STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BLANCA E. CARBIA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-0420
	)	
ALACHUA COUNTY,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A hearing was held pursuant to notice on April 29 and May 14, 2004, in Gainesville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Bruce M. Smith, Esquire
Law Offices of Bruce M. Smith, P.A.
Post Office Box 450
Gainesville, Florida 32602

For Respondent: William E. Harlan, Esquire
Alachua County Attorney's Office
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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 October 29, 2002.

PRELIMINARY STATEMENT

On October 29, 2002, Petitioner, Blanca E. Carbia, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), which alleged that Alachua County violated Section 760.10, Florida Statutes, by discriminating against her on the basis of gender and national origin. The Charge of Discrimination also alleged that she was subjected to different terms and conditions of employment, wrongful denial of promotion, and wrongful termination as a result of retaliation.

The allegations were investigated, and on January 7, 2004, FCHR issued its determination of "no cause" and Notice of Determination: No Cause.

A Petition for Relief was filed by Petitioner on February 3, 2004. FCHR transmitted the case to the Division of Administrative Hearings (Division) on or about February 5, 2004. A Notice of Hearing was issued setting the case for formal hearing on April 29, 2004. The hearing did not conclude on the scheduled date, and the hearing resumed and concluded on May 14, 2004.

At hearing, Petitioner testified on her own behalf and presented the testimony of Christy Crawford, Jay Butts, Penny Lefkowitz, Hillary Hynes, Steve Gayler, Wayne Mangum, and Robert Thompson. Petitioner offered Exhibit Nos. 1 through 8 and 10 through 14, which were admitted into evidence. Petitioner

proffered Exhibit numbered 15. Respondent presented the testimony of Bill Burrus and Penny Lefkowitz and proferred the testimony of Barbara Brooks.[1/] Respondent offered into evidence Exhibit Nos. 22, 24 through 26, 37, 52, 58, and 60, which were admitted into evidence. Respondent proferred Exhibits numbered 15 and 63 through 65. Official Recognition was taken of Chapter 72, entitled "Animals" of the Alachua County Code; and Chapters V and XIX, entitled "Appointments" and "Disciplinary Policy" of the Alachua County Personnel Regulations.

A Transcript consisting of four volumes was filed on June 10, 2004. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an Hispanic woman who was employed by Respondent from December 1997 until her termination on October 2, 2002. She worked in Alachua County Animal Services (Animal Services) as an animal control officer.

2. Animal Services control officers are supervised by the Animal Services field supervisor who reports to the director of Animal Services.

3. Petitioner received a bachelor's degree in 1983 in agriculture with a concentration in animal production and agricultural management courses, has experience in animal

nutritional research, and has one published paper in that field.[2/] Prior to working for the Alachua County, Petitioner managed a small pest control business. By the time she applied for the supervisory position, she had obtained Florida Animal Control Association (FACA) Level I, euthanasia, and chemical immobilization certifications.

4. An animal control officer is responsible for enforcing state laws and county ordinances regarding small animals. Animal control officers impound animals at-large, issue warnings and citations, handle citizen complaints, and investigate animal bites and cruelty to animals.

5. Petitioner served as interim Animal Services supervisor for a little over one month in June 2000.

6. When the position of Animal Services field supervisor became vacant in December 2001, Petitioner applied for the job. Penny Lefkowitz, a newly hired Animal Services officer, also applied for the job.

7. At that time, Ms. Lefkowitz had seven years of animal control experience in Arizona as lead officer. In that capacity, she was a sworn officer with firearm authority, a field training officer, and handled over 1,000 calls per year in that position. She held National Animal Control Association (NACA) Level I and II certifications. She was euthanasia-

certified and had 25 years' experience breeding dogs and horses. Ms. Lefkowitz has a high school diploma.

8. Ms. Lefkowitz was placed in the interim field supervisor position for a period of approximately three months, during which time she received supervisory pay.

9. The record is not clear whether there was a separate application process for the permanent position following the appointment of the interim supervisor position. In any event, Respondent hired Bill Burris as Animal Services supervisor in March 2002. At the time he applied, Mr. Burris had nine years of animal control experience in Arkansas, where he was the animal control officer and shelter assistant. He held a high school G.E.D. Additionally, he held NACA Level I, II, and III certifications.

10. Petitioner's Charge of Discrimination regarding failure to promote only references Ms. Lefkowitz's appointment to the interim director position, "[i]n December 2001, a newly hired officer, white female with less experience was hired as interim supervisor." It does not reference Mr. Burris as being hired in the director position. Her Petition for Relief alleges, "[t]hose less qualified individuals were hired and promoted in violation of county/company policy." Thus, it is not clear that Respondent hiring Mr. Burris for the permanent position is properly within the scope of this case.

Nonetheless, the evidence presented at the hearing regarding Mr. Burris' qualifications is addressed herein.

11. Mr. Burris held the position of field operation supervisor from March 2002 until his resignation in September 2003.

12. Based upon the evidence in the record, at the time the decision was made to place Ms. Lefkowitz in the temporary supervisory position, she and Petitioner met the qualifications for the job. Ms. Lefkowitz had significantly more supervisory and field experience than Petitioner. At the time he was placed in the job, Mr. Burris met the qualifications for the job and had significantly more supervisory experience than Petitioner. Petitioner held a college degree, which neither Ms. Lefkowitz or Mr. Burris had. However, according to Mr. Burris, a college degree was not a minimum requirement of the job, but two years' animal control or animal shelter experience were required. There is nothing in the record to contradict his testimony in this regard.

13. When Mr. Burris became field supervisor, he held a staff meeting and told the animal control officers he supervised that he would start fresh as far as performance and discipline issues. He handed them an empty folder and informed them that he would only consider their past performance if he saw a pattern that caused him to look at past personnel records.

14. Mr. Burris called staff meetings to discuss policies that were not up-to-date or in need of updating. Prior to the staff meeting, Mr. Burris sent a memorandum to the animal control officers informing them that there would be a staff meeting. Officers were expected to attend and were excused only if they were on an emergency call. If an officer was absent from a meeting, Mr. Burris would promptly notify them in memorandum format as to what happened at the meeting.

15. When changes were made in policies or procedures, Mr. Burris would put a copy of the policy changes in every officer's box. Each officer had his or her box where they would receive their mail. Each officer was expected to check that box daily. The boxes were accessible to everyone so that when there was a confidential document, such as payroll information, that document was placed in an envelope and then put in the officer's box.

16. Petitioner's mid-year performance review was due in April 2002, approximately six weeks after Mr. Burris became the supervisor. Petitioner received an overall rating of "exceeded expectation." There are five categories of performance ratings, and "exceeded expectation" is the second highest category. That rating was consistent with ratings Petitioner received from previous supervisors.

17. On April 24, 2002, Mr. Burris held a staff meeting to discuss a new policy regarding issuance of warnings and citations. The new policy required officers to give animal owners in violation of vaccination or licensing requirements 15 days to come into compliance. Previous to this, some officers had given animal owners 30 days to come into compliance. Under extenuating circumstances and upon seeing reasonable attempts to achieve compliance, the officer could extend an owner's deadline by 15 more days. Testimony is conflicting as to whether Petitioner attended this meeting. Petitioner insists she was not at this meeting. Mr. Burris insists that she was and that this issue was discussed in great detail. In any event, Mr. Burris put the new policy in writing a few days after the April 24, 2002, meeting, and the new written policy was given to all the officers. The weight of the evidence establishes that even if Petitioner did not attend the April 24, 2002, meeting, she would have been notified of the policy change shortly thereafter.

18. On April 29, 2002, Petitioner issued a warning to a dog owner, which allowed the dog owner 30 days to achieve compliance with licensing and vaccinations for 24 dogs. According to Petitioner, she considered 30 days to be ample time for the owner to come into compliance. Petitioner maintains that at the time she issued this warning, she was not aware of

the change in policy from 30 to 15 days. She acknowledges that Mr. Burris later explained the change in policy to her. It is clear that Mr. Burris informed Petitioner of this policy change and directed her to follow these procedures.

19. In June or July 2002, Mr. Burris designed a policy and procedure manual incorporating all policies and procedures. A manual was issued for each truck used by the animal control officers.

20. On July 31, 2002, Mr. Burris issued a memorandum entitled, "Bite Priority," to the animal control officers. Following a staff meeting where this memorandum was given to the officers, an informal discussion took place around the dispatch area. During this informal discussion, Petitioner questioned Mr. Burris as to whether he had ever read a document called the rabies compendium. Mr. Burris described Petitioner as speaking in a disrespectful, challenging tone. Ms. Lefkowitz witnessed the exchange and described it as disrespectful and condescending.[3/] This statement made in front of other officers was inappropriate.

21. The "Bite Priority" memorandum reads, in pertinent part, as follows:

> All Bites will be priority. Stand-by officers will be required to respond if the bite is after hours during their on-call shift. Bites will not be passed on to the next day.

> Shifts are 10 hour shifts, not 9 1/2 hours, if you end up working over you are compensated. Officers will not pass calls off to the stand-by person. Priority calls will be taken by Officers during their regular shift.

The remainder of the memorandum dealt with off-premise bites.

22. In early August 2002, Mr. Burris decided to "work the roads on a Saturday to take up some of the slack" because the animal control officers were overworked. Late one afternoon, Mr. Burris attempted to reach Petitioner on the radio, but was unable to do so. He asked the dispatcher to contact Petitioner. Petitioner acknowledges that she was contacted by the dispatcher and received Mr. Burris' request to fill up the truck she was driving and to leave the keys and the fuel card on Mr. Burris' desk.

23. Petitioner had already filled up the truck that day in the late morning. She did not fill up the truck again at the end of the day, but described the truck as being seven-eighths full at the end of her shift, after making ten to 12 calls after stopping for fuel. Petitioner believed her actions complied with Mr. Burris' instructions.

24. Mr. Burris described finding the truck the next morning as half-full of gas. Mr. Burris concluded that Petitioner did not follow his instructions. Mr. Burris' conclusion in this regard was not unreasonable.

25. The truck incident gave rise to Mr. Burris' first written warning about her conduct. On August 5, 2002, Mr. Burris issued a memorandum to Petitioner for "failure to follow verbal instruction." The memorandum noted a safety concern in that he was not able to reach Petitioner by radio and his concern that she did not follow his directive.

26. On August 6, 2002, Mr. Burris called Petitioner into his office to discuss the written memorandum. Mr. Burris described Petitioner's behavior when he handed her the memorandum to be disrespectful. As a result, Mr. Burris went to the director's office to explain the circumstances surrounding this incident. This resulted in a meeting in the director's office at which the director, Mr. Burris, and Petitioner were present.

27. Petitioner acknowledges that she made the statement, "I guess one out of a hundred is unacceptable" during this meeting, and that she said it using a sarcastic tone.

28. Later on August 6, 2002, Mr. Burris issued Petitioner another in-house written warning, the subject of which was "improper conduct" about her conduct in the director's office, which read in part:

> I informed Dr. Caligiuri of Blanca's discourtesy and or improper conduct. I had Blanca meet with me in Dr. Caligiuri's office to discuss her comment and the way in which it was stated. During our

> conversation in Dr. Caligiuri's office Blanca used mild sarcasm, expressing, "I guess one time out of a hundred is unacceptable" as we discussed the importance of responding to her radio.
>
> At this time, I do not want to write this up as a group I #19 Discourtesy to another employee or a Group II #7 Improper conduct which would effect the employees relationship with co-workers. However, if this behavior continues I will be left with no alternative.
>
> I know Blanca is capable of doing her job in a professional manner. I only want this as a written documentation of what occurred on this day, to prevent future occurrences of this same behavior.

29. Petitioner refused to sign the August 6, 2002, memorandum.

30. On August 13, 2002, Animal Services received a call about a dog bite at a residence. Animal control officer Jay Butts was dispatched on the call. When he arrived, he saw two or three dogs inside the home, and he could not determine which dog was involved in the reported bite. The owner of the dog was not at home. He left without leaving a written warning because, "I did not have the correct owner or dog, so I didn't know which dog or which owner to leave a written warning to. . . So I wanted to come back and find out which dog actually was involved in the bite."

31. The following morning, Mr. Butts received information from the Health Department regarding the dog's owner and learned

that the dog was not currently vaccinated or licensed. Mr. Butts returned to the residence where the bite occurred. He posted a notice to the dog's owner. Apparently the owner was still not home because he posted a warning which included the following necessary corrective action: "Your dog must be placed into quarantine by 5:00 pm on 8-14-02 at our shelter or a licensed vet. If you do not have this done today your animal will be impounded and you will receive a citation of $200.00 per day." The warning required the owner to correct the violation by 5:00 p.m. that day. Officer Butts proceeded to handle other calls until his shift was over. He did not make contact with the dog's owner before his shift ended. His shift ended before 5:00 p.m.

32. The dog's owner called Animal Services after 5:00 p.m. on August 14, 2002. Petitioner took the call. After speaking to the dog's owner, she called a veterinarian and learned that the dog's vaccination had expired by a few months. She did not pick up the dog. She gave the following reason:

> Yeah, it happened on property. The dog was confined to his property. We had contacted the owner. And basically even though the vaccination had expired, even a one-year vaccination is good for three years. This is a known fact of any vaccine, any rabies vaccine manufactured in the United States, a one-year vaccine has an efficacy of three years. So I take all that matter into consideration when I have to

make a decision as to what to do with a bite dog.

33. Petitioner told the dog's owner that he had to comply with the written warning given by Mr. Butts. According to Petitioner, she told the dog's owner that he had to quarantine the dog off the property either at the shelter or at a veterinarian clinic. She also informed him that the only person who could reverse that decision was her supervisor.

34. The next morning, August 15, 2002, the dog's owner called Mr. Burris. Mr. Burris spoke to the dog's owner and then questioned Petitioner to get her side of the story. He then instructed Petitioner to pick up the dog. She did not pick up the dog as instructed; another officer picked up the dog later that day.

35. Mr. Burris gave a verbal warning to Officer Butts regarding his handling of the dog-bite incident. Mr. Butts had received previous disciplinary actions, including suspensions, prior to Mr. Burris becoming the field supervisor.

36. However, on August 20, 2002, Mr. Burris initiated a Notice of Proposed Disciplinary Action (Notice) to Petitioner in which he recommended a three-day suspension without pay. The reasons referenced in the Notice were willful negligence in the performance of assigned duties or negligence which would endanger the employee, other employees, or the public; and

refusal to perform assigned duties or to comply with written or verbal instructions of a higher level supervisor. The narrative of the Notice referenced the dog-bite incident and the August 6, 2002, improper conduct memorandum.

37. Mr. Burris explained his decision to give different disciplinary actions to Officer Butts and Petitioner:

> Q What should she have done with the dog?
>
> A She should have impounded it immediately. If the owner refused her, she should have issued him a citation for failure to comply.
>
> Q Jay Butts participated in this. We had some testimony about that. Jay Butts participated in this event two days prior and one day prior to Ms. Carbia getting involved. Why wasn't Butts given any suspension on the same matter?
>
> A Jay Butts was given the same verbal consultation that Officer Carbia had received. The only thing Jay Butts could have done differently would have perhaps left a posted notice the day of or given a notice to the roommate with generic information.
>
> Jay Butts received consultation pertaining to that. He did not receive disciplinary action because he never made any contact with the owner. The officer that made contact with the owner and had the first opportunity to take the dog was Officer Carbia.
>
> Q So there is a difference in the seriousness of her offense and Jay Butts' offense?
>
> A Absolutely.

Q Hers was more serious?

A Yes.

38. As a result of the Notice, a grievance hearing took place on August 26, 2002, in the director's office. Wayne Mangum, who at that time was the union steward, Mr. Burris, and Petitioner were there, as well as the director, Dr. Caligiuri. During the meeting, Petitioner explained her position. At some point in the meeting, Dr. Caligiuri made a comment to the effect that 80 years ago women could not vote.[4/] Petitioner found that comment to be discriminatory toward women.

39. When asked whether Dr. Caligiuri's demeanor in that meeting was aggressive or not cordial, Mr. Mangum replied that his demeanor was "uncordial." In any event, Dr. Caligiuri's comment was offensive and inappropriate.

40. During the August 26, 2002, meeting, Mr. Burris instructed Petitioner to discontinue striking the word "within" from the form used when giving an animal owner a time frame within which to bring in an animal to be impounded. She had not been instructed regarding that previously.

41. Mr. Burris received a copy of a warning form dated August 28, 2002, on which Petitioner had crossed out the word "within" contrary to his instructions. He took no action at the time since he thought it might have been a "slip of the pen." He then received another warning form dated September 9, 2002,

regarding a dog bite which Petitioner had again altered by crossing out the word "within."

42. Petitioner had written on the form that the warning had been posted. Posting is a procedure officers follow when the animal owner cannot be found. The notice is posted on the door of the residence for the owner to find upon returning home. Based upon his telephone call to the dog's owner and the information on the form, Mr. Burris was of the belief that the form had not been posted, and that Petitioner's indication on the form that it had been posted was inaccurate.

43. Mr. Burris met with Petitioner regarding this incident. Petitioner acknowledged at hearing that she spoke to the dog's owner, but was intimidated and confused when questioned by Mr. Burris about whether or not she had spoken to the owner. Petitioner contends that she did not lie to Mr. Burris, that initially the owner did not come to the door but later did come to the door. According to Petitioner, she simply neglected to cross out the word "posted" or ask the owner to sign the form.

44. On September 18, 2002, Mr. Burris signed and provided a Notice of Proposed Disciplinary Action to Petitioner which proposed her termination from employment. The stated reasons for the proposed action were willful negligence in the performance of assigned duties or negligence which would

endanger the employee, other employee, or the public; deliberate falsification and or destruction of county records; and refusal to perform assigned duties or to comply with written or verbal instruction of a higher level supervisor. The Notice referenced the August 28, 2002, warning notice with the word "within" crossed out; the September 10, 2002, warning notice with the word "within" crossed out; the written word "posted" on a warning when she had personally spoken to the dog's owner; and the meeting on August 26, 2002, which resulted in her three-day suspension. The Notice concluded:

> This is the same type of circumstance concerning the same written instruction after meeting with Blanca and her union rep. This time Blanca was untruthful in her statements, even after I gave her three opportunities to tell me that she had personally spoken to the dog owner. By writing "posted" on the notice which indicates the owner was not home, she falsified a county document. Blanca hand delivered the notice to the dog owner and did not impound the dog when she had the opportunity.

45. Petitioner was terminated from her employment with Respondent effective October 2, 2002.

46. There is no evidence in the record that Petitioner complained to anyone that she felt she was discriminated against on the basis of her gender or national origin. The only evidence presented regarding her national origin was Petitioner's brief testimony:

Q Were there any other Hispanics employed at animal services during the time frame that Mr. Burris was there?

A No.

Do you feel that your national origin had something to do with the way Mr. Burris treated you?

A Certainly just—basically I felt that I was treated differently, yeah.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2003).

48. Subsection 760.10(1), Florida Statutes (2003), states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of gender or national origin.

49. 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).[5/] 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).

50. Once the employer articulates a legitimate non-discriminatory explanation for its actions, the burden shifts back to the charging party to show that the explanation given by the employer was a pretext for intentional discrimination. "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.

51. 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) she was qualified and applied for the promotion; (3) 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).

52. Petitioner arguably has met her burden of proving a prima facie case regarding the issue of promotion in the context of national origin. She is a member of two protected classes (she is Hispanic and a female), and she was qualified for and applied for the promotion. Although Ms. Lefkowitz had more relevant experience, it is arguable that Ms. Lefkowitz, who is not a member of the protected class (she is a white female), was an employee equally or less qualified. However, there obviously was no gender discrimination against Petitioner when Ms. Lefkowitz was promoted to the temporary position.

53. Respondent presented evidence to explain Ms. Lefkowitz' promotion to the temporary position. Ms. Lefkowitz was qualified for the job. She had more years of animal control experience and more lead officer and training experience than Petitioner.

54. While there was much evidence presented as to Mr. Burris' qualifications, his hiring appears to be outside the scope of the Charge of Discrimination. The Charge of Discrimination specifically alleges that a "white female with less experience" was promoted to the job. Mr. Burris was not promoted, he was hired. The Petition for Relief generally

references the hiring of "less qualified individuals," but in the context of being "in violation of county/company policy."

55. In any event, Mr. Burris was amply qualified for the job, and his relevant experience exceeds that of Petitioner. He had nine years of animal control and supervisory experience, and she had less than five years' total experience in animal control and only one month as interim supervisor when she applied for the position. He held higher national level certifications. Accordingly, even if the hiring of Mr. Burris can be construed to be properly within the scope of this proceeding, Petitioner has not made a prima facie case in that Mr. Burris' qualifications were superior, not equally or less qualified. Lee v. GTE Florida, supra.

56. Moreover, Petitioner's arguments regarding failure to follow county personnel policies are misplaced. Whether or not Respondent violated its personnel policies, including Ms. Lefkowitz' promotion, and any failure by Respondent to label actual verbal warnings as verbal warnings for purposes of cumulative discipline, is beyond the scope of this proceeding, which is limited to whether Respondent discriminated against Petitioner. "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).

57. Regarding its decision not to hire Petitioner for the job, Respondent has met its burden of production by articulating a legitimate, non-discriminatory explanation of the employment action taken. That is, the candidate(s) selected had more desired experience than Petitioner.

58. Next in the shifting-burden analysis is whether or not the reasons given by Respondent were merely pretext. Where a respondent proffers a reasonable motivation for a 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 Ms. Lefkowitz and Mr. Burris that would "jump off the page and slap a person in the face." The primary difference in Petitioner's qualifications from Ms. Lefkowitz and Mr. Burris is Petitioner's college degree. Her college degree, while a legitimate factor to be considered in an employment decision, was not a requirement for the job.

59. 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.

60. Dr. Caligiuri's comment at the August 26, 2002, meeting is insufficient to support the conclusion that Petitioner was subjected to different treatment or harassment based upon her gender. First, the comment could not be related to the promotional decision as the comment was made long after that. More significantly, a mere utterance of an ethnic or racial remark that engenders offensive feelings in an employee does not sufficiently affect terms, conditions, or privileges of employment to constitute a violation of Title VII. See Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

Petitioner has failed to establish that there was anything more than the single comment regarding gender. Thus, Petitioner has failed to prove that this comment was sufficiently severe or pervasive as to alter a term of employment or create an abusive work environment. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

61. Finally, Petitioner's Charge of Discrimination alleges that after she was suspended, she complained that she was being treated differently than male employees and was ultimately terminated in retaliation. The McDonnell Douglass Corp. v. Green, supra, shifting burden of proof framework is applied in cases alleging retaliation. Goldsmith v. City of Atmore, 996 F.2d 1155, 1162-63 (11th Cir. 1993).

62. Petitioner offered no evidence expressly directed toward her retaliation claim. Petitioner's Proposed Recommended Order does not provide any meaningful argument or citation to the retaliation claim other than the mere assertion that she was retaliated against. Based on the Findings of Fact herein and applying the shifting burden framework described above, Petitioner has failed to establish that her termination was retaliatory or that her termination was motivated by discriminatory intent.

63. In summary, Petitioner has failed to carry her burden of proof that Respondent engaged in discrimination based upon gender or national origin toward Petitioner when it denied her the promotion to interim field supervisor or field supervisor. Petitioner has also failed to carry her burden of proof as to her allegations of disparate treatment in the workplace or of wrongful termination resulting from retaliation. Petitioner's speculation and personal belief concerning the motives of Respondent are not sufficient to establish intentional discrimination. See Lizaro v. Denny's, Inc. 270 F.3d 94, 104 (2d Cir. 2001). ("Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude it must have been related to their race. This is not sufficient.")

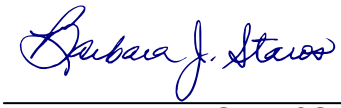
RECOMMENDATION

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 Charge of Discrimination and Petition for Relief.

DONE AND ENTERED this 27th day of July, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of July, 2004.

ENDNOTES

[1/] The record is unclear as to whether Ms. Brooks' deposition had been taken prior to the hearing. In any event, the undersigned was never given possession of a transcript of any deposition of Ms. Brooks.

[2/] Petitioner's testimony differed somewhat from her resume in describing her college degree. Her resume states that she has a bachelor of science in agriculture and that she completed more than 40 hours in agriculture and animal science courses with a concentration in animal production and agricultural management courses. At hearing, Petitioner testified that she had a bachelor of science with a major in animal science. In any event, having a college degree was not a requirement for the job.

[3/] In her Proposed Recommended Order, Petitioner questions Ms. Lefkowitz' credibility suggesting that "motive is clearly an issue." This suggestion is based on Mr. Burris' testimony that on the day of the hearing, he was an applicant with Respondent for the position of director of Animal Services. Because Mr. Burris could again be her supervisor and because they were friends, her testimony was suspect. Having considered the

testimony presented and the demeanor of the witnesses, this suggestion has been considered and is rejected.

[4/] Dr. Caligiuri did not testify. However, his statement to Petitioner is admissible pursuant to Section 90.803(18)(d) of the Evidence Code as an admission by a party's agent. Mr. Mangum's testimony regarding this comment is consistent with Petitioner's and, therefore, supplements or explains Petitioner's testimony in this regard. See § 120.57(1)(c), Fla. Stat. (2003).

[5/] FCHR and Florida courts have determined that federal discrimination law should be used as a guidance when construing provisions of Section 760.10, Florida Statutes (2003). See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

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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.