STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARTHA J. FREEMAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-3893
	)	
PHOENIX TRANSPORT & SERVICES, INC.,	)	
	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for formal proceeding and hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, pursuant to notice setting the cause for hearing on June 17, 2002, in Orlando, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Martha J. Freeman, pro se
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Floral City, Florida 34436

For Respondent: William J. Denius, Esquire
Killgore, Pearlman, Stamp,
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Orlando, Florida 32802-1913

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Petitioner was unlawfully discriminated against on

the basis of her sex in violation of the provisions of Chapter 760, Florida Statutes, cited below.

PRELIMINARY STATEMENT

This cause arose upon the filing of a charge of discrimination by the Petitioner with the Florida Commission on Human Relations (Commission). The charges were filed November 25, 1998, and after more than 180 days elapsed the Petitioner filed an Election to Withdraw the Charge and file a Petition for Relief to proceed with an administrative hearing, as provided for in Section 760.11(4)(b), and (8), Florida Statutes, thus electing to proceed to the Division of Administrative Hearings to advance her cause.

The case was transmitted to the Division of Administrative Hearings and ultimately assigned to the undersigned Administrative Law Judge. The cause came on for hearing as noticed and at the hearing the Petitioner called witness Gary Green and herself as her witnesses. She moved 11 exhibits and had 11 exhibits admitted into evidence at the hearing. The Respondent, Phoenix Transport and Services, Inc. (Phoenix) called as witnesses Andrea H. White, Gary Green and Ernest D. English. Phoenix moved and had admitted 16 exhibits into evidence. Upon conclusion of the proceedings the parties ordered a transcript thereof which was duly filed with the Division of Administrative Hearings and the parties timely

submitted Proposed Recommended Orders which have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. Phoenix is a female-owned and managed company, engaged solely in contract carriage of mail for the United States Postal Service (USPS). Phoenix contracts with the USPS based upon a schedule. Phoenix guarantees the operation of the contract in accordance with the published schedule, including a time schedule. All drivers are required to meet the scheduled requirements of the portion of the contract they are operating. It is considered a "loss of service" under this contract if a driver fails to arrive and pick-up the mail shipment for a particular day or time on the schedule. A loss of service is extremely critical to the company because it can result in a loss of the contract which would be potentially fatal to the company's continued existence. Consequently, under the company's written policy, distributed in a handbook to the employees, including the Petitioner, a loss of service due to driver error or negligence is considered grounds for immediate dismissal.

2. The Petitioner, Martha Freeman, was employed by Phoenix as a USPS mail transporter or truck driver from February 4, 1997, through December 18, 1997. Shortly after beginning employment with Phoenix, the Petitioner hit a stationary object

while operating one of Phoenix's vehicles in a terminal area. On April 17, 1997, in accordance with its written policy, Phoenix sent the Petitioner a letter enclosing invoices for damage to her truck, number 1539. The damage had been caused by the Petitioner and the letter informed the Petitioner that the Phoenix company policy provides that in cases of driver error the driver is responsible for the cost of repair. The letter informed the Petitioner that the total cost of the damages was $405.23. Phoenix requested that the Petitioner execute an authorization form allowing Phoenix to deduct $50.00 per pay period for the purpose of reimbursing Phoenix for the damages to the truck. The Petitioner executed that authorization.

3. The authorization was executed in accordance with Phoenix's policy handbook which states: "Damage to Phoenix vehicles due to the inefficiency, negligence or deliberate intentions of the driver will be the driver's financial responsibility," and that Phoenix "will not tolerate such actions as hitting a stationary object."

4. On March 20, 1997, the Petitioner signed a policy handbook receipt verification in which the Petitioner states that she received, read and understands the policy set forth in the policy handbook.

5. The policy set forth in the policy handbook, including the policy for damages caused to company vehicles by company

employees, have always been enforced equally among male and female employees. The Petitioner, in fact, was treated no differently than male co-workers in instances involving damage to company vehicles. Specifically, on June 12, 1997, November 13, 1997, and May 4, 1998, Phoenix sent letters to the Petitioner's male co-workers Ron Austin, James Long, and Lewis Rabun, citing those employees for damages caused to company vehicles by those employees and informing them that they would be held accountable and responsible for such damages.

6. On August 12, 1997, the Petitioner was placed on a two-day suspension without pay and on a 30-day probation period for failure to follow company maintenance procedures. Specifically, she failed to maintain the company vehicle she was using to transport mail. The policy handbook provides that failure to have a vehicle repaired or serviced as instructed is an infraction subject to three days' suspension without pay.

7. On December 16 and 17, 1997, the Petitioner failed to make scheduled mail runs resulting in a loss of service under the terms of the contract. Because of this the Petitioner was terminated from employment.

8. The Phoenix policy handbook provides that a failure to make a scheduled run, resulting in a loss of service, is an infraction subjecting an employee to immediate dismissal. The policy handbook specifically provides:

> A loss of service occurs when the scheduled contractor does not make the scheduled run and the mail is either moved by another contractor, or by the USPS. This infraction is highly detrimental to the integrity of the contract and may, in fact, cause the contract to be pulled. Phoenix employees are expected to do everything within their power to avoid a loss of service. A loss of service due to driver error or negligence is subject to immediate dismissal.

9. The Petitioner did not present any evidence that the misconduct for which she was terminated, specifically her failure to make scheduled runs on the days in question, which resulted in losses of service, was similar too or identical to conduct engaged in by any other employee who had not been discharged.

10. On November 25, 1998, the Petitioner filed a Charge of Discrimination with the Commission. In the charge, the Petitioner alleged that (1) she was not treated the same as male co-workers by her Supervisor, Ernie Craig; (2) that she was asked sexually related questions by Ernie Craig; (3) that Ernie Craig made her pay for things that happened under normal circumstances for which he did not make male employees make payment; (4) that Ernie Craig spoke to her in a hateful, angry manner and did not talk to male employees in the same manner; (5) that Ernie Craig was told about a co-worker who "stalked" her and that he made fun of her, made light of the incident, and never reported the incident; (6) that Ernie Craig made her lose

two days of work and put her on 30 days' probation concerning a phone conversation; and (7) that she was fired when she asked Ernie Craig to stop yelling at her.

11. The Petitioner claims that her Supervisor, Ernie Craig, asked her on one occasion if she was celibate and also attempted to kiss her on one occasion. She also claims that a co-worker, James King, used an expletive and made an offensive gesture toward her on one occasion and that Ernie Craig and co-workers Gary Green and Ernie English joked about the incident in the Petitioner's presence.

12. The testimony of Gary Green, Ernie English, and Andrea White (owner), shows that Ernie Craig did not treat the Petitioner any differently than he did other employees, in terms of discipline, nor by making her pay for things that he did not make male employees pay for. The evidence does not show that Ernie Craig was ever told about any co-worker who allegedly stalked the Petitioner and none of the employees who testified were aware of any stalking incident involving the Petitioner. Indeed, the Petitioner did not have a great deal of contact with Mr. Craig at work. The Petitioner did not see him very much on a day-to-day basis nor speak to him on the phone on frequent occasions either. The evidence shows that the Petitioner was able to perform her job properly during the entire time she was employed by Phoenix.

13. Ernie Craig never physically touched the Petitioner according to the preponderant weight of the evidence. The alleged conduct constituting the Petitioner's claim of discrimination was related to a hostile work environment even according to the Petitioner's testimony, just verbal in nature. The Petitioner never reported any of her discrimination claims, later contained within the Charge of Discrimination, to anyone at Phoenix.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes (2001).

15. The claims of discrimination filed in this case can be categorized as hostile work environment; disparate treatment; or discriminatory discharge claims. Specifically the Petitioner's claim that Mr. Craig asked her sexual questions and that he was told about a co-worker who stalked her appear to be hostile work environment claims. Further the Petitioner's claim that she was not treated in the same manner as her male co-workers and that Mr. Craig made her pay for things that he did not make the men pay for and talked to the Petitioner in a hateful manner, appear to constitute disparate treatment claims. Finally, although the Petitioner claimed that she was fired because she asked Mr. Craig to stop yelling at her, the Petitioner appears to make a

claim for discriminatory discharge. These claims must fail, however, for the reasons delineated below.

Hostile Work Environment

16. Sexual harassment involving a "hostile work environment" is based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive so as to create a hostile work environment." Colon v. Environmental Technologies, Inc., 15 Fla. L. Weekly Fed. D34 (M.D. Fla. November 5, 2001)(citing Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 751 (1998)). In order to establish a prima facie showing of a hostile environment involving sexual harassment, a plaintiff must show: (1) that she belongs to a protected group; (2) that she has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors and other conduct of a sexual nature; (3) that the harassment complained of was based upon sex; (4) that the harassment was sufficiently severe or pervasive as to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. Colon; Gupta v. Board of Regents, 212 F.2d 571, 582 (11th Cir. 2000)(citing Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999)).

17. In order to prevail in a sexual harassment action of this nature the Eleventh Circuit requires a Petitioner to demonstrate that "but for the fact of her sex, she would not have been the object of harassment." Colon (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). Further, "personal animosity is not the equivalent of sexual discrimination and is not proscribed by Title VII . . .[T]he plaintiff cannot turn a personal feud into a sex discrimination case." Colon (citing McCollum v. Bolger, 794 F.2d 602, 610 (11th Cir. 1986)). In short, Title VII is not a shield against harsh treatment in the work place. Id.

18. In order to prevail on a hostile work environment claim a plaintiff (petitioner) must also show that any abuse she allegedly suffered was so severe and pervasive as to alter the terms, conditions, or privileges of employment. Colon. Conduct must be extreme to amount to a change in terms and conditions of employment, within the context of the anti-discrimination provisions of Title VII. Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998). The court must assess whether the alleged harassment is offensive on both subjective and objective levels. Colon. Harassment is subjectively offensive when the victim in fact perceived the harassment to be hostile or abusive. Id. Harassment is objectively offensive when a reasonable person would have found the alleged harassment

hostile and abusive. Id. In determining whether the conduct at issue is objectively severe and pervasive, the court must look at the "totality of the circumstances." Id. The Supreme Court has established the following factors for evaluating the totality of the circumstances: (1) the frequency of discriminatory conduct; (2) the severity of the discrimination; (3) whether the conduct is physically threatening or humiliating or a mere utterance; and (4) whether the conduct unreasonably interferes with the plaintiff's performance at work. Id. (Citing Faragher v. City of Boca Raton, 524 U.S. 775 (1998)). These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code. Faragher. Properly applied, these standards filter out complaints attacking the ordinary tribulations of the work place, such as the sporadic use of abusive language, gender-related jokes and occasional teasing. Faragher. In this case, the evidence demonstrates that Phoenix's conduct, or that of its supervisor and co-employees, was not so objectively offensive that a reasonable person would have found the alleged harassment hostile and abusive.

19. First, the Petitioner can point to only isolated incidents in support of her claims of discrimination. Even if the Petitioner were to claim that the conduct constituting her claims of discrimination occurred frequently, the Eleventh

Circuit has held that such frequent conduct does not constitute actionable sexual harassment. Colon (offensive utterances occurring on a daily basis for three months was not objectively severe and pervasive)(citing Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999)).

20. Additionally, the Petitioner concedes that the conduct of Ernie Craig did not actually involve physical conduct or overt physical threats, if it occurred. Specifically, the Petitioner admits that Ernie Craig never physically touched her. She also admits, with respect to the claims contained within the charge of discrimination, that all of the conduct constituting those claims were verbal acts or words. Courts have rejected sexual harassment claims under circumstances where the harassment or alleged harassment involved a much greater degree of physical harm or intimidation. See, e.g., Colon (conduct not severe or pervasive where a co-work made offensive gestures and comments, called another co-worker a Mexican expletive that translates to "bitch," "whore," or "person paid for sex," called her stupid, grabbed his crotch, made an offensive hand gesture that signified the "f-word" and spit on the floor); Mendoza, 195 Fed.3d at 1245-52 (conduct not physically threatening nor severe where supervisor followed plaintiff constantly, staring her up and down, froze his gaze on the plaintiff's genital area and made a sniffing motion to two occasions and rubbed his right hip

against plaintiff's left hip and touched her shoulder); Shepard v. Comptroller of Public Accounts of Texas, 168 F.3d 871 (5th Cir. 1999), cert. denied, 120 S. Ct. 395 (1999)(holding that a series of "boorish and offensive" sexual remarks and attempts to look down the plaintiff's dress, coupled with repeated touching of plaintiff's arms over a period of more than a year, were insufficient to establish severe and pervasive element); Scott v. Pizza Hut of America, Inc., 92 F.Supp.2d 1320 (M.D. Fla. 2000)(granting summary judgment for employer in part because there was no evidence of physical contact with the plaintiff)(conduct not severe and pervasive where comments were made involving homosexual experiences and jokes implying that the plaintiff was a prostitute, co-workers used expletives throughout plaintiff's employment, and two co-workers called the plaintiff a "bitch" and told her that she was being bitchy because she does not get enough sex). In Weiss v. Coca-Cola Bottling Company, 990 F.2d 333 (7th Cir. 1993) the court held that a plaintiff's claims that a supervisor put his hand on her shoulder at least six times, placed "I Love You" signs in her work area, and tried to kiss her once at a bar and twice at work were not sufficient for actionable sexual harassment. In the instant situation the Petitioner has admitted that Phoenix's employees or supervisors' conduct did not involve actual physical contact or overt physical threats. There is no

evidence in this case that the conduct of Ernie Craig or other employees, if it occurred as described by the Petitioner, involved any actual physical contact or physical threats of a sexual nature or otherwise and there is no evidence from which this trier of fact could conclude that a reasonable person would believe that any such conduct created a threat of physical harm or intimidation.

21. Finally, the Petitioner admits that she was able to perform her job for the entire time that she was employed by Phoenix and that she never reported any of the claims contained in her Charge of Discrimination to anyone at Phoenix. There is no evidence to show that the management of Phoenix learned of them otherwise. Further, the Petitioner rarely ever saw Ernie Craig during the regular course of her duties at work. She did not speak to him on the phone with any frequency and recalled only three or four occasions when she talked to him by phone. A reasonable person, therefore, could not conclude that Phoenix unreasonably interfered with the Petitioner's work performance.

22. Accordingly, for the reasons delineated above a reasonable person simply could not conclude that the Respondent's conduct was sufficiently severe and pervasive so as to affect a term or condition of the Petitioner's employment. (Weighing all of the Petitioner's evidence against the four factors of the totality of the circumstances analysis referenced

above, a reasonable person could not conclude that the employer's conduct, if it occurred as described by Petitioner, was sufficiently severe and pervasive so as to affect a term or condition or her employment). Therefore, the claim for sexual harassment related to a hostile work environment must fail.

Disparate Treatment

23. In order to established a prima facie case involving disparate treatment, a female employee/petitioner must show: (1) that she is a member of a protected class; (2) that she was subjected to an adverse employment action; (3) that the employer treated similarly-situated male employees outside of the plaintiff's classification more favorably; and (4) that the plaintiff was qualified to perform her job. See Maniccia v. Brown, 171 F.3d 1364 (11th Cir. 1999). In this case, the Petitioner failed to present any evidence that Phoenix treated similarly-situated employees outside the Petitioner's classification more favorably. Contrarily, the evidence demonstrates that during the entire time the Petitioner was employed by the Respondent, she was treated exactly the same as her male co-workers by Ernie Craig and by all other Phoenix employees. Further, the policy set forth in the policy handbook, including Phoenix's policy for damages caused to company vehicles by company employees, have always been enforced equally among all Phoenix's employees. The Petitioner was

treated no differently than her male co-workers for damages caused to company vehicles and Phoenix never made the Petitioner pay for any damages that it did not make male employees pay for. Because the evidence demonstrates that Phoenix treated similarly-situated employees outside of the Petitioner's classification no differently than the Petitioner herself, the Petitioner's claims of disparate treatment must fail.

24. Further, in order to establish a prima facie case of disparate treatment based on wrongful termination, a petitioner must show that she was replaced by a person outside of the protected class. Delandro v. Jackson Memorial Hospital, 15 Fla. L. Weekly Fed. D14 (S.D. Fla. October 16, 2001). In this case the Petitioner did not present evidence that she was replaced by a person outside of her protected class. Therefore, the Petitioner's disparate treatment claims must fail for this reason as well.

Discriminatory Discharge

25. To establish a prima facie of discriminatory discharge, a petitioner must show: (1) that she was a member of a protected class; (2) that she was qualified for the job from which she was fired; and (3) the misconduct for which she was discharged was nearly identical to that engaged in by an employee outside the protected class who was retained. See Nix v. WCLY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir.

1984). In this case, the Petitioner failed to present any evidence that the misconduct for which she was discharged was nearly identical to that engaged in by an employee outside the protected class who was retained. This is especially true in light of the fact that the Petitioner was terminated for her failure to make two scheduled runs resulting in losses of service, an infraction subject to immediate dismissal. For these reasons, the Petitioner's discriminatory discharge claim fails.

26. Moreover, the Petitioner not only failed to establish the elements of a prima facie case of discrimination, but the Respondent articulated legitimate, non-discriminatory reasons for its challenged actions, as shown by the above Findings of Fact concerning the Petitioner's violating the employment policies referenced in the above Findings of Fact which justified discipline and termination, of which employment policy she had advance notice by receipt, and acknowledgment of receipt, of the employee policy manual. Specifically, the evidence shows that the Petitioner was treated no differently than any other Phoenix employees, including the Petitioner's male co-workers, and that the Petitioner was properly discharged for failing to show up for work on two consecutive occasions resulting in losses of service. Having articulated legitimate, non-discriminatory reasons for its challenged actions, the

burden then shifted to the Petitioner to demonstrate that the employers' proffered reasons for taking actions were actually a pretext for discrimination. Thomas v. Dade County Public Health Trust, 15 Fla.L. Weekly Fed. D1 (S.D. Fla. September 20, 2001). Further, the ultimate burden of persuasion remains with the Petitioner at all times. Texas Department of Community Affairs v. Burdine, 450 U.S. 278 (1981). Here the Petitioner failed to present any evidence that the adverse employment actions taken were pretextual. Indeed, the legitimate, non-discriminatory reason for the challenged employment action tends to be borne out as to its legitimacy when one considers that this employer actually employed female supervisory employees who supervised male employees, most notably in its Fort Myers operation, and, indeed, Debbie Baird was in a supervisory position from 1997 to 2001. Significantly, Ernie Craig recommended Debbie Baird for her promotion to "Regional Coordinator" for the company. Since there is a dearth of evidence that the alleged adverse employment actions taken against the Petitioner were pretextual then the Petitioner's claims must fail.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that the Petitioner's Charge of Discrimination and Petition against the Respondent Phoenix Transport & Services, Inc., be dismissed in its entirety.

DONE AND ENTERED this 5th day of September, 2002, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with Clerk of the
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this 5th day of September, 2002.

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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.