STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DIANE SCOTT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-2057
	)	
MONROE COUNTY SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing in Marathon, Florida, on February 15, 2006.

APPEARANCES

For Petitioner: Diane Scott, pro se
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For Respondent: Theron C. Simmons, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner's suspension in March 2004 and subsequent dismissal in March 2004 were not, in fact, imposed in consequence of her gross insubordination (which insubordination Respondent allegedly used as a pretext for the adverse employment actions), but rather were in truth retaliatory acts

taken by Respondent because Petitioner had filed a charge of discrimination against Respondent.

PRELIMINARY STATEMENT

On or about November 22, 2004, Petitioner Diane Scott filed a Charge of Discrimination with the Florida Commission on Human Relations ("FCHR") and with the U.S. Equal Employment Opportunity Commission ("EEOC") in which she claimed that Respondent Monroe County School District had unlawfully retaliated against her after she had made an earlier discrimination charge against Respondent. On May 12, 2005, the FCHR issued Scott a Right to Sue Letter.

Ms. Scott elected to pursue administrative remedies. She timely filed a Petition for Relief with the FCHR on June 5, 2005. The FCHR transmitted the Petition for Relief to the Division of Administrative Hearings on June 6, 2005, and an administrative law judge ("ALJ") was assigned to the case. The ALJ scheduled the final hearing for August 16-17, 2005.

On August 4, 2005, Respondent filed a Motion for Final Summary Judgment. After hearing Ms. Scott's response, the undersigned determined that there existed no genuine disputes of material fact and, accordingly, issued an Order Relinquishing Jurisdiction on August 16, 2005. Needless to say, the final hearing was canceled.

On November 3, 2005, the FCHR entered an Order Remanding Petition in which it expressed disagreement with some of the undersigned's legal conclusions and directed that a hearing be held. After considering the FCHR's position, the undersigned issued, on November 14, 2005, an Order Accepting Remand With Qualifications and Directing Parties to Respond. For reasons set forth in the order, the undersigned accepted the FCHR's remand for the limited

> purpose of allowing [Ms.] Scott to prove at hearing that her suspension in March 2004 and subsequent dismissal were not, in fact, imposed in consequence of her gross insubordination, which latter, she must show, merely provided a pretext for the [alleged] adverse employment actions[.] . . . [Ultimately, Ms.] Scott must establish that these were in truth retaliatory acts taken by [Respondent] in consequence of [Ms.] Scott's having filed [an earlier discrimination charge].

Order Accepting Remand at 14.

On November 29, 2005, Ms. Scott filed an Amended Petition for Relief. Shortly thereafter, the final hearing was scheduled for February 15, 2006.

At the hearing, Ms. Scott testified on her own behalf and called the following individuals as additional witnesses: Minerva Santana, Debra Wonderlin, Jan Dorl, Karetta Scott, Leroy Washington, Elaine B. Edwards, Rosa Rossique-Rios, Susan F. Dalrymple, and Veronica Dixon. Also received in evidence was

Petitioner's Composite Exhibit 1. Respondent declined to present a case.

The final hearing transcript was filed on April 11, 2006. Each party timely filed a Proposed Recommended Order ahead of the prescribed deadline, which was April 21, 2006. The parties' submissions have been considered.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2005 Florida Statutes.

FINDINGS OF FACT

1. The Order Relinquishing Jurisdiction contained a statement of undisputed material facts, which provided as follows:

> A.
>
> [a.] [Petitioner Diane] Scott [("Scott")] was employed as a teacher's aide in the Monroe County Public School System for approximately 13 years. The [Monroe County School] Board [(the "Board"), which is the governing body of Respondent Monroe County School District,] suspended [Scott] without pay in March 2004 pending termination for just cause. Scott timely requested a formal hearing.
>
> [b.] On August 18, 2004, Administrative Law Judge Robert E. Meale of the Division of Administrative Hearings ("DOAH") conducted a formal hearing in DOAH Case No. 04-2060 to determine whether Scott's employment should be terminated. Judge Meale issued a Recommended Order on October 25, 2004, holding, on the basis of extensive findings of fact, that Scott had "repeatedly refused to obey direct orders,

essentially to allow the school system to function as an educational resource, free from her harassment of other employees trying to do their jobs." Judge Meale recommended that the Board terminate Scott's employment for just cause, i.e. gross insubordination.

[c.] On November 16, 2004, the Board entered a Final Order adopting Judge Meale's Recommended Order in its entirety. Scott did not appeal the Final Order.

B.

[d.] In November 2004, Scott filed with the FCHR and the EEOC a Charge of Discrimination, signed November 12, 2004 (the "Charge"), wherein she alleged that the Board had retaliated against her for having filed an earlier charge of discrimination. The Charge was received by the FCHR on or about November 22, 2004, and docketed as Charge No. 150-2005-00405.

[e.] In the Charge, Scott stated the "particulars" of her claim against the Board as follows:

> I am black.
>
> I filed a charge of discrimination under 150-2004-00146. In retaliation, Respondent placed papers in my fie [sic] that pertained to someone else and papers that were not signed by me. In further retaliation, Respondent placed me on suspension.
>
> I believe all of the above occurred in retaliation for filing the aforementioned charge in violation of Title VII of the Civil Rights Act of 1964, as amended.[1]

Scott also alleged that the unlawful retaliation took place between the dates of August 18, 2004, and August 24, 2004.[2]

[f.] . . . Charge No. 150-2004-00146 (the "Prior Charge"), which allegedly triggered the Board's allegedly retaliatory acts, had been brought against the Board in November 2003. . . . [To repeat for emphasis,] the retaliation claim asserted in the [present] Charge is based on alleged adverse employment actions that the Board took, allegedly, in response to Scott's filing the Prior Charge in November 2003.

[g.] In her Charge Scott alleged that the Board's unlawful retaliation consisted of (a) placing papers in her personnel file that didn't belong there and (b) putting her on suspension. Regarding the allegedly spurious papers, . . . [f]ive . . . are . . . documents pertaining to another teacher's aide in Monroe County whose name is "Diane M. Scott." (Petitioner Scott is also known as Diane Hill Scott but not, so far as the record reveals, as Diane M. Scott.) The papers relating to the "other" Diane Scott are: (1) an Oath of Public Employee form dated December 20, 1996; (2) an Employer's Statement of Salary and Wages dated April 24, 2001; (3) an Employer's Statement of Salary and Wages dated March 13, 2002; (4) a Civil Applicant Response dated December 20, 1996, which notes that the individual (identified as "Diane Marie Scoh") had failed to disclose a prior arrest; and (5) a copy of the school district's anti-discrimination policy, apparently signed by the other Ms. Scott on August 23, 2002.

[h.] In addition to these five papers, Scott claims that her personnel file contained an unsigned copy of the school district's anti-discrimination policy, bearing the handwritten note "Diane Hill Scott refused to sign——8/24/00." Scott

> asserts that before last year's administrative hearing, she had never seen this particular document. Because of that, she alleges, its presence in her file is evidence of discriminatory retaliation.
>
> [i.] Regarding the alleged retaliatory suspension [on which the Charge is based in part], Scott [actually] was referring to three separate suspensions: (1) a three-day suspension in May 2003; (2) a three-day suspension in October 2003; and (3) the suspension in March 2004 that was part and parcel of the proceeding to terminate Scott's employment. It is undisputed that Scott was in fact suspended from employment on each of these three occasions. However, [by] a letter to Scott from the Director of Human Resources dated October 3, 2003, [the Board had] formally rescind[ed], as the product of "error and miscommunication," the three-day suspension Scott was to have served that month.
>
> [j.] On April 26, 2005, the EEOC issued a Dismissal and Notice of Rights on Scott's Charge against the Board. In this notice, the EEOC stated that it was unable to determine whether the Board had violated Scott's civil rights. Thereafter, on May 12, 2005, the FCHR issued Scott a Right to Sue letter. Scott timely filed a Petition for Relief ("Petition") with the FCHR on June 6, 2005. The FCHR immediately transferred the Petition to DOAH, initiating the instant action.

The undersigned hereby adopts the foregoing as findings of fact.

2. Following the principle of estoppel by judgment (discussed in the Conclusions of Law below), it is found that, prior to being suspended from employment in March 2004, Scott

repeatedly had refused to obey direct orders; she had been, in other words, grossly insubordinate at work.

3. The evidence in the record is insufficient to persuade the undersigned——and consequently he does not find——that the Board used Scott's gross insubordination as a pretext for taking adverse employment actions, namely suspension and dismissal, against Scott. The evidence is likewise insufficient to establish, and thus it is not found, that the Board in fact suspended and discharged Scott in retaliation for filing the Prior Charge.

4. It is determined, therefore, as a matter of ultimate fact, that the Board did not unlawfully retaliate against Scott when it terminated her employment on the ground that she had been grossly insubordinate, which misbehavior constitutes just cause for firing a teacher's aide, see §§ 1012.01(2)(e) and 1012.33(1)(a), Fla. Stat., and hence is a legitimate, non-retaliatory basis for taking adverse employment action.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, and 120.57(1), Florida Statutes.

6. The following conclusions, originally published in the Order Relinquishing Jurisdiction, are hereby adopted:

[a.] Under Florida law, which is patterned after Title VII of the federal Civil Rights Act, it is an unlawful employment practice to retaliate against an employee who, among other things, has filed a charge of discrimination, which latter constitutes a "protected activity." See § 760.10, Fla. Stat. To make a prima facie case of retaliation, the claimant must demonstrate that: "1) [s]he engaged in statutorily protected activity; 2) [s]he suffered an adverse employment action; and 3) there is a causal relation between the two events. Guess v. City of Miramar, 889 So. 2d 840, 846 (Fla. 4th DCA 2004). Because the "McDonnell Douglas framework" applies in retaliation cases as well as discrimination cases,

> [o]nce the prima facie case is established, the employer must proffer a legitimate, non-retaliatory reason for the adverse employment action. The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct.

Id.

[b.] It is undisputed that Scott filed the Prior Charge, which is a statutorily protected activity. Thus, she has demonstrated the first element of the prima facie case.

[c.] With regard to the spurious papers allegedly kept in her personnel file, however, the undisputed facts show that Scott suffered no "adverse employment action." To be actionable, an adverse employment action must amount to "a serious and material change in the terms, conditions or privileges of employment." Davis v. Town of Lake Park, Florida, 245 F.3d 1232, 1239

(11th Cir. 2001)(emphasis in original). Further, "the employment action must be materially adverse as viewed by a reasonable person in the circumstances." Id.; see also, McCaw Cellular Communications of Florida, Inc. v. Kwiatek, 763 So. 2d 1063, 1066 (Fla. 4th DCA 1999).

[d.] Having reviewed the papers relating to the other Diane Scott, the undersigned concludes that no reasonable person could view the presence of these documents in Scott's file as a serious and material change in the terms, conditions, or privileges of Scott's employment. Indeed, since it is obvious that the papers relate to someone else, namely Diane M. Scott, it is equally apparent that these papers could have no meaningful effect on Scott's employment. There is, moreover, no evidence whatsoever . . . that Scott's employment was in fact affected by the other Ms. Scott's documents.

[e.] As for the presence in Scott's file of an unsigned copy of the anti-discrimination policy noting Scott's refusal to sign same, this too is not an adverse employment action. The undersigned does not believe that any reasonable person would consider what is, in effect, a memorandum to the file memorializing a simple historical fact (Scott's refusal to sign the anti-discrimination policy) to be a serious and material change in the terms, conditions, or privileges of employment. Of course, the memorialized fact might prove detrimental to the employee's employment, as Scott's refusal to sign the policy ultimately did, but that is a different matter. No one, not even an employee engaged in a statutorily protected activity, is given a monopoly of the facts.

[f.] In this connection, Scott's real complaint about maintenance of the "unsigned document" in her personnel file is that the

memorialized fact (i.e. that Scott refused to sign the anti-discrimination policy) was used against her in the termination hearing. In his Recommended Order, Judge Meale found that

> [t]here were also numerous other examples of insubordination, such as [Scott's] refusal to sign a statement acknowledging [the Board's] anti-harassment policy and her refusal to sign her evaluation at the end of the 2002-03 school year, which warned that her noncompliance with [the Board's] policies was disrupting school operations."

Monroe County School Board v. Scott, 2004 WL 2407777, *4 (Fla.Div.Admin.Hrgs. 0ct. 25, 2004). Scott strongly disputes this finding of fact (and many others) from the prior hearing, but, as will be seen, such findings are conclusive and cannot be re-litigated in this action.

[g.] One final point regarding the "unsigned document": the notation regarding Scott's refusal to sign (which is the only aspect of the document that could conceivably be viewed as any sort of action adverse to Scott's employment) is dated August 24, 2000. The remark, therefore, was evidently written more than three years before Scott filed the Prior Charge, for which activity the Board allegedly retaliated against her. It is plainly impossible for Scott's filing of the Prior Charge in November 2003 to have caused the Board to make the earlier notation.[3] Thus, even if the "unsigned document" constituted an adverse employment action (which it didn't), such action could not, as a matter of law, support a claim for retaliation, where the protected activity took place subsequent to the adverse employment action.

> [h.] Turning to the allegedly retaliatory suspensions, . . . Scott's filing of the Prior Charge in November 2003 was not the cause of the suspensions that were imposed in May 2003 and October 2003, for the simple reason that these suspensions pre-dated the protected activity and therefore could not have been imposed in consequence of Scott's engaging in the protected activity. Thus, to the extent that Scott's retaliation claim is based upon the suspensions of May 2003 and October 2003, it [fails].[4]

7. Concerning the doctrine of res judicata and its effect on Scott's contention that her suspension in March 2004 and subsequent dismissal for just cause were retaliatory, the undersigned reached the following conclusions, which were originally set forth in the Order Relinquishing Jurisdiction, and are hereby adopted:

> [a.] As the Florida Supreme Court has instructed, "[i]t is now well settled that res judicata may be applied in administrative proceedings." Thomson v. Department of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987). Res judicata includes the principle of estoppel by judgment, which holds that parties who previously have litigated a different cause of action are estopped (i.e. barred) from "litigating in [a later] suit issues——that is to say points and questions——common to both causes of action and which were actually adjudicated in the prior litigation." Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1142 n.4 (Fla. 2d DCA 2001).
>
> [b.] The parties to the present action are the very same parties who faced each other in DOAH Case No. 04-2060, where the

> issue was whether the Board had just cause for terminating Scott's employment. While the causes of action are not identical, there are issues common to both the previous case and this one that were actually litigated and decided in the termination proceeding.
>
> [c.] Specifically, in the prior case the Board was required to prove its grounds for firing Scott. Ultimately, the Board established by a preponderance of the evidence that Scott had been grossly insubordinate, for which misconduct the Board lawfully could (and did) terminate her employment. Simply put, then, the Board already has demonstrated a legitimate, non-retaliatory reason (gross insubordination) for discharging Scott.[5]
>
> [d.] This means that . . . the burden [is on Scott] to prove, by a preponderance of the evidence, that the legitimate, non-retaliatory reason for her discharge was, in fact, a pretext for retaliation. See, e.g., Guess [v. City of Miramar,] 889 So. 2d [840,] 848 [(Fla. 4th DCA 2004)]. "To demonstrate a pretext for retaliation, a plaintiff must show both that the employer's stated reasons for its actions are false and that the prohibited retaliation was the real reason for the employer's decision." Id.

8. In the Order Accepting Remand, the undersigned made additional conclusions pertaining to res judicata and its consequences. These conclusions are hereby adopted:

> [a.] [Because] the final order terminating Scott's employment establishes conclusively that the Board had a legitimate, non-retaliatory reason (gross insubordination) for discharging Scott[,] . . . the McDonnell Douglas shifting-burdens framework [is not] applicable here[, for] the presumption that would arise from

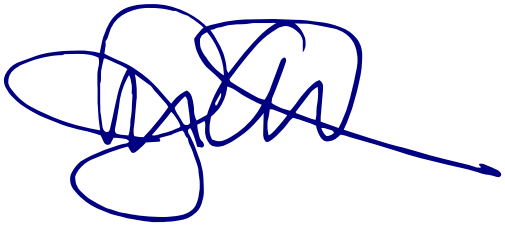
> Scott's making a prima facie case is already rebutted and thus cannot make an appearance. See, e.g., St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-08 (1993)(presumption drops from case once employer articulates legitimate, non-discriminatory reason for adverse action).
>
> [b.] Consequently, . . . Scott [cannot prevail merely by proving] "the few generalized factors that establish a prima facie case." Id. at 516. Rather, . . . Scott must [demonstrate persuasively] (a) that the proffered reason for her discharge (gross insubordination) was not the true reason therefor and (b) that she was the victim of intentional retaliation. As a practical matter, these issues——on which Scott bears the ultimate burden of persuasion——. . . merge into one. Id.

9. As the findings above make clear, Scott failed to carry her burden of proof.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order finding the Monroe County School District not liable to Diane Scott for retaliation or unlawful discrimination.

DONE AND ENTERED this 11th day of May, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of May, 2006.

ENDNOTES

[1]/ The following analysis from the Order Relinquishing Jurisdiction is hereby adopted:

> Before a claimant can initiate a formal adjudicative proceeding based on an unlawful employment practice, he or she must exhaust administrative remedies by filing a charge with the FCHR or the EEOC. See, e.g., Ray v. Freeman, 626 F.2d 439, 442 (5th Cir. 1980). These agencies are responsible for investigating——and determining preliminarily the merits of——such charges, which agency functions are designed both to notify employers of discriminatory practices and to encourage pre-suit conciliation. See, e.g., Buzzi v. Gomez, 62 F.Supp.2d 1344, 1351 (S.D.Fla. 1999). To allow a claimant to maintain an action, either in court or before DOAH, on an allegation of

> discrimination that had never been presented to the EEOC or the FCHR would undermine the remedial and conciliatory process so carefully laid out in the applicable civil rights statutes. See id. at 1352. Succinctly put, the "aggrieved [party] may not complain to the EEOC of only certain instances of discrimination and then seek judicial [or formal administrative] relief for different instances of discrimination." Rush v. McDonald's Corp., 966 F.2d 1104, 1110 (7th Cir. 1992).
>
> This is not to say that the subsequent complaint or petition must be a mirror image of the original charge. It is permissible, for example, to include allegations that "amplify, clarify, or more clearly focus" the claims presented in the charge of discrimination. See Ray, 626 F.2d at 443. As well, the plaintiff or petitioner may make any allegations that are "reasonably related" to those contained in his or her administrative charge. See Buzzi, 62 F.Supp.2d at 1351-52. But "[a]llegations of new acts of discrimination, offered as the essential basis for the requested judicial [or, as here, formal administrative] review, are not appropriate." See Ray, 626 F.2d at 443.

Order Rel. Juris. at 8-9 (endnote omitted). In large part, the allegations contained in Scott's Amended Petition for Relief are not reasonably or discernibly related to the particulars set forth in her Charge. To the extent the Amended Petition advances claims beyond the scope of the Charge (which it does), the undersigned has ignored the superfluous allegations.

[2]/ [Order Relinquishing Jurisdiction, Endnote 1:] [T]hese dates make little sense in the context of the allegations underlying the Charge. The undersigned has chosen not to base any conclusions herein on the seemingly incongruous timeframe within which Scott alleged the retaliation occurred.

[3]/ [Order Relinquishing Jurisdiction, Endnote 3:] The undersigned recognizes that the author of the note theoretically

could have back-dated the message, but there is no evidence whatsoever to imagine, much less reasonably infer, that such a fraud occurred.

[4]/ [Order Relinquishing Jurisdiction, Endnote 4:] Further, because the October 2003 suspension was rescinded, it appears that no adverse employment action was actually taken at that time——making another fatal deficiency in Scott's claim, to the extent it rests upon the October 2003 suspension.

[5]/ The conclusion, based on the principle of estoppel by judgment, that the Final Order terminating Scott's employment established conclusively that the Board had a legitimate, non-retaliatory reason (gross insubordination) for discharging Scott is reinforced by the court's decision in Dep't of Children and Family Servs. v. Garcia, 911 So. 2d 171 (Fla. 3d DCA 2005). The claimant in Garcia alleged that her former employer, a state agency, had discharged her unlawfully on the basis of gender. To dismiss the claimant, however, the agency had been required to establish "cause" in a proceeding before the Public Employees Relations Commission. As a result, wrote the court, it was

> clear that the [agency had] presented legitimate nondiscriminatory evidence that [the claimant] had been discharged for serious misconduct which was itself related to sexual harassment. See Garcia v. Dep't of Health & Rehab. Servs., 697 So.2d 841 (Fla. 1st DCA 1996), (affirming dismissal). Therefore, she could succeed on the present claim only upon an affirmative showing that the employer had used those grounds only as an excuse or "mere pretext" for what was really motivated by gender discrimination.

Id. at 172 (footnote omitted). In other words, the claimant in Garcia was estopped from denying that she had engaged in serious misconduct involving sexual harassment because that fact had been established conclusively in the prior administrative proceeding.

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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.