STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEATRICE L. MAYS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-0096
	)	
PROGRESS ENERGY CORPORATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

An administrative hearing was conducted in this case on November 4, 2005, in Orlando, Florida, before Jeff B. Clark, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Curtis B. Lee, Esquire
37 North Orange Avenue, Suite 500
Post Office Box 3412
Orlando, Florida 32802

For Respondent: Thomas Martin Gonzalez, Esquire
Thompson, Sizemore & Gonzalez
501 East Kennedy Boulevard, Suite 1400
Post Office Box 639
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STATEMENT OF THE ISSUES

Whether Respondent discriminated against Petitioner on the basis of her race or color in violation of Chapter 760, Florida

Statutes (2003); and, whether Respondent retaliated against Petitioner in violation of Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

On December 27, 2003, Petitioner filed with the Florida Commission on Human Relations (FCHR), a Charge of Discrimination, alleging discrimination based upon race and sex and retaliation. In Petitioner's Charge of Discrimination, she alleges that in May 2003, she was singled out for a "360 survey," and that, subsequent to the survey, she was retaliated against and was made to feel intimidated by her supervisor. She further alleges that in December 2003, she was terminated for her personal use of Respondent's stamp machine and that two white, male employees who used the stamp machine for their on personal purposes were not discharged.

On December 7, 2004, FCHR, after investigating Petitioner's Charge of Discrimination, entered a Notice of Determination: No Cause. Thereafter, Petitioner's Petition For Relief dated January 4, 2005, was filed with FCHR. In her Petition For Relief, Petitioner claimed that Respondent "violated the Florida Civil Rights Act of 1992 when it harassed and intimidated myself through verbal abuse undue scruity [sic] because of my race and sex and by its [sic] eventual termination of myself the Complaintant [sic]."

The case was forwarded to the Division of Administrative Hearings by FCHR on January 11, 2005, and received on January 12, 2005. An Initial Order was sent to both parties on January 19, 2005.

On February 16, 2005, the case was scheduled for final hearing on March 25, 2005. On March 22, 2005, Petitioner moved to have the case continued, and the case was rescheduled for May 17, 2005, in Orlando, Florida.

On May 16, 2005, Petitioner again moved to have the case continued, and the case was rescheduled for August 10, 2005. On August 5, 2005, Petitioner requested an additional continuance, and the case was rescheduled for November 4, 2005.

The case was heard, as rescheduled, on November 4, 2005.

During the hearing, Petitioner testified on her own behalf and presented the testimony of Stephanie Ann Tate. Petitioner offered two exhibits which were received into evidence as Petitioner's Exhibits 1 and 2. Respondent presented three witnesses: Stephen E. McKinnie, Sandra D. Shields, and Faith Whirley. Respondent offered nine exhibits, eight were received into evidence as Respondent's Exhibits 1 through 8. One exhibit was withdrawn.

A two-volume Transcript of the proceeding was filed with the Division of Administrative Hearings on November 28, 2005. On December 9, 2005, an Order Granting Extension of Time to File

Proposed Recommended Order was entered allowing the parties until December 16, 2005, to file their proposed recommended orders. Respondent mailed its Proposed Recommended Order on Friday, December 16, 2005. It was filed at 9:05 a.m., December 19, 2005. Although technically late, Petitioner is not prejudiced, and Respondent's Proposed Recommended Order was considered by the undersigned.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following findings of facts are made:

1. Respondent, Progress Energy Corporation, is a public utility which provides electrical power. Respondent is an employer as defined by Subsection 760.02(7), Florida Statutes (2003).

2. Petitioner is an African-American female. She began working for Respondent in October 1980. Petitioner was finally discharged from her employment on December 12, 2003. During her period of employment, she received various promotions and eventually became a service coordinator. She worked at the Jamestown Operations Center and was responsible for designing electrical power services and customer coordination. In 1992, Petitioner was terminated and re-hired at a lower position as discussed hereinafter.

3. Steven McKinnie became Petitioner's supervisor in March 2002. While Petitioner's performance was adequate, Mr. McKinnie received complaints from both co-employees and customers about Petitioner's work performance. As a result, he engaged in private counseling sessions with Petitioner as he did with other employees.

4. Concerned about Petitioner's performance, Mr. McKinnie consulted with Respondent's Department of Human Resources regarding the advisability of employing a "360 survey" as a tool for improving Petitioner's performance.

5. A "360 survey" provides an employee with confidential assessments made by co-employees as a tool for self-improvement. A "360 survey" is not a disciplinary tool, nor does it effect an employees status.

6. After receiving Petitioner's approval to conduct the "360 survey," on March 6, 2003, Mr. McKinnie distributed the survey questionnaire to Petitioner's co-employees. On the evening of March 6, 2003, Petitioner e-mailed Mr. McKinnie objecting to the "360 survey."

7. The following day, March 7, 2003, the Jamestown Operations Center staff, including Petitioner and Mr. McKinnie, were in Deland, Florida, for a "two c's" (compliments and concerns) meeting. This is another human resources' tool. This

gives employees the opportunity to express their concerns and for management to respond to those concerns.

8. During the "c and c" meeting, Petitioner voiced her complaint about the "360 survey." This was Mr. McKinnie's first notice of her objection. She also complained that Mr. McKinnie treated employees as if they were in high school and intimidated them (or words to that effect). No mention was made of racial or sexual discrimination.

9. The results of the "360 survey" were offered to Petitioner as a self-improvement tool. The survey was not included in her performance evaluation nor did it effect her pay.

10. In early December 2003, Respondent's management received a complaint from a co-employee that Petitioner was using Respondent's postage machine for personal use. Shortly thereafter, Sandra Shields, conducted an investigation of the alleged impropriety. Respondent's postage machines and the cost of mailing are to be used for Respondent's business purposes only, not for personal use.

11. During the investigation, Petitioner asserted that other employees similarly used the postage machine for personal use. She declined to identify any employees. The investigation failed to corroborated Petitioner's assertion.

12. Petitioner had two employment-related incidents of theft. In 1990, she was arrested during her lunch period and incarcerated for retail theft. The company vehicle she was driving was impounded. She entered a pre-trial diversion program and admitted the theft. Her arrest and record of pre-trail diversion was made a part of her employment record. On a second occasion, in June 1992, Petitioner received a letter of reprimand because she "misused her position as an Engineering Technician for personal gain." She had produced and submitted engineering drawings for underground cable installation at the residence of a family member. The letter of reprimand noted: "This type of action cannot be tolerated. Further violations of this nature will result in disciplinary action, up to and including termination." As noted on the letter of reprimand, Petitioner did not agree with it (the letter).

13. Incidental to this incident, Petitioner was terminated. She grieved her termination and was rehired at a lower paid position. The letter of reprimand was placed in her employment record.

14. As a result of Petitioner's misuse of the postage meter, aggravated by the two previous incidents of theft, Petitioner was terminated.

15. Subsequent to her termination, Petitioner complained to the Respondent's "Ethics Line" and invoked Respondent's

dispute resolution process to contest her termination. Additional investigations did not change the facts or the outcome.

16. At the hearing, Petitioner presented no direct evidence of discrimination or statistical evidence of discrimination.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569, 120.57(1), and 760.11, Fla. Stat. (2003).

18. Petitioner has the burden of proving by the preponderance of the evidence that Respondent committed an unlawful employment practice. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

19. It is an unlawful employment practice for an employer to discharge or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race or color. § 760.10(1)(a), Fla. Stat. (2003).

20. It is also an unlawful employment practice to discriminate against any person because the person opposes an

unlawful employment practice or has filed a charge of an unlawful employment practice. § 760.10(7), Fla. Stat. (2003).

21. The provisions of Chapter 760, Florida Statutes (2003), are analogous to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) et seq. Cases interpreting Title VII are, therefore, applicable to Chapter 760, Florida Statutes. School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

22. To prove a prima facie case of retaliation, Petitioner must show the following: (a) she engaged in statutorily protected expression; (b) she suffered an adverse employment action such as demotion and/or assignment to a position with less responsibility; and (c) the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998).

23. A prima facie case of discrimination based upon race or sex may be established in one of three ways: first, through direct evidence of discriminatory intent by the employer; second, through statistical proof that a neutral policy has an adverse impact on a protected group; or third, by meeting the familiar disparate treatment test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989).

24. As Petitioner presented no direct evidence of discrimination or any statistical evidence of discrimination, she was required to establish a prima facie case under the McDonnell Douglas framework. Under McDonnell Douglas, a prima facie case of race or sex discrimination may be established by showing the following: (1) Petitioner belongs to an identified minority; (2) Petitioner was subjected to adverse job action; (3) Petitioner's employer treated similarly situated employees outside Petitioner's classification more favorably; and (4) Petitioner was qualified to do the job. See 411 U.S. at 802; Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). The "prima facie case under McDonnell Douglas must be established and not merely incanted." Coco v. Elmwood Care, Inc., 128 F.3d 1177, 1178 (7th Cir. 1997).

25. Under the McDonnell Douglas model of proof, the Petitioner bears the initial burden of establishing a prima facie case of discrimination. Proof of a prima facie case under McDonnell Douglas raises a presumption that the employer's decision was motivated by discrimination. Saint Mary’s Honor Center v. Hicks, 509 U.S. 502, 506 (1993).

26. Once this presumption is raised, the Respondent is able to rebut it by introducing admissible evidence of a reason, which is believed by the trier of fact and supports a finding that discrimination or retaliation was not the cause of the

challenged employment action. Grigsby v. Reynolds Metals Co., 821 F.2d 590, 594 (11th Cir. 1987); and Equal Opportunities Employment Commission v. Navy Federal Credit Union, 424 F.3d 397, 405 (4th Cir. 2005). 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, 450 U.S. 248, 257 (1981). 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, 1142 (11th Cir. 1983).

27. Once the employer produces evidence of a legitimate, nondiscriminatory reason for the challenged action, any presumption of discrimination or retaliation arising out of the prima facie case "drops from the case." See Krieg v. Paul Revere Life Ins. Co., 718 F.2d 998, 1001 (11th Cir. 1983), cert. denied 466 U.S. 929 (1984); and Navy Federal Credit Union, 424 F.3d at 405. The ultimate burden remains upon the complainant to prove that the employer intentionally discriminated or retaliated. See Burdine, 450 U.S. at 256. Stated another way,

"the ultimate question in a disparate treatment case is not whether the plaintiff establish a prima facie case or demonstrate a pretext, but 'whether the defendant intentionally discriminated against the plaintiff.'" Pashoian v. GTE Directories, 208 F. Supp. 2d 1293 (M.D. Fla. 2002).

28. The burden shifting analysis of McDonnell Douglas applies both to claims for discrimination and retaliation. Navy Federal Credit Union, 424 F.3d at 405. Thus, once Petitioner establishes a prima facie case of retaliation or discrimination, a presumption is raised that the employer's actions were caused by discriminatory or retaliatory animus.

29. Petitioner established that she is a member of a protected class. Further, Petitioner was the subject of adverse job action as a result of her termination. However, Petitioner has failed to establish the remaining prima facie case of discrimination.

30. Petitioner failed to introduce 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 subject to the same adverse employment action. Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999). 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. With respect to her claims discrimination, there is no evidence, other than Petitioner's unsupported allegation, that other employees were using the postage meter for personal use. The evidence indicates that more than one investigation failed to ascertain the names of any individuals, other than Petitioner, who improperly used the postage machine. Even assuming some other individual was discovered, because Petitioner's employment file contains a unique warning that further misuse of her position for personal gain would not be tolerated and could result in termination, it would be hard to find a comparator.

31. Petitioner failed to prove a prima facie case of retaliation because she failed to establish that she had engaged in a statutorily protected expression and was thereafter the subject of an adverse employment action.

32. Being the subject of a "360 survey" does not evidence discrimination. There is no evidence that her objections to her supervisor's counseling was the result of racial or sexual discrimination or retaliation. The evidence suggests that her

termination, which occurred approximately six months after the "360 survey" and her objections voiced at the March 7, 2003, "c and c" meeting, was a result of her misuse of the postage machine and no more.

33. 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 termination of Petitioner. 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., 530 U.S. 133, 142 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 509. Respondent presented ample evidence to support Petitioner's termination. Petitioner presented no evidence that contradicted Respondent's witnesses. Indeed, she admitted that she had misused the Respondent's postage machine for personal gain.

34. 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. 604, 610 (1993). 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).

35. However, Petitioner has failed to either establish a prima facie case, show Respondent's legitimate non-discriminatory reasons for its action were pretextual, or demonstrate Respondent intentionally discriminated against her.

36. Even if Petitioner had established a prima facie case of discrimination based upon race or color, Respondent articulated legitimate, nondiscriminatory reasons for all of the challenged conduct. Petitioner failed to demonstrate that Respondent's legitimate nondiscriminatory reasons were pretextual in any way.

RECOMMENDATION

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

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

DONE AND ENTERED this 12th day of January, 2006, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 2006.

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.