STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHRISTINE N. MONKHOUSE,

Petitioner,

vs. Case No. 16-6583

DAVITA HEALTHCARE PARTNERS, INC.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 22, 2017, in Deland, Florida, and on March 15, 2017, by telephone conference in Tallahassee and Deland, Florida, before Suzanne Van Wyk, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Christine N. Monkhouse, pro se
1512 Clapton Drive
Deland, Florida 32720

For Respondent: Gretchen Maria Lehman, Esquire
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STATEMENT OF THE ISSUE

Whether Davita Healthcare Partners, Inc., is liable to Petitioner for employment discrimination based on race in violation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

Petitioner, Christine N. Monkhouse, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) on March 18, 2016, alleging that her employer, Davita Healthcare Partners, Inc., discriminated against her on the basis of her race when Petitioner was given a final written warning on February 1, 2016. The allegations were investigated, and on October 5, 2016, FCHR issued its Determination of No Cause (Determination).

On November 5, 2016, Petitioner filed a Petition for Relief requesting an administrative hearing regarding FCHR's Determination pursuant to section 760.11(7), Florida Statutes.[1/]

The matter was referred to the Division of Administrative Hearings on November 10, 2016, for assignment of an Administrative Law Judge to conduct a final hearing. The final hearing was initially scheduled to commence on January 18, 2017, but was subsequently rescheduled to, and convened on, February 22, 2017.

At the final hearing, Petitioner testified on her own behalf and offered the testimony of Pamela Maniec. Petitioner's Exhibits LL, W1, W2, and W3 were admitted in evidence.[2/]

Respondent presented the testimony of Fluerette Dakin-Davis, Kelly Jacobs, Karen Corn, and Sharon Alpizar. Respondent's Exhibits R1, R2, R4, R6, R8 through R16, and R20 through R22 were admitted in evidence.

A three-volume Transcript of the final hearing was filed on April 3, 2017. Both parties timely filed Proposed Recommended Orders which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, Davita Health Care Partners, Inc. (Davita), is a subsidiary of Total Renal Laboratory, which treats patients with end-stage renal disease who require kidney dialysis treatment. Davita processes lab specimens for patients receiving kidney dialysis services. Processing lab specimens involves performing laboratory tests on the tissue, blood, and other specimens taken from patients.

2. Petitioner, who is African-American, has been employed by Davita since July 2007. Petitioner's current position is Compliance Specialist in the Compliance Department, which she has held since March 2016.

3. Petitioner previously held the position of Payer Rules Specialist II within the Payer Rules team in Patient Accounting.[3/]

4. The general job description of the Payer Rules Specialist II was to ensure that Davita was billing compliantly based on the payer's rules and regulations.

5. The Payer Rules team consisted of four teammates, Petitioner, Pamela Maniec, and two additional employees.

6. Ms. Maniec held the position of Payer Rules Specialist III and became the "team lead" in mid-2015. As team lead, Ms. Maniec was responsible to assign, and oversee completion of, tasks for the other teammates.

7. The Payer Rules team was responsible for ensuring the accuracy of certain information on which Davita bases its patient billing. For example, government payers, such as Medicare, issue bulletins specifying what types of tests will be covered and how frequently the tests may be ordered. If Davita issued bills to Medicare patients charging for tests which were not covered, or tests that had been ordered too frequently, Medicare would deny the claim and Davita would not be paid. Moreover, frequent billing errors may result in investigations of Davita by government payers.

8. The Payer Rules team was responsible to ensure that the current version of government-payer rules was updated in Davita's billing system.

9. For Medicare billings, two sets of rules are most critical: National Coverage Determinations (NCDs), which specify covered tests from Federal Medicare; and Local Coverage Determinations (LCDs), which track state-specific rules governing covered tests. NCDs and LCDs are published quarterly by the Centers for Medicare and Medicaid Services (CMS) and are available for download through the CMS website. The Payer Rules team was charged with the responsibility to review NCDs and LCDs quarterly and upload any changes to the Davita billing system.

10. The Payer Rules team was also responsible for uploading changes in the "CodeMap medical necessity" database to the Davita billing system. The Codemap database contains a list of testing procedures which may only be performed with specific associated diagnoses. The team was responsible for reviewing the quarterly CodeMap updates and uploading the data to the Davita billing system.

11. Finally, the Payer Rules team was responsible for Correct Coding Initiatives updates, or CCIs. CCIs are published by CMS within days of the quarterly NCDs and LCDs, and "edit" the information in those publications related to what types of test can and cannot be billed together.

Q4 2015 CodeMap Issue

12. Davita's Patient Accounting Supervisor is Fleurette Dakin-Davis, who is African-American and who supervises the Payer Rules team, including Petitioner.

13. In late December 2015, Karen Jacobs, Director of Patient Accounting, asked Ms. Dakin-Davis why the fourth quarter 2015 CodeMap file (Q4 2015), which had been received in late September, had not been uploaded to the Davita billing system. Ms. Dakin-Davis replied that she would look into it.

14. Ms. Dakin-Davis approached Ms. Maniec and inquired about the delay in uploading the Q4 2015. Ms. Maniec indicated she would ask the Petitioner what was taking so long.

15. Ms. Maniec asked Petitioner about the delay in the Q4 2015 update, and Petitioner explained she had not uploaded the Q4 2015 because of discrepancies between that file and recently-updated diagnosis codes known as the ICD-10.

16. On January 5, 2016, Ms. Maniec sent an email to Ms. Dakin-Davis, with copies to Ms. Jacobs and Karen Corn, the Patient Accounting Manager, relaying her conversation with Petitioner and Petitioner's explanation for the delay. In the email, Ms. Maniec's email noted, "This was an error on Christine's part."

17. On January 12, 2016, Ms. Dakin-Davis and Ms. Corn met with Petitioner and discussed the error in not uploading the

Q4 2015, the potential impact the error had on patient billing, and the expectations going forward. Ms. Dakin-Davis described this "discussion" with Petitioner as a "verbal warning."

18. That same date, Ms. Dakin-Davis completed a corrective action form, providing written documentation of Petitioner's verbal warning for failing to timely upload the Q4 2015. In the section titled "Expectations Moving Forward," Ms. Dakin-Davis noted, as follows:

> It is expected that the medical necessity file will be updated within the first two weeks of file receipt.
>
> It is expected that if you are unable to perform a task due to other priorities, that this is communicated to both the team lead and supervisor.

19. The following day, January 13, 2016, Ms. Corn sent the following email to Petitioner, copying Ms. Dakin-Davis and Ms. Maniec:

> Christine--per our conversation yesterday afternoon new goals were established for 2 processes you are responsible for and are listed below. The goals will ensure we have reviewed and submitted any applicable changes in a timely manner. This will prevent any future misses for these updates on our team.
>
> - **NCD/LCD & LMRP review and update:** The LMRP file will be saved on the network and an email will be sent to Christine on a quarterly basis when the file is available. Christine will pull the NCD/LCD list directly from CMS.
> **GOAL:** The LMRP & NCD/LCD's will be reviewed, edits suggested, a QA performed and final

edits suggested within the first 2 weeks after the file is available.

- **NCCI Edits:** NCCI edits are published within the last several days of a Qtr. up until the first few days of every new Qtr. Christine will pull the updated list directly from CMS on a quarterly basis.
  GOAL: NCCI edits will be reviewed, edits suggested, a QA performed and final edits completed by the 7th calendar day of every new quarter.
  If you are unable to meet the goals specified due to other priorities, it is expected you communicate this with both the team lead and Supervisor prior to the due date.

  Although the payer bulletins may be reallocated to compliance at a later date, I will be setting up some time to further discuss this process. If we currently do not have one, we will need to establish a schedule to ensure these are being reviewed and actions are taken timely.

20. Davita procedure does not require that the employee be given a copy of, or even sign, a documented "verbal warning." Petitioner was not provided a copy of the January 12, 2016, verbal warning. At final hearing, Petitioner testified that she was unaware of the written verbal warning until that document was revealed during the FCHR investigation of her Charge of Discrimination.

21. The written verbal warning was not placed in Petitioner's human resources file. This documentation of the verbal warning was placed only in the manager's file.

22. Petitioner received no suspension, demotion, reduction in pay, or change in job duties based on the written verbal warning.

January CCI Edit Error

23. On January 20, 2016, Susan McNeice, an employee in a different team, brought to Ms. Maniec's attention some denials of Medicare claims which appeared to be a CCI edit issue. Ms. McNeice asked Ms. Maniec to review the system data to determine the source of the error.

24. Ms. Maniec reviewed the edits in the system and could not find any discrepancy. She then brought the denial to Petitioner's attention and requested Petitioner to review the text file she would have uploaded for the prior quarter. After her review, Petitioner told Ms. Maniec that she had uploaded the wrong file into the Davita billing system.

25. Ms. Maniec informed Petitioner she would have to report the error to Ms. Dakin-Davis. In response, Petitioner said to Ms. Maniec something to the effect of, "Don't open your mouth until I have looked at it more."

26. Petitioner does not deny asking Ms. Maniec to hold off on reporting the error to management, but testified that she only wanted the time to figure out how the error occurred and calculate the financial impact on billing prior to reporting the error.

27. Petitioner proceeded to investigate how the error occurred, as well as its impact on Davita's billings. At around 2:30 p.m. that day, Petitioner emailed Ms. Dakin-Davis, her supervisor, explaining that Ms. McNeice had brought some payer denials to the team's attention, and that she had investigated and discovered that the October 2015 CCI edit upload was incorrect. Further, Petitioner related that she had isolated the particular diagnosis codes affected and was running a query to determine how many incorrect bills were generated.

28. In her email, Petitioner stated, as follows:

> This appears to have happened by the 'duplicates' being uploaded instead of deleted from the file after the process file was complete for upload. The process calls for the duplicate to be removed.
>
> In order to prevent this from happening in the future an additional QA step was added to the process for the file to be QA after upload.

29. In response to Petitioner's email, Ms. Dakin-Davis wrote, "The current P&P states that once the data is uploaded, a QA of the upload is supposed to be done. What additional QA are you referring to?" In reply, Petitioner wrote, "We normally QA prior to upload. I'll double check the P&P."

30. The "P&P" is a reference to Davita Policy PAP 1006: CCI Edits. The purpose of the policy is to "Maintain the most current CMS CCI edits for accurate billing. Ensure compliance

with all federal billing guidelines." The Policy sets out the procedural steps for downloading CCI edits from the CMS website, manipulating the data, saving it as a text file, and uploading it to the Davita billing system.

31. The final step in the process is to "[p]erform a quality check on the newly updated data confirming accurate uploading."

32. Petitioner is the author of PAP 1006, which she created in 2013.

33. Ms. Dakin-Davis was justifiably surprised at Petitioner's apparent unfamiliarity with the post-upload QA requirement. It is easy to understand how Petitioner's suggestion that a post-upload QA step be added to the P&P could be seen as an effort to conceal her error.

34. Ms. Maniec reported the error to Ms. Dakin-Davis in her office following lunch. Ms. Dakin-Davis instructed Ms. Maniec to document the issue, which Ms. Maniec did by email to Ms. Dakin-Davis the following day, January 21, 2016. Ms. Dakin-Davis forwarded Ms. Maniec's email to Ms. Jacobs.

35. Ms. Jacobs and Ms. Dakin-Davis met with Petitioner that same day and confronted her about the statement, "Don't open your mouth until I look at it further," that she had made to Ms. Maniec. Ms. Jacobs and Ms. Dakin-Davis construed this statement as an effort by Petitioner to conceal her CCI edit

error. Ms. Jacobs counseled Petitioner about appropriate language to be used with other teammates, as well as the importance of reporting any error, no matter the dollar amount, to the Director.

36. On February 1, 2016, Ms. Corn issued Petitioner a Final Written Warning regarding the incident, using the company's Universal Corrective Action Form. The following description of the incident is particularly relevant:

> 1/20/2016 - [I]t was discovered via another team receiving denials that the CCI edit changes that were made in October 2015 were incorrect. The changes to the CCI edits are the responsibility of Christine to complete and QA once the changes are made to the [Accounts Receivable] AR system. The team lead discovered the error and went to Christine to review her process as the data was incorrect in the AR system. Christine's reply to the team lead was "don't open your mouth until I have looked at it more." The lead's reply was that these type of errors effect appropriate billing and will be reported immediately to the leadership team.
>
> The Supervisor was made aware of the issue by the team that receives the denials, Supervisor questioned Christine about the error and why the final QA was not performed on the data that is part of the formal policy and procedure. Christine's reply was that she was not aware a final QA was expected. Supervisor pushed back as Christine was the teammate that wrote the P&P detailing a final QA is expected.
>
> 1/21/2016 - Director of [Patient Accounting] and Supervisor had a verbal conversation with Christine in regards to her comment "don't open your mouth until I have looked at it

more." Director asked Christine if she ever made that comment to the team lead. She stated that she cannot confirm that she used those exact words and meant that she wanted to identify the dollar impact before it should be shared. Director counseled her on being aware of her language when she communicates to other teammates.

Director also informed Christine that regardless of the dollar amount of an error, she, Director, should be informed of any error that pertains to billing. The expectation is for Christine to be transparent and disclose immediately when an issue is identified.

37. In the section of the Corrective Action Form titled "Expectations Moving Forward," Ms. Corn noted:

Immediately and on a sustained basis it is our expectation that you perform your job duties at a satisfactory level to include the following:

It is expected that all tasks assigned to Christine are completed within the appropriate time frame and the policy and procedure for each is followed.

It is expected that if you are unable to perform a task due to other priorities, that this is communicated to both the team lead and supervisor.

It is expected that Christine demonstrate our core value of integrity and immediately disclose an issue when it is identified. Going forward, any behaviors not demonstrating our core values, and most specifically integrity, will not be tolerated.

In addition, it is our expectation that you adhere to all Davita Policies, Procedures and Guidelines and exemplify the Core Values.

38. Ms. Corn presented the Final Written Warning to Petitioner in her office with Ms. Dakin-Davis present. Petitioner refused to sign the acknowledgment section of the corrective action.

39. Neither party introduced Davita's disciplinary policy into evidence. There is enough record evidence to find that Davita follows a progressive discipline program. There is no reliable record evidence of the effect on an employee's status based on issuance of a final written warning.[4/]

40. Petitioner received no change in job duties or salary, demotion, or suspension, based on the final written warning. Petitioner received a merit pay increase in 2016 following the issuance of the final written warning. Petitioner speculated that her pay increase would have been higher without the final written warning on her record.

Responsibility for the Errors

41. Petitioner's case centers on her argument that both Petitioner and Ms. Maniec, who is Caucasian, were equally responsible for the Q4 2015 upload and the CCI edits, but only Petitioner was disciplined for the errors. Petitioner maintains that she was selectively disciplined based upon her race.

42. Ms. Maniec is the Payer Rules team lead, responsible for assigning and overseeing tasks of the Payer Rules teammates.

43. With regard to the Q4 2015, Petitioner argued that she and Ms. Maniec had agreed not to upload the Q4 2015 because of conflicts with the diagnosis codes in the ICD 10, which would be corrected by the next quarterly update. Ms. Maniec denied that she had ever agreed to hold off on uploading the Q4 2015. Neither Petitioner nor Ms. Maniec had authority to decide not to upload the Q4 2015. That is a decision that would have had to be made by management.

44. Ms. Maniec testified, credibly, that her responsibility with both the Q4 2015 and the CCI edits was quality assurance, not initial data download and manipulation.

45. Petitioner's testimony that she and Ms. Maniec had agreed together not to upload the Q4 2015 was simply not credible.

46. Petitioner had the responsibility to perform the Q4 2015 update and failed to do so.

47. With respect to the CCI edits, Ms. Maniec was responsible to perform a QA check of the data file following Petitioner's manipulations, but prior to the upload.

48. On October 6, 2015, Petitioner emailed Ms. Maniec, "I have completed the October 2015 NCCI edits for upload, can you please QA." Petitioner attached a file titled "NCCI New/October 2015."

49. On October 13, 2015, Ms. Maniec replied, "I have QA'd the data and agree with your findings. The file is ready for upload."

50. That same day, Petitioner replied, "Upload is complete. See you next quarter."

51. PAP 1006 requires a final QA to be performed on the "newly updated data confirming accurate uploading." Petitioner did not refute testimony that the final QA on the uploaded data was Petitioner's responsibility.

52. Petitioner did not prove that Ms. Maniec was responsible for QA of the final uploaded data, or that Ms. Maniec was otherwise responsible for the CCI edit error that created the incorrect billings.

53. Petitioner did not perform the final QA, even though she authored the policy requiring it. Furthermore, when confronted with the error, Petitioner suggested that she was adding a final QA step to the process to prevent similar errors in the future. Ms. Dakin-Davis' met this suggestion as suspect given Petitioner's familiarity with the policy.

Petitioner's Transfer

54. In March 2016, Davita dissolved the Payer Rules team for reasons unrelated to the instant case. Each of the Payer Rules teammates was allowed to transfer to another position with Davita.

55. Petitioner transferred to the Compliance Department in her current position of Compliance Specialist.

CONCLUSIONS OF LAW

56. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569 and 120.57(1), Florida Statutes.

57. The Florida Civil Rights Act of 1992 ("FCRA") prohibits discrimination in the workplace. Among other things, FCRA makes it unlawful for an employer:

> To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

§ 760.10(1)(b), Fla. Stat.

58. Florida's chapter 760 is patterned after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting chapter 760. Valenzuela v. Globe Ground N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009).

59. Petitioner claims she was discriminated against by Davita based on her race (African-American) in violation of FCRA.

Specifically, Petitioner alleges that race was a motivating factor in Respondent's decision to discipline Petitioner.

60. Section 760.11(7) permits a party who receives a no cause determination to request a formal administrative hearing before the Division of Administrative Hearings. "If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." Id.

61. Petitioner claims disparate treatment (as opposed to disparate impact) under the FCRA; in other words, she claims she was treated differently because of her race. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against her. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

62. A party may prove unlawful race discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631, (M.D. Fla. May 27, 2009); 2009 U.S. Dist. LEXIS 44885 (M.D. Fla. 2009). When a petitioner alleges disparate treatment under the FCRA, the petitioner must prove that her race "actually motivated the employer's decision. That is, the [petitioner's race] 'must have actually played a role [in the employer's decision making] process and had a

determinative influence on the outcome.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (alteration in original).

63. Direct evidence is evidence that, "if believed, proves [the] existence of [a] fact in issue without inference or presumption." Burrell v. Bd. of Trs. of Ga. Mil. Coll., 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

64. The record in this case did not establish unlawful race discrimination by direct evidence.

65. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC, supra. Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

66. Accordingly, Petitioner must prove discrimination by indirect or circumstantial evidence under the McDonnell Douglas framework. Petitioner must first establish a prima facie case by showing: (1) she is a member of a protected class; (2) she was qualified for the position held; (3) she was subjected to an adverse employment action; and (4) other similarly-situated employees, who are not members of the protected group, were treated more favorably than Petitioner. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "When comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (l1th Cir. 2004).

67. Thus, in order to establish a prima facie case of disparate treatment based on race, Petitioner must show that Davita treated similarly situated non-African-American employees differently or less severely. Valdes v. Miami-Dade Coll., 463 Fed. Appx. 843, 845 (11th Cir. 2012); Camara v. Brinker Int'l, 161 Fed. Appx. 893 (11th Cir. 2006).

68. The Findings of Fact here are not sufficient to establish a prima facie case of discrimination based on race. Petitioner did establish the first two elements: she is a member of a protected class--African-American--and she was qualified for the position of Payer Rules Specialist II.

However, Petitioner did not establish the third element--that she suffered an adverse employment action.

69. "Not all conduct by an employer negatively affecting an employee constitutes adverse employment action." Davis v. Town of Lake Park Fla., 245 F. 3d 1232, 1238 (11th Cir. 2001)(Plaintiff, who received one oral reprimand, one written reprimand, the withholding of a bank key, and a restriction on cashing non-account-holder checks, did not suffer an adverse employment action). "The asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff's employment." Id. at 1239. An employee is required to show a "serious and material change in the terms, conditions, or privileges of employment." Id.

70. In this case, the record does not support a finding that Petitioner suffered an adverse employment action. Neither the verbal warning nor the final written warning had any tangible effect on Petitioner's employment. Neither action resulted in her termination, demotion, suspension, a reduction in pay, or a change in job duties. Despite the final written warning, Petitioner received a merit pay increase in 2016. While Petitioner speculated that she would have been eligible for a greater pay increase without the final written warning, such speculation is insufficient to establish a tangible adverse effect on Petitioner's employment. See Barnett v. Athens Reg'l

Med. Ctr., 2013 U.S. App. LEXIS 248677 (11th Cir. Dec. 16, 2013)(Although Plaintiff speculated that his written reprimands and negative performance reviews might have been used by his employer as grounds for future adverse employment action, he did not establish that they actually led to any tangible effect on his employment).

71. The fact that the final written warning was a step in Davita's progressive disciplinary policy was also an insufficient basis to conclude that it constituted an adverse employment action. See Barnett, 2013 U.S. App. LEXIS 24867 *5-6 (Plaintiff's argument that the written reprimands and the negative performance evaluation were steps in the employer's progressive disciplinary policy, which could have led to harsher disciplinary action, was insufficient to establish an adverse employment action.) The Petitioner must establish that the actions actually led to any tangible effect on his or her employment. Id.

72. Assuming, arguendo, that either the verbal or final written warning did constitute an adverse employment action, Petitioner still failed to establish a prima facie case because she did not establish that similarly-situated employees outside of her protected class were treated more favorably.

73. Petitioner presented evidence attempting to show that Davita treated Caucasian team lead Ms. Maniec more favorably

than it did her when the error in uploading the CCI edits came to light. To be a proper comparator, Ms. Maniec's conduct must have been "nearly identical" to Petitioner's. Vickers v. Hyundai Motor Mfg. Ala., LLC, 2016 U.S. App. LEXIS 6741 (11th Cir. Apr. 14, 2016); and Stone & Webster Constr., Inc. v. U.S. Dep't of Labor, 684 F.3d 1127, 1134-35 (11th Cir. 2012). This requirement prevents courts from "second-guessing employers' reasonable decisions and confusing apples with oranges." Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

74. The evidence shows that Ms. Maniec's conduct was not at all similar to Petitioner's. First, Petitioner's contention that the two employees were equally responsible for the CCI edit error was unsupported by the record evidence. Petitioner was responsible to download the edits from CMS and manipulate the data to remove duplicates and edit incorrect diagnostic codes, which she did. Ms. Maniec was responsible to QA the data prior to upload to ensure accuracy, which she did. Petitioner was clearly responsible to perform the post-upload QA, which she failed to do. The employees' actions were not at all similar--only Petitioner failed to perform her duty with regard to the CCI edit.

75. Further, Petitioner's behavior when confronted with the error was significantly different from Ms. Maniec's. While Ms. Maniec recognized the responsibility to immediately report

the error to management to prevent further erroneous billing, Petitioner wanted to wait until she had the details of the fiscal impact prior to reporting. The record is clear that Petitioner's discipline was related more to her attempt to conceal the error than the commission of the error itself. Thus, Ms. Maniec's behavior was diametrically opposed to Petitioner's since Ms. Maniec did not engage in any effort to delay reporting the error to management.

76. In short, Ms. Maniec was not a proper comparator, and Petitioner fell short of establishing her prima facie case. See Robinson v. Colquitt EMC, 2016 U.S. App. LEXIS 10040 (11th Cir. June 2, 2016) (summary judgment for the employer affirmed in race discrimination action where the plaintiff failed to present sufficient evidence of a proper comparator).

77. Even assuming, arguendo, that Petitioner established a prima facie case of discrimination, Respondent presented persuasive documentary and testimonial evidence that it disciplined Petitioner because of its reasonable belief she had exhibited a lack of integrity in failing to disclose the CCI edit error immediately, and that she engaged in unprofessional conduct when she instructed Ms. Maniec to do the same. As such, Davita has met its burden to establish legitimate, non-discriminatory business reasons for its decision to discipline Petitioner.

78. Petitioner did not present any credible evidence that Respondent's reason for disciplining her was a pretext for discrimination. Petitioner expressed her belief that her discipline was unfair because it was based upon facts with which she disagreed, but disagreement with the employer's decision falls short of the showing necessary to establish pretext. Chambers v. Walt Disney World Co., 132 F. Supp. 2d 1356, 1366 (M.D. Fla. 2001). Courts "do not sit as a super-personnel department that examines an entity's business decisions." Chapman v. AI Transport, 229 F.3d 1012, 1033 (11th Cir. 2000) (en banc) (citations omitted).

79. "The ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [employee] remains at all times with the [employee]." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. at 253. In this case, Petitioner failed to meet her burden.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief from an Unlawful Employment Practice filed against Respondent.

DONE AND ENTERED this 16th day of May, 2017, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 2017.

ENDNOTES

[1/] All references to the Florida Statutes are to the 2016 version, unless otherwise noted herein.

[2/] The balance of Petitioner's exhibits were excluded because she did not comply with the undersigned's Order of Pre-hearing Instructions which directed the parties to exchange, no later than seven days before the final hearing, copies of all documents which they intended to offer as exhibits. As of the date of final hearing, Petitioner had not disclosed to Respondent any documents she intended to offer as exhibits.

[3/] Davita eliminated the Payer Rules team in March 2016, thus the past tense is used in reference to the team.

[4/] Petitioner testified that, due to the final written warning, she was ineligible for the bonus pool in 2016 and unable to apply for a transfer to a new position for six months. However, Petitioner's knowledge was based solely on what she read or was told through the Davita personnel system. Petitioner's hearsay testimony was not corroborated by any non-hearsay evidence.

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.