STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOROTHY J. McCRIMMON, Petitioner, vs. DAIMLERCHRYSLER CORPORATION, Respondent.	)	Case No. 02-3575

RECOMMENDED ORDER

A formal hearing was held before the Division of Administrative Hearings by Daniel M. Kilbride, Administrative Law Judge, on February 19 and March 14, 2003, in Orlando, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: Dorothy J. McCrimmon, pro se
5361 Commander Drive
Number 304
Orlando, Florida 32822

For Respondent: Stephanie L. Adler, Esquire
Susan K. McKenna, Esquire
Jackson Lewis LLP
390 North Orange Avenue, Suite 1285
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Petitioner was terminated from her position with Respondent as a picker/stock keeper on or about

September 26, 2001, on the basis of her race (African-American) and/or gender (female), in violation of Section 760.10(1)(a), Florida Statutes (2001).

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), charging Respondent with employment discrimination. On or about August 6, 2002, a determination was issued by the FCHR. On September 9, 2002, Petitioner filed a Petition for Relief with the FCHR and requested a formal hearing. This matter was subsequently referred by the FCHR to the Division of Administrative Hearings for a formal hearing de novo on September 13, 2002, and this matter was set for hearing. Upon counsel for Respondent filing a notice of appearance and a motion to continue, the formal hearing was rescheduled and discovery commenced. Following discovery, a formal hearing was commenced on February 19, 2003.

At the hearing, Petitioner appeared pro se and advised the Administrative Law Judge that she had requested that several people appear at the hearing as her witnesses, but she had not served them with subpoenas because they stated that they would appear voluntarily. However, only one of those persons appeared and testified. One other witness was served with a subpoena but did not appear. The Administrative Law Judge ruled that the

hearing would proceed, but that Petitioner could seek to keep the record open in order to obtain the testimony of the subpoenaed witness, James Swift, at a later date. Petitioner presented the testimony of five witnesses but declined to testify in her own behalf. No exhibits were offered or received in evidence on behalf of Petitioner. Respondent presented the testimony of four witnesses and submitted two exhibits, including the deposition testimony of Petitioner taken on December 31, 2002, which were admitted. A Transcript was ordered and was filed on March 14, 2003. Following the hearing, Petitioner made an ore tenus motion, during a telephone conference call, to reopen her case-in-chief in order to offer the testimony of James Swift. The motion was granted, over objection. The hearing was re-noticed and reconvened on March 14, 2003; however, the witness failed to appear, and the hearing was adjourned. The parties were allowed 15 days from the hearing in which to file proposed findings of fact and conclusions of law. Petitioner has not filed proposed findings as of the date of this Recommended Order. Respondent filed proposed findings on March 28, 2003.

Based upon all of the evidence, the following findings of fact are determined:

FINDINGS OF FACT

1. Respondent is an employer as that term is defined under the Florida Civil Rights Act of 1992.

2. Petitioner was employed by Respondent as a temporary employee to perform the job of picker/stock keeper at its Parts Distribution Center in Orlando, Florida, during the time period from September 12, 2001, to September 26, 2001, the date she was terminated. Petitioner worked a total of 14 days for Respondent.

3. Petitioner is an African-American female, a member of a protected class.

4. The Parts Distribution Center for Respondent in Orlando, Florida, is a facility that holds automotive parts that are then shipped to dealerships.

5. All temporary employees at Respondent are at-will employees. Temporary employees are told during their orientation that they are at-will employees who can be terminated at any time, for any reason. Temporary employees at Respondent are only eligible to work 119 days. Most temporary employees are not offered full time permanent employment. There is no guarantee that a temporary employee will receive an offer to work as a permanent employee.

6. Petitioner was hired to perform the job of picker/stock keeper. A picker/stock keeper takes parts off of shelves to be

shipped to dealerships. Petitioner participated in an orientation, and Petitioner received the same training as every other temporary employee. Petitioner worked the night shift.

7. Respondent maintains written Standards of Conduct to which all employees must adhere. The Standards of Conduct apply to both temporary and permanent employees. The Standards of Conduct were in effect in September 2001, when Petitioner worked as a temporary employee.

8. All employees are given a copy of the Standards of Conduct when they are hired. Petitioner received a copy of the Standards of Conduct when she was hired, and the Standards of Conduct are posted throughout the plant.

9. The Standards of Conduct provide that an employee's "[f]ailure or refusal to follow the instructions of supervision" is grounds for "disciplinary action up to and including discharge."

10. The supervisors who worked at Respondent's Distribution Center during Petitioner's employment were Richard Alvarez ("Alvarez") (Hispanic male), Lenier Sweeting ("Sweeting") (Black male), and Joe Bromley (White male).

11. Alvarez was temporary supervisor for the night shift from June 2001 until December 2001. Alvarez was Petitioner's direct supervisor.

12. Sweeting was a supervisor in September 2001. Sweeting was chosen to become a supervisor by Hal McDougle, a Black male. Sweeting was the supervisor on the day shift when Petitioner worked at the Distribution Center. His shift ended at 3:30 p.m. but he stayed in the building to help with the transition to the night shift. Alvarez would normally walk Sweeting to the front door to discuss what had occurred during the day shift.

13. On September 25, 2001, Sweeting was walking past the bathroom with Alvarez and heard two women talking and laughing in the bathroom. Alvarez recognized one of the voices to be that of Petitioner.

14. Alvarez had heard rumors that Petitioner had been taking a lot of extended breaks and told Sweeting about the complaints he had been receiving. Alvarez received at least two complaints, and possibly four or five, from Petitioner's co-workers that she was taking extended breaks and not on the floor working.

15. Alvarez wanted to wait and see how long Petitioner remained in the bathroom. Sweeting and Alvarez waited outside the bathroom until they saw Petitioner exit the bathroom with Maria Dejesus. Alvarez believes that he and Sweeting waited outside the bathroom for approximately ten to 15 minutes.

16. Alvarez told Petitioner that she had been taking an extensive break and needed to go back to work. Sweeting

witnessed Alvarez tell Petitioner to go back to work in a professional tone. Alvarez also told Petitioner that he had heard rumors that she was taking extended breaks. He told her that since he saw it first hand, he wanted to mention it to her and let her know it would not be tolerated.

17. Petitioner asked Alvarez which bathroom she could use in a very sarcastic tone. Sweeting observed Petitioner ask this question. Alvarez told Petitioner that he did not care which bathroom she used, as long as she did not abuse the break period.

18. Petitioner proceeded to ask Alvarez in a sarcastic tone which bathroom she could use several times throughout the night. Despite Petitioner's sarcastic tone, Alvarez answered her questions professionally. Alvarez never asked Petitioner how old she was, whether she was married or how many children she had.

19. Sweeting asked Maria Dejesus to go back to work as well.

20. Sweeting and Alvarez have told other employees to go back to work when they have observed employees taking extended breaks. They have spoken to employees of both genders and all racial groups.

21. On September 26, 2001, Alvarez assigned Petitioner to the "fast rack" area. Petitioner had never previously worked in

the fast rack area. Alvarez personally instructed Petitioner in how to perform the assignment. Alvarez told Petitioner to pick the parts and put them on a rack float.

22. After Alvarez gave Petitioner her instructions, Petitioner began her assignment. Petitioner never asked Alvarez any questions about her assignment or expressed that she was having difficulty with the job.

23. Wanda Carithers ("Carithers") saw Petitioner using the wrong equipment to complete her assignment. Petitioner was using a bin cart instead of a float to pick the items.

24. Alvarez noticed that Petitioner's assignment was running late. Alvarez walked over to the fast rack area and asked Petitioner two questions. Alvarez asked Petitioner whether she was going to be able to pick the whole assignment using the bin cart that she was using. Petitioner did not respond to or acknowledge Alvarez. Alvarez then asked Petitioner if she was almost done with her assignment. Petitioner rolled her eyes and said, "Your first question, yes, second question, no." Alvarez was very uncomfortable with Petitioner's response and demeanor.

25. Alvarez told Petitioner that perhaps they had gotten off on the wrong foot. Petitioner asked Alvarez something about her union rights. Alvarez saw Petitioner's co-worker, Carithers, who was a union representative, driving by. Alvarez

asked Carithers to explain to Petitioner her union rights as a temporary employee. During this conversation, Alvarez tried repeatedly to talk to Petitioner and on each occasion, Petitioner cut Alvarez off and would not let him speak.

26. When Alvarez realized that he was not making any progress with Petitioner, he asked her to go to the warehouse office so that they could talk to a senior supervisor, Al White ("White") (Black male). Alvarez hoped that they could work out their differences with White's help. Alvarez started to walk approximately ten steps. He turned back and realized that Petitioner was not moving towards the office. Alvarez walked back to Petitioner and asked her a second time to go to the office. Once again, Petitioner did not move. Alvarez told Petitioner, "This is your last chance; go to the warehouse office." Once again, Petitioner did not move.

27. Alvarez, after asking Petitioner to go to the office three times with no response, told Petitioner that her services were no longer needed, that she should gather up her things, and that she was terminated.

28. Alvarez terminated Petitioner for her failure to follow a direct order of her supervisor in violation of Respondent's Standards of Conduct No. 6.

29. Petitioner refused to move even after she was terminated. Petitioner asked Alvarez to reconsider, and he said

that he had made up his mind. Alvarez started to walk away. When he saw that Petitioner was still not moving, he told her that he could call law enforcement to escort Petitioner off the property.

30. Alvarez, and ultimately Petitioner, walked to the office. White asked Petitioner if she knew why she was terminated. Petitioner never asked to have someone from the union with her in the office until after she was terminated. At that time, Alvarez and White complied with her request and paged Rodney Witt, a union official, to come to the office.

31. Carithers observed Petitioner fail to follow Alvarez's instruction to go to the office. Carithers recalls that Petitioner told Alvarez that Petitioner did not have to listen to Alvarez.

32. Amber McPherson heard Alvarez call Petitioner to the office several times. Petitioner did not respond to Alvarez's requests.

33. Sweeting has never experienced discrimination from management while working for Respondent for over seven years. Sweeting has never heard Alvarez make any gender or race-related comments or slurs. Sweeting has never heard any management employee at Respondent make a gender or race related comment or slur.

34. Alvarez did not consider Petitioner's gender or race when he made the decision to terminate Petitioner.

35. In addition, Petitioner lied on her application to Respondent and failed to indicate that she had been terminated from a prior employment. Petitioner had been terminated from Walt Disney World Company for theft. If Respondent had known that Petitioner had lied on her application or had been terminated for theft from a prior employer, it would not have hired her. Had Respondent learned that she had lied on her application after she was hired, she would have been terminated.

36. Petitioner had no idea why she thinks she was treated differently based upon her gender or race. She just had a "feeling" or a "hunch." Petitioner had no evidence or information that her termination was based on her gender or race. Petitioner had no idea why she was terminated. She did not believe that it was because she failed to follow a command. Petitioner had no idea whether her supervisor, Alvarez, considered her gender or race when he terminated her employment with Respondent.

37. Petitioner bases her claims that Respondent discriminated against her on the fact that there is general racism and sexism in society. Petitioner checked the "sex" and "race" box on her FCHR Charge of Discrimination simply because she is female and African-American.

38. Petitioner felt as though she was harassed but cannot articulate a reason for it.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to subsections 120.569 and 120.57(1), Florida Statutes, and Rule 60Y-4.016(1), Florida Administrative Code.

40. The State of Florida, under the legislative scheme contained in Chapter 760, Florida Statutes, incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 USC Section 2000e et seq. The Florida law prohibiting unlawful employment practices is found in Section 760.10, Florida Statutes. This section prohibits discrimination against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race and/or sex. Section 760.10(1)(a), Florida Statutes. The Florida Commission on Human Relations and the Florida courts interpreting the provisions of the Florida Civil Rights Act of 1992 have determined that federal discrimination law should be used as guidance when construing provisions of the Act. See Brand v. Florida Power Corp. 633 So. 2d 504, 509 (Fla. 1st DCA

1994); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); Cooper v. Lakeland Regional Medical Center, 16 FALR 567, 574 (FCHR 1993).

41. Petitioner has the ultimate burden to prove discrimination either by direct or indirect evidence. Direct evidence is evidence which, if believed, would prove the existence of discrimination without inference or presumption. Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989). Blatant remarks, whose intent could be nothing other than to discriminate, constitute direct evidence of discrimination. See Earley v. Champion International Corporation, 907 F.2d 1077, 1081 (11th Cir. 1990). There is no record of any direct evidence of discrimination on the part of Petitioner's supervisor. There is no evidence Alvarez made any gender or race related comments or slurs. Petitioner has not presented any documentary evidence which would constitute direct evidence of discrimination.

42. Absent any direct evidence of discrimination, the Supreme Court established, and later clarified, the burden of proof in disparate treatment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and again in the case of St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993). The FCHR has adopted this evidentiary model.

Kilpatrick v. Howard Johnson Co., 7 FALR 5468, 5475 (FCHR 1985). McDonnell Douglas places upon Petitioner the initial burden of proving a prima facie case of racial discrimination. See also Davis v. Humana of Florida, Inc., 15 FALR 231 (FCHR 1992); Laroche v. Department of Labor and Employment Security, 13 FALR 4121 (FCHR 1991).

43. Judicial authorities have established the burden of proof for establishing a prima facie case of discriminatory treatment. Petitioner must show that:

a. Petitioner is a member of a protected group;

b. The employee is qualified for the position; and

c. The employee was subject to an adverse employment decision (Petitioner was terminated);

d. The position was filled by a person of another race or that she was treated less favorably than similarly-situated persons outside the protected class:

e. There must be shown by the evidence that there is a causal connection between a. and c. Crapp v. City of Miami Beach, 242 F.3d 1017, 1020 (11th Cir 2001); Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983); Smith v. Georgia, 684 F.2d 729 (11th Cir. 1982); Lee v. Russell County Board of Education, 684 F.2d 769 (11th Cir. 1982), appeal after remand, 744 F.2d 768 (11th Cir. 1984).

44. Proving a prima facie case serves to eliminate the most common nondiscriminatory reasons for Petitioner's disparate

treatment. See Teamsters v. U.S., 431 U.S. 324, 358, n. 44 (1977). It is not, however, the equivalent of a factual finding of discrimination. It is simply proof of actions taken by the employer from which discriminatory animus is inferred because experience has proved that, in the absence of any other explanation, it is more likely than not that those actions were bottomed on impermissible considerations. The presumption is that more often than not people do not act in a totally arbitrary manner, without any underlying reason, in a business setting. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

45. Once Petitioner has succeeded in proving all the elements necessary to establish a prima facie case, the employer must then articulate some legitimate, nondiscriminatory reason for the challenged employment decision. The employer is required only to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Texas Department of Community Affairs v. Burdine, at 257. The employer "need not persuade the court that it was actually motivated by the proffered reasons . . . [i]t is sufficient if the [employer's] evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. at 254. This burden is characterized as "exceedingly light." Perryman

v. Johnson Products Co., Inc., 698 F.2d 1138 (11th Cir. 1983).

46. Once the employer articulates a legitimate reason for the action taken, the evidentiary burden shifts back to Petitioner who must prove that the reason offered by the employer for its decision is not the true reason, but is merely a pretext. The employer need not prove that it was actually motivated by the articulated nondiscriminatory reasons or that the replacement was more qualified than Petitioner. Texas Department of Community Affairs v. Burdine, at 257-8.

47. In Burdine, the Supreme Court emphasized that the ultimate burden of persuading the trier of fact that Respondent intentionally discriminated against Petitioner remains at all times with Petitioner. Texas Department of Community Affairs v. Burdine, at 253. The Court confirmed this principle again in St. Mary's Honor Center v. Hicks, 509 U.S 502, 113 S.Ct. 2742 (1993).

48. In the case sub judice, Petitioner has established that she is a member of a protected class. She has established that she was qualified for the position at the time she was hired and that she was subjected to an adverse employment decision when she was terminated. However, Petitioner has failed to come forward with credible evidence that there is a causal connection between her race or her gender and her termination. Petitioner has failed to show that similarly-

situated males or similarly-situated persons outside the protected class received more favorable treatment under similar circumstances. Therefore, there can be no inference of discrimination. Pound v. Stone, 945 F.2d 796 (4th Cir. 1991). "Whatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706 (1993). This standard requires Petitioner to establish that "but for" her protected class and the employer's intent to discriminate she would not have been terminated. Petitioner has failed to came forward with sufficient evidence to meet her initial burden of proof on the issue of racial discrimination.

49. First, Petitioner was not qualified for the job because she was not performing up to the standards required by her employer. Respondent requires all of its employees, including temporary employees, to adhere to its Standards of Conduct. The testimony during the hearing was undisputed, Petitioner failed to follow the instructions of her supervisors and had a poor attitude. Failing to follow instructions and demonstrating a poor attitude deems an employee unqualified for the job. For example, in Vandel v. Standard Motor Products, Inc., 52 F.Supp. 2d 344 (D. Conn. 1999), a former employee who

had problems with interpersonal skills and a poor attitude was deemed unqualified for his job. Although the employee had the necessary technical knowledge, his documented interpersonal and attitude problems showed the employee was not meeting the employer's legitimate job experiences, and, therefore, was not qualified for the job.

50. Second, even assuming Petitioner was qualified, she had failed to meet the fourth element of the McDonnell Douglas analysis. Petitioner has not introduced any evidence to create an inference of discrimination. She has failed to cite any non-minority employees who were treated differently than she was treated under similar circumstances. In order to make a prima facie case, Petitioner must demonstrate there were employees outside of the protected class who engaged in similar conduct but were not terminated. Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1998). The most important factors in comparing disciplinary actions imposed on employees are the nature of the offenses in relation to the punishment imposed. Id. "We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second guessing employers' reasonable decisions and confusing apples with oranges." Id. Petitioner failed to introduce any evidence whatsoever to support the fourth and most important element in proving any claim of discrimination through indirect evidence.

The hearing record is completely devoid of any evidence which would create even an inference that employees who were outside of a protected class were treated differently than Petitioner.

51. Assuming arguendo that Petitioner had met her initial burden, the sequence of presentation of evidence then required Respondent to come forward and articulate valid, nondiscriminatory reasons for the resulting termination decision. Respondent has done so. The burden to articulate a legitimate business reason for the action is one of production, not of persuasion. The Court need not weigh the credibility of the nondiscriminatory reason at this stage of the burden shifting analysis. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2105 (2000); St. Mary's Honor Center v. Hicks, at 509. Respondent terminated Petitioner's employment because she failed to respond to her supervisor's direct order for her to go to the office. Petitioner presented no evidence that contradicted Respondent's witnesses. Every witness who testified about the incident on September 26, 2001, which led up to Petitioner's termination testified consistently that Petitioner failed to follow her supervisor's instructions to go to the office despite at least three requests to do so. Regardless of the reason her supervisor asked her to go to the office or the reason Petitioner failed to respond to him, Respondent has every right to require its employees to adhere to

its Standards of Conduct. When Petitioner failed to follow number 6 of Respondent's Standards of Conduct, it had a legitimate, nondiscriminatory basis for terminating her. See Davidson v. Time, Inc., 972 F. Supp. 148 (E.D.N.Y. 1997) (discrimination laws should not be used as a vehicle for second guessing an employer's business judgment).

52. The record in this case is undisputed. Petitioner failed to testify at the hearing or introduce any evidence to suggest that the basis offered for her termination by her employer was false or that the real basis was invidious discrimination. In fact, Petitioner testified in her deposition, which was read into the record at the hearing, that she had no evidence of discrimination. Instead, her case was based on a "hunch" that she was fired for some other reason than her failure to follow her supervisor's instructions. Petitioner testified that she actually has no idea why she was terminated. If she does not know, she cannot meet her ultimate burden to prove that Respondent considered her race or her gender when her employment was terminated. Petitioner's own subjective feelings, without evidence of racial bias, are insufficient to support a claim of discrimination. Wright v. Wyandotte County Sheriff's Department, 963 F. Supp. 1029 (D. Kan. 1997).

53. Petitioner has the continuing burden of persuading the trier of fact that Respondent intentionally discriminated

against her. Texas Department of Community Affairs v. Burdine, supra. When a Petitioner alleges disparate treatment, "liability depends on whether the protected trait actually motivated the employer's decision." Hazen Paper Co. v. Briggins, 507 U.S. at 610. The plaintiff's race or gender must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome. Petitioner simply cannot prevail on her claims of disparate treatment unless she can demonstrate that Respondent intentionally discriminated against her. Cason Enterprises, Inc. v. Metropolitan Dade County, 20 F. Supp. 2d 1331, 1337 (S.D. Fla. 1998). An employer may terminate an employee fairly or unfairly and for any reason or no reason at all without incurring Title VII liability unless its decision was motivated by invidious discrimination. Fucci v. Graduate Hospital, 969 F. Supp. 310 (E.D. Pa. 1997).

54. Petitioner worked for Respondent for 14 days as a temporary employee. There is no dispute that Petitioner failed to follow her supervisor's instructions on September 26, 2001. As a result, Petitioner's supervisor terminated her. There is no evidence to demonstrate that her termination was a result of her gender or her race. Petitioner failed to introduce any evidence to establish a prima facie case or to prove that

Respondent's legitimate, nondiscriminatory basis for her termination was a pretext for discrimination.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order which DENIES the Petition for Relief.

DONE AND ENTERED this 8th day of April, 2003, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
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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.