PhyAmerica decisionmakers knew of any alleged protected activity, or took any action in response to the alleged protected activity. PhyAmerica considered Plaintiff to have voluntarily resigned.

## **II. BASIS OF FEDERAL JURISDICTION**

Under 28 U.S.C. §§ 1331 and 1337, this Court has original jurisdiction for Plaintiff's race discrimination claim filed under 42 U.S.C. § 1981 and supplemental jurisdiction over Plaintiff's Florida Civil Rights Act claims filed under Fla. Stat. § 760 *et seq.*

## **III. PLEADINGS**

The pleadings consist of Plaintiff's Complaint and Defendant's Answer and Affirmative Defenses to Plaintiff's Complaint. No amended pleadings have been filed.

## **IV. PENDING MOTIONS**

### **A. Motion for Summary Judgment**

On March 15, 2011, Defendant filed a Motion for Summary Judgment and Memorandum of Law seeking dismissal of all claims set forth in Plaintiff's Complaint. On April 6, 2011, Plaintiff filed her Response in Opposition to Defendant's Motion. On April 8, 2011, Defendant filed its Reply Brief. The briefing has been completed.

**B. Motion to Continue Pretrial Deadlines**

On June 6, 2011, Defendant filed a Motion to Continue Pretrial Deadlines and Memorandum of Law in support. On June 7, 2011, Defendant supplemented the Motion under Local Rule 7.1 to advise the Court that Plaintiff consented to the requested relief.

**V. STATEMENT OF UNCONTESTED FACTS**

Since her attorney withdrew, Plaintiff has not retained a certified Haitian translator to communicate with Defendant about the case and the parties' pretrial obligations. Plaintiff has advised Defendant that she is currently attempting to seek new counsel. Given the foregoing, Defendant has not been able to reach agreement on a statement of uncontested facts.

**VI. ISSUES OF FACT TO BE LITIGATED**

Similar to Section V above, Defendant cannot identify issues of fact to be litigated without knowing what facts Plaintiff intends to contest. Defendant has taken the position in its Motion for Summary Judgment that no disputed issues of material fact exist. Nevertheless, Defendant anticipates that the following factual issues will be litigated if not resolved on summary judgment: (1) whether Ms. Alves made a derogatory statement toward Haitian employees; (2) whether Ms. Alves made a derogatory gesture toward Plaintiff; (3) whether Plaintiff was subjected to any adverse employment actions with respect to scheduling, pay, or overtime; (4) whether Plaintiff was constructively discharged; (5) whether Plaintiff violated any company policies; (6) whether any similarly situated employees outside of Plaintiff's protected classifications received more favorable treatment under the same or similar circumstances; (7) whether and to what extent Plaintiff engaged in protected activity; (8) whether any relevant decisionmaker had notice of Plaintiff engaging in protected activity; and (9) whether any decisions pertaining to Plaintiff's employment were motivated by unlawful reasons, such as race, national origin, or retaliation.

**VII. ISSUES OF LAW ON WHICH THE PARTIES AGREE**

As set forth above, Defendant has not been able to reach agreement on any pretrial issues in the case. Plaintiff has not retained a certified translator to communicate with Defendant concerning the issues set forth herein.

**VIII. ISSUES OF LAW THAT REMAIN FOR THE COURT**

The issues of law that remain for the Court to decide, including those issues of law raised in Defendant's Motion for Summary Judgment, include the following: (1) whether Plaintiff was subjected to a hostile work environment based upon her race or national origin under 28 U.S.C. § 1981 or the Florida Civil Rights Act; (2) whether Plaintiff was subjected to any adverse employment actions based upon her race or national origin under 28 U.S.C. § 1981 or the Florida Civil Rights Act; and (3) whether Defendant retaliated against Plaintiff under 28 U.S.C. § 1981.

**IX. LIST OF TRIAL EXHIBITS**

Plaintiff has not identified any exhibits for use at trial. Defendant cannot properly identify all the exhibits it may intend to use at trial without receiving Plaintiff's list. Additionally, Defendant does not know what facts of the case that Plaintiff disputes. Accordingly, Defendant can only speculate what exhibits it may need for trial. A list of exhibits is attached as Exhibit "A" hereto.

**X. LIST OF WITNESSES**

**A. Plaintiff's Witness List**

Plaintiff has not identified a list of witnesses she intends to call at trial.

**B. Defendant's Witness List**

Defendant is unable to identify witnesses it intends to call at trial without knowing the facts and law that Plaintiff intends to dispute in this case. Plaintiff has failed to identify any witnesses she intends to call and, therefore, Defendant need not put on any witnesses as Plaintiff

carries the burden of proof. However, Defendant may call the witnesses identified on the list attached as Exhibit "B" hereto.

**XI. ESTIMATED TRIAL TIME**

Three days.

**XII. ESTIMATED ATTORNEYS' FEES**

If Defendant prevails in this litigation, it is not entitled to an award of attorneys' fees under the federal and state anti-discrimination statutes applicable to this case absent extraordinary circumstances. At this time, Defendant is not seeking recovery of its attorneys' fees from Plaintiff.

DATED this 9<sup>th</sup> day of June, 2011.

**ROGERS TOWERS, P.A.**

By: s/René M. Fix  
René M. Fix, Esq.  
Florida Bar No. 189545  
1301 Riverplace Boulevard, Suite 1500  
Jacksonville, Florida 32207  
(904) 398-3911 (telephone)  
(904) 396-0663 (facsimile)

**ATTORNEYS FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

I hereby certify that on June 9, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/René M. Fix  
Attorney

**SERVICE LIST**

**LOUISE MOILERE vs. PHYAMERICA GOVERNMENT SERVICES, INC.**

**CASE NO.: 10-23949-CIV-MORENO**

**United States District Court, Southern District of Florida**

*Pro se*

Louise Moilere  
1040 NW 198<sup>th</sup> Street  
Miami, Florida 33169

# EXHIBIT "A"

**EXHIBIT LIST**

1. Plaintiff's pay records
2. Handwritten schedule
3. Letter from Plaintiff
4. Disciplinary Letter
5. Documentation of Counseling Meeting
6. Counseling Forms
7. Termination Form
8. At-Will Policy
9. Employee Handbook Policies
10. Anti-Harassment and Anti-Discrimination Policies
11. Corporate Compliance Code of Conduct

# EXHIBIT "B"

**WITNESS LIST**

1. Laurie Alves

1532 West 22<sup>nd</sup> Street

Ft. Lauderdale, Florida 33315-1835

Ms. Alves will present live testimony concerning Plaintiff's employment history, work performance, and separation from employment.

2. Elisa Hernandez

300 South Park Road, Ste 400

Hollywood, FL 33021

Ms. Hernandez will present live testimony as the corporate representative as to Plaintiff's employment history, relevant corporate policies and records, and to the extent necessary any data of comparator employees.

### CIVIL CALENDAR CALL MINUTES

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

HONORABLE FEDERICO A. MORENO Presiding

Case No. 10-23949-CIV-MORENO Date: June 14, 2011

Clerk: Shirley Christie/ Maritza Nicado Reporter: Gilda Pastor-Hernandez

USPO: N/A Interpreter: N/A

Louise Moliere vs. PhyAmerica Government Services, Inc.,

Plaintiff(s) Counsel: Louise Moliere, pro-se, Stuart Abramson, Esq. (friend of the family, doesnot represent plaintiff)

Defendant(s) Counsel: Rene Fix, Esq.,

Reason for hearing: Calendar Call for the two-week trial period beginning: June 14, 2011

Result of hearing: Plaintiff's ore tenus Motion to Continue trial was GRANTED; Last court continuation. Plaintiff must retain counsel prior to the start of trial or plaintiff will have to precede to trial without the assistance of counsel.

Trial is continued to two-week period of: July 5, 2011 @ 9:00 AM

Calendar call is set for: June 28, 2011 @ 2:00 PM, written order to follow.

MISC: \_\_\_\_\_

33 mins

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division  
Case Number: 10-23949-CIV-MORENO

LOUISE MOILERE

Plaintiff,

vs.

PHYAMERICA GOVERNMENT SERVICES,  
INC.,

Defendant.

ORDER

THIS CAUSE came before the Court during Calendar Call on June 14, 2011. It is  
**ADJUDGED** that a Calendar Call shall take place before the undersigned, United States  
District Judge Federico A. Moreno, at the United States Courthouse, Wilkie D. Ferguson Building,  
Courtroom 13-3, 400 North Miami Avenue, Miami, Florida 33128, on Tuesday, June 28, 2011 at  
2:00 p.m.

**ADJUDGED** that the Parties will be prepared to set a trial date for two-week period  
beginning the following Tuesday, July 5, 2011. Parties will also be prepared to discuss any  
outstanding issues at that time.

DONE AND ORDERED in Open Court at Miami, Florida, this 16<sup>th</sup> day of June, 2011.

  
\_\_\_\_\_  
FEDERICO A. MORENO  
UNITED STATES DISTRICT JUDGE

Copies provided to:  
Counsel of Record

United States District Court - Southern District of Florida - Miami Division

Judge Federico A. Moreno 99 N.E. 4th Street Courtroom 4 10th floor



Calendar

Start	End	Category	Description
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23 Jun 2011	2:05 PM	2:05 PM	CALENDAR CALL
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10-23949-CIV-MORENO  
LOUISE MOLIERE  
vs.  
PHYAMERICA GOVERNMENT SERVICES, INC.  
Rene Fix, Esq.  
(Calendar Call)

Court Reporter: Gilda Pastor-Hernandez

Court Time: 8 minutes

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division

Case Number: 10-23949-CIV-MORENO

LOUISE MOILERE,

Plaintiff,

vs.

PHYAMERICA GOVERNMENT SERVICES,  
INC.,

Defendant.

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**ORDER SCHEDULING TRIAL**

THIS CAUSE came before the Court at Calendar Call on June 28, 2011. It is

**ADJUDGED** that trial shall begin on **July 14, 2011 at 9:00 a.m.** before the undersigned,  
Chief United States District Judge Federico A. Moreno, at the United States Courthouse, Wilkie D.  
Ferguson Building, Courtroom 13-3, 400 North Miami Avenue, Miami, Florida 33128.

DONE AND ORDERED in open court at Miami, Florida, this 29<sup>th</sup> day of June, 2011.

  
\_\_\_\_\_  
FEDERICO A. MORENO  
CHIEF UNITED STATES DISTRICT JUDGE

Copies provided to:  
Counsel of Record