STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CYNTHIA KEYS, Petitioner, vs. FIRST HEALTH SERVICES CORPORATION, Respondent.	)	Case No. 02-2748

RECOMMENDED ORDER

A hearing was held pursuant to notice, on December 2 through 4, 2002, in Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Fred H. Flowers, Esquire
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For Respondent: John E. Duvall, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Charge of Discrimination filed by Petitioner on August 9, 2000.

PRELIMINARY STATEMENT

On August 9, 2002, Petitioner, Cynthia Keys, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that First Health Services Corporation violated Section 760.10, Florida Statutes, by discriminating against her on the basis of race and gender. The Charge of Discrimination alleged hostile work environment, wrongful denial of promotion, and wrongful termination.

The allegations were investigated and on April 25, 2002, FCHR issued its determination of "cause" and Notice of Determination: Cause. FCHR's determination of cause was based solely on race and found that there was insufficient evidence to establish a charge of discrimination based on gender.

A Petition of Relief was filed by Petitioner on May 30, 2002. The Petition for Relief referenced discrimination based upon race but did not reference gender discrimination. The Petition for Relief raised for the first time "disparate treatment pattern" in addition to her allegations of hostile work environment, denial of promotion, and wrongful termination. FCHR transmitted the case to the Division of Administrative Hearings (Division) on or about July 11, 2002. A Notice of Hearing was issued setting the case for formal hearing on September 18 through 20, 2002. On August 20, 2002, the parties filed a Joint Motion to Continue Hearing which was granted. The

hearing was rescheduled for October 28 through 30, 2002. The parties filed a Second Joint Motion to Continue Hearing which was granted. The hearing was rescheduled for December 2 through 4, 2002.

During the hearing, a Motion by Nonparty for Protective Order Quashing Subpoena Ad Testificandum was filed by the Florida Commission on Human Relations seeking to quash a subpoena issued to one of its employees, Katina Hinson. Oral argument was heard on the motion. The motion was granted and the subpoena quashed.

At hearing, Petitioner presented the testimony of nine witnesses: Neil Alspach; Beverly Williams; Douglas Keel; Paul Shelley; James Gilbert; Melvin Lofton; Auguista George; Alice Wilson; and Petitioner, Cynthia Keys. Petitioner offered Exhibit Nos. 1 through 16, which were admitted into evidence with the exception of Exhibit No. 8, which was proffered. Respondent presented the testimony of two witnesses, Douglas Keel and Paul Shelley. Respondent offered into evidence Exhibit Nos. 1 through 13, which were admitted into evidence.

A Transcript, consisting of five volumes, was filed on January 10, 2003. On February 3, 2003, the parties filed a Joint Motion to Extend Deadline for Filing Recommended Orders. The motion was granted. On February 24, 2003, the parties filed another Joint Motion for Extension of Time to File Proposed

Recommended Orders. The motion was granted. On March 11, 2003, Petitioner filed a Stipulated Motion for Extension of Time to File Proposed Recommended Order which was granted. Proposed Recommended Orders were filed by the Petitioner and Respondent on March 13, 2003, and March 11, 2003, respectively, and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American woman who was employed by Respondent from September 1998 until her termination on August 4, 2000.

2. Respondent, First Health Services Corporation (First Health), is an employer within the meaning of the Florida Civil Rights Act. Part of First Health's business is providing Medicaid billing and claims services for state and local governments. First Health opened a Tallahassee office in 1998.

3. Petitioner received a bachelor's degree in 1984 in data processing. Prior to working at First Health, Petitioner worked in the area of computer programming for approximately 15 years for the Department of Labor and Leon County Schools. Petitioner was hired by First Health as a computer program analyst in its Tallahassee office. In that position, she assisted with computer programming and systems analysis tasks relating to Medicaid claims for various public entities.

4. The State of New York contract or project was composed of two areas of responsibility: generating claims for services rendered and generating documents and records relating to reimbursement from third parties for claims, commonly referred to as "third party liability." Petitioner was assigned to the third party liability portion of that contract, although the record is unclear as to when she was assigned to the New York account.

5. When Petitioner first started her employment with First Health, there was no office manager for the Tallahassee office. Dennis O'Donahue eventually became the office manager. Woody Wise was a team leader for the New York account but later left that position. After Wise no longer held the team lead position, Petitioner functioned in the capacity of team lead for the third party liability segment of the New York account. She was never officially designated as team lead or as acting team lead. Her job titles while at First Health were computer programmer analyst and systems computer programmer analyst.

6. At some point during the period of time that Petitioner was unofficially acting as team lead of the third party liability segment of the account, O'Donahue met with her and another coworker, Beverly Williams. During that meeting, O'Donahue offered the team lead position for the third party liability segment of the New York account to Petitioner.

O'Donahue was removed as office manager and was replaced by Doug Keel in March or April of 2000.

7. O'Donahue was replaced because there were some problems with the New York account dealing with customer satisfaction and production that was perceived by First Health's management as a management problem. As a result of these problems, the client was dissatisfied and the contract was in jeopardy.

8. In May of 2000, First Health posted an advertisement for a team lead position for the New York account. This advertisement contemplated a position that would combine the claims and third party liability aspects of the New York account. The advertisement listed the following under the heading, "Qualifications":

> -Ability to react to user community with support and assistance in everyday needs.
> -Ability to effectively direct staff with minimal amount of supervision.
> -Motivate with excellent interpersonal skills.
> -Ability to deal professionally with internal and external customers.
> -Full working knowledge of system development methods, tools, and techniques.

9. Within the Tallahassee office, Petitioner and another African-American employee, Auguiste George, applied for the position. Neil Alspach, a Caucasian, also applied. First Health initially hired Alspach in January 2000 as a senior programmer analyst in its Richmond, Virginia, office, where he

worked on a Medicaid project for the state of Virginia. He holds a degree in management information systems and has worked in the data processing field since 1985. His data processing experience includes having worked for companies such as Sony and Unisys.

10. Alspach was offered the job as team leader and moved to Tallahassee to assume that position.

11. Paul Shelley is Director of Human Resources for First Health and is also located in Richmond, Virginia. While he did not make a formal ranking of these applicants, he voiced an opinion as to how he viewed the applicants. He "ranked" Alspach, first; George, second; and Petitioner, third.

12. Doug Keel was office manager at that time and is still in that position. He conducted interviews of Petitioner and George and forwarded their resumes to Richmond for review. He made no recommendation as to any of the candidates. He was not the final decision-maker with respect to Alspach's getting the job of team lead.

13. The decision to promote Alspach to the team lead position was made by Mark Therianos, who worked for Paul Shelley, and Bev Quick, a vice president of First Health. Both Therianos and Quick are located in the Richmond, Virginia, office.

14. Based upon the evidence presented, Petitioner and Alspach were equally qualified for the job.

15. As Alspach analyzed the New York account, he discovered that on two consecutive weekends in April 2000, two programs suffered abnormal terminations referred to as "ab ends." Alspach discovered that Petitioner had made changes to the programs which would have addressed and prevented the specific ab ends, but that she never placed the changes "into production" to effectuate the changes and modify the programs. Ab ends can be serious concerns as they can cause systems to stop running. Ab ends can result from different causes, but Petitioner admitted that she had made a mistake regarding not placing the changes into production.

16. Alspach perceived Petitioner's failure to place changes into production as a violation of First Health's policies and procedures. Through a series of e-mails, one which is time-stamped by the computer as being sent immediately after the meeting, Alspach notified Petitioner that there would be a meeting to discuss concerns about production problems the afternoon of July 11, 2000.

17. The July 11, 2000, meeting was attended by Petitioner, Alspach, and Keel. Although the evidence is conflicting as to exactly what happened during this meeting, the weight of the evidence indicates that Alspach yelled at Petitioner about the

mistakes that occurred and acted in a rude, intimidating manner towards her. His behavior was such that she became afraid of Alspach. First Health acknowledges that his behavior was unprofessional. However, the evidence does not establish that Alspach's behavior was racially related.

18. Petitioner was very upset as a result of the meeting. She sent an e-mail to and telephoned Quick to tell her about the meeting. Quick responded that she was on medical leave and requested that Petitioner inform their Human Resources department about her concerns so that the matter would not "lay idle" while she was on medical leave. Quick also informed Petitioner that she had discussed the matter with Keel and alerted Shelley, Human Resource Director.

19. Petitioner also discussed her concerns with Keel who was her office manager. She informed Keel in an e-mail that she was "willing to meet with you as long as its not with Neil or behind closed doors." He replied in an e-mail that he attempted to call her but "got voice mail," that he spoke with Shelley about the matter and that "we are working toward resolution".

20. Petitioner also made a complaint directly to Shelley about Alspach's behavior. Petitioner complained to Shelley that she was continuing to receive e-mails from Alspach, although she acknowledged at hearing that the e-mails were not threatening and were all business related.

21. Shelley spoke to Petitioner on the telephone and sent her the following e-mail:

> Cynthia,
> To follow up on our telephone conversation of earlier today, this email requests your cooperation in resolving the issues between you and Neil Alspach. Specifically, you need to meet with Neil and Doug Keel to discuss the situation and address the issues. You indicated to me this morning by telephone that you are not willing to meet with Doug and Neil.
>
> Doug, the manager in charge of the Tallahassee office, has spoken with all members of the team for which Neil is the Team Leader to identify issues regarding Neil's management style and behavior toward colleagues. In addition, Doug has counselled [sic] Neil regarding his management style, his behavior and the way he comes across to colleagues.
>
> It is appropriate for Doug and Neil to meet with you to discuss these issues, with the goal of resolution. It is essential that the Tallahassee team work together and resolve issues so the team can function properly and serve the client in the manner expected.
>
> You informed me and Doug in separate conversations this morning that you are not willing to meet with Doug and Neil to discuss these issues. This is not acceptable and I ask that you reconsider your position over the weekend and be prepared to meet with Doug and Neil on Monday morning, July 31. If you continue to refuse to meet with Doug and Neil, the two management colleagues in the Tallahassee office, we will have to terminate your employment, which we do not want to do.

> We have addressed the issues you have raised about the unprofessional way Neil treated you and spoke to you. It is essential that these issues be addressed with you in a meeting and resolved in order to move forward and have an effective team with professional and appropriate business-like relationships in the future by all concerned.

22. Petitioner replied to this e-mail that she was willing to meet with Doug Keel, but that she would not meet with Alspach.

23. At this point, there was an unfortunate lack of communication or miscommunication. Shelley was of the firm belief that Petitioner did not ever meet with Doug Keel in an attempt to resolve this matter. His belief that she refused to meet with Keel "was a big issue with me," and greatly influenced his decision to inform Keel that he should terminate Petitioner. He acknowledged that had he been aware that she had met with Keel, he would have taken additional measures to attempt to resolve this matter by personally intervening in the process.

24. Shelley also learned that Petitioner had not attended several weekly Friday staff meetings presumably because Alspach would be present at those meetings. Shelley had been told by Keel that Alspach's behavior at the July 11, 2000, meeting had been stern but not hostile, as Petitioner had described. As a result of his belief that Petitioner was not willing to cooperate with management to resolve this matter and all of the

circumstances, Shelley consulted with a colleague in Human Resources located in another city as well as with Quick. The consensus was that Petitioner should be terminated. Shelley made the decision to terminate Petitioner and informed Keel that he should terminate Petitioner on August 4, 2000. Petitioner was terminated on August 4, 2000. Alspach was not involved in the decision to terminate Petitioner.

25. Shelley's decision to direct Doug Keel to terminate Petitioner was primarily based on his belief that she failed to cooperate by not meeting with Alspach and, in particular, with Keel; failure to attend weekly team meetings for four weeks; and his belief that the matter needed to come to resolution, as First Health was struggling with client dissatisfaction on the New York account.

26. There was no evidence presented that establishes or even suggests that Shelley's decision to direct Keel to terminate Petitioner was based on race.

27. Auguiste George resigned from First Health in April 2001. George believes he overheard "what seemed like [Alspach's] voice" speaking to Petitioner in a "loud, stern voice" during a meeting in the conference room. However, George did not hear the content of the remarks and never heard Alspach say anything of a racial character when addressing employees, including Petitioner.[1/]

28. Keel acknowledged that Alspach's subordinate employees, both Caucasian and African-American, have complained that Alspach was a "micro-manager" and "too direct" as a manager. This sentiment was not limited to members of any particular race. However, Keel perceived that those traits represented Alspach's philosophy that he wanted people to be held accountable for their work and wanted the work performed properly. Alspach has been counseled concerning his management style by Keel and by Shelley.

29. Significantly, Petitioner admitted that Alspach's management style impacted the entire New York team regardless of the race of members.

30. In her various verbal and written interactions with First Health management, Petitioner never made a complaint of race discrimination pertaining to her employment situation, including her interactions with Shelley. Finally, Petitioner acknowledged that Alspach never made any racial comments towards her or any other employee.

31. First Health has Affirmative Action and Equal Opportunity policies and had them in place during 2000.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. Sections 120.569 and 120.57, Florida Statutes.

33. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race.

34. In discrimination cases alleging disparate treatment, the Petitioner generally bears the burden of proof established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).[2/] Under this well established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., the Petitioner, is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Id. Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). "The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for

the employment decision is not worthy of belief." Department of Corrections v. Chandler, supra at 1186; Alexander v. Fulton County, Georgia, supra. Petitioner has not met this burden.

35. In a failure to promote context, to establish a prima facie case of discrimination, the charging party must prove that (1) she is a member of a protected minority; (2) that she was qualified and applied for the promotion; (3) that she was rejected despite these qualifications; and (4) other equally or less qualified employees who are not members of the protected minority were promoted. Lee v. GTE Florida, Inc., 226 F.3d 1249, 1253 (11th Cir. 2000), relying upon Taylor v. Runyon, 175 F.3d 861, 866 (11th Cir. 1999).

36. Petitioner has met her burden of proving a prima facie case regarding the issue of promotion. She is a member of a protested class, she was qualified for and applied for the promotion, and an equally qualified employee who is not a member of a protected class was promoted.

37. Respondent has met its burden of production by articulating a legitimate, non-discriminatory explanation of the employment action taken. Respondent presented ample evidence that its motivations in promoting Alspach were reasonable and were not racially motivated. Alspach was qualified for the job. Given the prior managerial problems regarding the New York project and First Health's concerns regarding client

dissatisfaction placing the contract in jeopardy, it was not unreasonable for First Health to elect to bring in a qualified employee from another office to take over this management position.

38. Where a respondent proffers a reasonable motivation for the promotional decision, it is not up to a court to question the wisdom of the employer's reasons. Lee v. GTE Florida Inc., supra, relying upon Combs v. Plantation Patterns, 106 F.3d 1519, 1543 (11th Cir. 1997); Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1361 (11th Cir. 1999)(emphasizing that courts "are not in the business of adjudging whether employment decisions are prudent or fair").

> In a failure to promote case, a plaintiff cannot prove pretext by simply showing that she was better qualified than the individual who received the position that she wanted . . . [D]isparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face.

Denney v. City of Albany, 247 F.3d 1172, 1187 (11th Cir. 2001), quoting Lee v. GTE Florida, Inc., supra at 1253-54. There are no disparities between Petitioner's qualifications and those of Alspach that would "jump off the page and slap a person in the face."

39. Petitioner has not met her burden of showing that a discriminatory reason more likely than not motivated the decision, or by showing that the proffered reason for the employment decision is not worthy of belief. Consequently, Petitioner has not met her burden of showing pretext.

40. In summary, Petitioner has failed to carry her burden of proof that Respondent engaged in racial discrimination toward Petitioner when it denied her the promotion to team leader.

41. As to Petitioner's discriminatory discharge claim, to establish a prima facie case, she must show that she is a member of a protected class (e.g., African-American); that she was qualified for the job from which she was fired; and, that employees who are not members of the protected class performed their duties in a similar fashion but were not terminated. See McDonald, supra.

42. Petitioner failed to present any evidence regarding a similarly situated Caucasian employee that First Health retained though that employee committed misconduct similar to Petitioner. Paul Shelley indicated that Petitioner was terminated for the reasons previously described. Petitioner has not identified any employee outside of the protected class who committed similar conduct, and thus, she has failed to establish a prima facie case of discriminatory discharge. See, for example, Anderson v.

WBMG-4, 253 F.3d 561 (11th Cir. 2001)(plaintiff's burden to establish proof of similarly situated comparator employees).

43. Applying the McDonald analysis, Petitioner did not meet her burden of establishing a prima facie case of discriminatory discharge. Even assuming that Petitioner had demonstrated a prima facie case of discriminatory discharge, First Health demonstrated a legitimate, non-discriminatory reason for her termination; that the decision maker (Paul Shelley) believed that Petitioner refused to meet with Keel and, therefore, failed to cooperate with management in resolving her issues; failure to attend weekly team meetings; and a concern about resolving the issue because of client dissatisfaction. Petitioner did not meet her burden of proving pretext to negate these legitimate reasons. Petitioner admitted that she would not meet with Alspach ever again, and admitted that she did not attend staff meetings after July 11, 2000.

44. Moreover, Shelley's admission that had he known that Petitioner was willing to meet with Keel and did meet with Keel, he would have taken the matter to the next step, meaning he would not have recommended termination at that point in time, does not support Petitioner's claim of race discrimination. Shelley's mistake or misunderstanding in this regard does not establish pretext. Rather, it supports Respondent's assertion that the reasons were legitimate, although mistaken in part.

"The employer may 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." (Emphasis supplied.) Department of Corrections v. Chandler, supra at 1187, quoting Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984).

45. As to the hostile work environment charge, Petitioner's subjective belief that rude conduct was motivated by unlawful discriminatory intent is generally insufficient to establish a violation of Title VII, regardless of the hostility of the conduct. For example, in Triplett v. Electronic Data Systems, 710 F.Supp. 667 (W.D. Mich. 1989), an employee "believed in [her] heart" that her supervisor was discriminating against her when he would continuously identify shortcomings in her work, would never look at her or talk to her casually, and was always very short with her. Id. at 671-72. Yet upon analysis of these claims, the court ruled that the plaintiff's observations and opinions were insufficient to establish violation of Title VII. Id.

> While plaintiff may rightly complain that she was treated discourteously by [the defendant], no facts have been presented to support a finding that the tension was related to racial difference. The statutes under which plaintiff seeks redress for race discrimination are designed for that limited purpose, they do not provide a shield

> against all harsh treatment in the work place.

Id., at 672 citing McCollum v. Bolger, 794 F.2d 602, 610 (11th Cir. 1986)(personal animosity is not the equivalent of unlawful harassment and is not proscribed by Title VII and a personal feud cannot be turned into a discrimination case merely by accusation).

46. In the instant case, Petitioner has not established that the harsh treatment she received from Alspach was motivated by racial considerations. Testimony was consistent that Alspach never used any racially derogatory remarks. Petitioner never complained to any First Health manager that the treatment she was receiving from Alspach was based upon racially discriminatory motives. Petitioner admitted to Shelley, in an e-mail, that Alspach's "rage" was affecting the entire New York project team, which consisted of white and African-American employees at the time. Finally, Keel testified that he has received complaints from employees of all races about Alspach's direct and controlling management style, not just from Petitioner.

47. Petitioner has not produced any competent evidence that she was subject to a hostile work environment created by racial harassment. While working for a "micromanaging" and "harsh" supervisor may create an intolerable working

environment, such a scenario is not actionable under Title VII, or under the Florida Civil Rights Act, where all employees are submitted to the same harsh treatment. It is not within the authority of this tribunal to second guess First Health's tolerance of Alspach's rude behavior to its employees.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 25th day of April, 2003, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2003.

ENDNOTES

1/ At hearing, Petitioner presented testimony from witnesses Williams, Gilbert, and George attempting to establish a pattern

of discrimination. "Disparate treatment pattern" was not raised in the initial charge of discrimination. Further, Petitioner presented testimony attempting to establish hostile work environment toward other African-American employees. The Charge of Discrimination alleges hostile work environment as it relates to Petitioner individually, not toward others. The Determination: Cause issued by FCHR only references discrimination based on race involving Petitioner, not others in her workplace: ". . . that she suffered adverse employment action in the form of a denial of promotion and hostile work environment . . . ." Accordingly, although Petitioner presented evidence in this regard, this Recommended Order will not address the allegation of a pattern of disparate treatment or hostile work environment as it related to others. The Division of Administrative Hearings has no jurisdiction to hear allegations of discriminatory conduct which FCHR has not investigated or made a determination as to reasonable cause. Natasha Tulloch v. Wal-Mart Super Center, DOAH Case No. 00-4935, Final Order issued November 30, 2001, FCHR Order No. 01-065. While the Determination: Cause did not reference wrongful termination, the Charge of Discrimination clearly did. Accordingly, the allegation of wrongful termination based upon racial discrimination is addressed herein.

2/ FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.