STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GWENDOLYN SALTER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-0339
	)	
INTERNATIONAL PAPER,	)	
	)	
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. The hearing was conducted in Pensacola, Florida, on May 17, 2006. The appearances were as follows:

APPEARANCES

For Petitioner: Frederick J. Gant, Esquire
Albritton & Gant
Post Office Box 12322
322 West Cervantes Street
Pensacola, Florida 32581

For Respondent: Vincent J. Miraglia, Esquire
International Paper Company
6400 Poplar Avenue, Tower II
Memphis, Tennessee 38197

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner was the victim of an unlawful employment

practice by allegedly being discriminated against as to a demotion and pay decision on the basis of race and sex, in purported violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

This cause arose on June 8, 2005, when the Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (Commission). The Petitioner maintained in her charge that she had been discriminated against between August 2004 and December 2004, for reasons of her race (African-American) and her sex (female). Specifically she claims she was discriminatorily demoted from Lead Lumber Grader to Grader and was also discriminatorily denied a pay raise.

The Commission embarked on an investigation of her charges, and following the conclusion of that investigation on December 13, 2005, the Commission issued a Determination that there was no reasonable cause to believe that an unlawful employment practice had occurred. The Petitioner thereafter filed a Petition for Relief, which was duly transmitted to the Division of Administrative Hearings and the undersigned Administrative Law Judge.

Thereafter, after a discovery process, the matter was scheduled and heard in a two-day Administrative Hearing concluding on May 17, 2006. Due to unknown reasons the filing of the Transcript of the proceeding was delayed for a number of

months before finally being filed with the undersigned and being provided to the parties. Thereafter, after a stipulated extended briefing schedule and an additional request for extension of time, which was granted to the Petitioner, the Proposed Recommended Orders were timely filed on or before September 8, 2006.

During the hearing, the Petitioner presented eleven witnesses and the Petitioner's Exhibits A, B, C, F, H, K, M, and O were admitted into evidence. The Respondent presented one witness and the Respondent's Exhibits 5, 7, 14, and 16 were admitted into evidence.

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

FINDINGS OF FACT

1. The Petitioner, Gwendolyn Salter, is an African-American female who was initially employed by International Paper in June 2000 as an Operator. Shortly thereafter she was promoted to the position of Lumber Grader and on December 15, 2001, was promoted to the hourly position of Lead Grader.

2. The Respondent, International Paper Company, is a forest product company. At its McDavid, Florida facility it operates a sawmill which produces lumber and other building products for sale to forest product dealers, lumber yards, and

dealers in the construction industry. The sawmill opened in the year 2000.

3. It is very important to determine the value of all pieces of lumber a sawmill produces. Variance in the grade of a given board can mean the difference in several dollars in value per board. In order to determine and set the value or price of a piece of lumber, the sawmill must employ Lumber Graders. The Graders inspect lumber to determine the type and number of defects and therefore to determine what the grade of a given board is, including the determination of whether a board should be trimmed to eliminate some defects.

4. The Southern Pine Inspection Bureau (SPIB) promulgates standard lumber grading rules, which are accepted and applied by all members of the lumber-producing industry that are members of the Southern Pine Association. The rules govern how each board is graded. Boards are basically graded one, two, three, four or MSR. Number one is the best grade and a board with the most knots or other defects would be graded a four. An MSR board is generally a grade two board that is particularly strong. Such boards are primarily used for structural members.

5. When grading lumber, the graders determine in the grading process whether a board should be trimmed in order to remove defects to enhance its grade and value. If there is a defect at the end of the board, for example, the board can be

trimmed to the next shorter standard length, which would actually increase the value of that board. Since a board's value can vary several dollars per piece, depending on its grade, the integrity of the grading system is integral to the successful operation and profitability of the Respondent's sawmill.

6. The McDavid Mill operated with four shifts. There were about four to five graders working on each shift. They worked on only the "dry end" of the mill. That means that they worked grading lumber after it was sawed in the sawmill, had been kiln dried, to remove excess moisture, and dressed in the planer mill. Then it was graded, including any necessary final trimming. The graders, have approximately two seconds to observe a board, flip it to look for defects on all four sides, and grade it. They look for natural defects, including knots, and make a mark or a symbol on a board indicating its grade. Additionally, the McDavid Mill has a machine vision grader (MVG) that automatically grades the wane and the size of each board. Wane is a defect involving a tapering or lessening of a board's proper dimension generally caused by the board being sawn near the outside margin of a log so that the logs curvature and natural taper and bark tend to reduce the size and square dimension along the edge of a board.

7. The Petitioner was promoted to the position of "Lead Grader" on December 15, 2001. It thus became her responsibility to review the performance of each of the graders at the facility.

8. The McDavid Mill through its operations manager, Alan Orcutt, instituted a new Grader Performance System in November 2003. The new system rated graders every eight weeks based on their grade decision accuracy, their trim decision accuracy, and their knowledge of grading rules. A grader's pay could vary every eight-week period depending on his or her performance during the previous eight week period.

9. The Lead Grader, the Petitioner, was charged with implementing this system. It was the responsibility of the Lead Grader to ensure that at least 1200 boards were reviewed for each grader, each eight-week period, either by the Lead Grader, by the MVG operator, or by SPIB reviewers. Essentially, the SPIB reviewers or inspectors would select a "pack" of boards and review them to ensure that the graders had graded those boards properly. The reviewers would record if a board was above grade, below grade, or properly graded.

10. Secondly, the Lead Grader was responsible for reviewing the graders' trim decision accuracy. The Lead Grader was required to review at least 100 "trim boards" for each grader for each period, to determine if the graders made the

correct trim decisions. The SPIB inspectors would record the percentage of boards trimmed accurately. For board trimming decisions, the board is not processed, but is placed into a pack where it is viewable in its entirety by the reviewer. The reviewer sees exactly what the grader saw in looking at the board, and thus can determine whether or not the grader made the correct decision about whether to trim the board and, if so, how much, and where. In other words, the viewer can determine whether it was appropriate to make a two-foot cut on one end, whether or not a knot should be cut out of the board or whether it was under-trimmed or over-trimmed.

11. The Lead Grader was also responsible for monitoring the graders' knowledge of lumber grading rules. The Lead Grader was thus required to give two 25-question written examinations (test) every eight-week period to graders concerning the written grading rules. The Lead Grader was required to administer the test twice per eight-week period on a crew-by-crew basis, correct the answers and return a copy to the grader with the correct answers and an overall score. In order to ensure the integrity of the testing process, the tests were only allowed to be given in group settings. Tests were not allowed to be given to individual graders. There had to be more persons present in the testing room than just the Lead Grader and one individual grader being tested.

12. The graders were ranked B, A, or AA, and their pay would be adjusted accordingly. AA was the highest rating and was paid the highest salary rate. The ranking were based on a combination of grading accuracy, trim decision accuracy, and scores on the grading examination. In order to be ranked AA, for example, a grader would be required to have at least two percent of boards above grade, two and a half percent below grade, with 95 percent trim decision accuracy and 90 percent correct answers on the written test of grading rules knowledge. Depending on the scores, he or she could change ranks each eight-week period and thus change the salary level.

13. The McDavid Mill's grader performance system was thus implemented in November 2003. Mr. Orcutt discussed the Lead Grader performance expectations with the Petitioner during a meeting with all graders. Essentially, Mr. Orcutt explained that the Petitioner was responsible for implementing the new performance system, specifically: re-grading 1200 boards per grader per period, reviewing 100 trim boards per grader per period, and providing at least two grading exams to each grader, each period.

14. When the Grader Performance System was implemented in November 2003, the manager, Mr. Orcutt, intended that the first eight-week period would be a "dry run" in which the results of the grading of the various graders would have no effect on pay

rates. The second eight-week period which ran from January to February 2004, was supposed to be "for the record" and would affect pay rates. Ultimately, Mr. Orcutt determined that the Petitioner's data on the graders was inaccurate and incomplete, and therefore he decided to extend the dry run until the third eight-week period during which pay rates would be affected by the graders' performance ratings.

15. On February 6, 2004, Mr. Orcutt provided the Petitioner her performance review. In that review, Mr. Orcutt stated that the Petitioner had "not met expectations." He explained that this referred to the Petitioner's failure to keep track of the performance of all the graders, as well as deficiency issues regarding the grade rule test being administered inappropriately.

16. On February 27, 2004, Mr. Orcutt issued a 30-day performance improvement plan to the Petitioner. In it he put her on notice that she must improve her performance in the execution of her role as a Lead Grader. He explained that during the first two months of 2004, the Petitioner had failed to meet the minimum expectations of the Lead Grader performance standards provided to her in November 2003. Specifically, this referred to Mr. Orcutt's finding that the Petitioner had failed to review the requisite number of boards during the first two months of 2004. The Performance Improvement Plan also explained

that if the Petitioner failed to meet the expectations that had been explained to her in November 2003, that she would be removed from her position as Lead Grader and demoted to a Shift Grader position.

17. Mr. Orcutt also decided to transfer the responsibility for in-putting the grader data into the computer to the accounting department. Mr. Orcutt explained that he had received complaints from graders to the effect that the Petitioner was failing to accurately keep records of the number of boards being reviewed, as entered into the computer, which could affect the pay rate of the graders. Mr. Orcutt believed that this change would allow the Petitioner to focus on monitoring the graders.

18. Jessie Ford is an African-American male. He was hired by International Paper at the McDavid Mill in March 2004 as a Dry-End Superintendent. He was hired to replace Mr. Orcutt, who had been promoted. Mr. Ford was responsible for safety, production, and quality of the dry-end production portion of the mill, which included supervision of the graders.

19. During his first few months he monitored the Petitioner's performance and determined that the Petitioner appeared to be complying with the Lead Grader performance expectations. He did, however, verbally counsel the Petitioner about giving tests to individual graders, instead of in the

required setting of administering tests to the group of graders simultaneously.

20. In August 2004, Mr. Ford asked the Petitioner if she had completed the requisite number of board re-grades in accordance with the lead grader performance expectations. Although the Petitioner indicated to him that she had completed the re-grades, a review of the data by Mr. Ford and Mr. Orcutt indicated that the Petitioner was under the required board count for re-grading as to several of the graders.

21. Mr. Ford and Mr. Orcutt met with the Petitioner to ask her about the missing boards and also about the discrepancy in what she had told Mr. Ford. The Petitioner explained that she believed that she had reviewed 1200 boards. She claimed that she had reached 1200 by combining the boards that were reviewed for trim tests, with boards reviewed with grading. This explanation revealed both that the Petitioner had failed to meet her minimum expectations and also that the Petitioner appeared not to understand the program almost nine months after it had been implemented. Further, there were a couple of graders, for whom the re-grading count remained low, even if one (wrongly) counted their trim test boards in the aggregate total.

22. Mr. Ford and Mr. Orcutt also spoke to the Petitioner about giving tests to graders on an individual basis, as was prohibited by the performance evaluating system that had been

implemented in November 2003. That system required that the test be only given to a group of people or more than one person at a time in order to ensure the integrity of the test and of the performance evaluation system. When confronted with the question of whether she had given a test to an individual alone, the Petitioner responded that there was "someone else" in the room during the test. This again demonstrated to Mr. Ford and Mr. Orcutt that the Petitioner did not really understand the requirements of the performance evaluation or testing system.

23. Following that meeting with the Petitioner, Mr. Ford and Mr. Orcutt met with the human resources manager, Karen Rutherford, as well as the mill manager, Alan Smith. They discussed the issues and possible solutions regarding the Petitioner's performance. Mr. Ford explained in his testimony that the group determined that it was his decision whether or not to discipline the Petitioner.

24. Mr. Ford therefore reviewed the November 2003 performance expectations and the February 2004 Performance Improvement Plan directed at the Petitioner. Mr. Ford determined that the Petitioner had been properly advised of her responsibilities as Lead Grader, the consequences of inadequate performance after imposition of the improvement plan, and had failed to meet expectations. On August 27, 2004, he demoted the Petitioner from Lead Grader to a Shift Grader role or position,

in accordance with the February Performance Improvement Plan. Mr. Ford explained to the Petitioner that she had failed to obtain the proper amount of boards in her re-counts, and that she had improperly given tests to graders on an individual basis, as prohibited.

25. The Petitioner claims that she was discriminatorily demoted to a grader from the Lead Grader position and was discriminatorily denied a raise. She grounds this position on the contention that similarly-situated employees outside her protected class were treated differently and more favorably in similar situations, and that her temporary supervisor in the fall of 2003, Mr. Garrett, had a discriminatory attitude toward her and against women. This contention is based upon an alleged discriminatory statement he made and upon the fact that he also required her, in addition to her normal Lead Grader duties, to work on the MVG machine when its regular operator had been fired, and after she had trained his replacement. In essence, the Petitioner complains that Jamey Garrett was prejudiced against her and once made a comment that he "really did not care for working with women."

26. Mr. Garrett had temporarily been placed in partial supervision of the Petitioner as Acting Dry-End Superintendent in the late summer and fall of 2003. At about this time, Mr. Orcutt, and/or Mr. Garrett, acting singly or in concert,

directed the Petitioner to assume operation of the MVG machine when its normal operator was fired. She also was required to train a replacement operator for the machine. That effort took about three weeks. Thereafter she asked that her temporary assignment to the machine operation be ended. Mr. Garrett instead told her that he needed her to operate it through the rest of 2003 (approximately two to three months). She maintains, in her own testimonial opinion, that Mr. Garrett and/or Mr. Orcutt "loaded her up" with this extra duty in order to intentionally cause her to fail at her duties as Lead Grader.

27. There is no evidence other than the Petitioner's unsupported opinion, that Mr. Garrett or Mr. Orcutt had this intent in requiring her to perform the extra duty, which incidentally began well before the implementation of the November 2003 new performance and evaluation standards for graders, which the Petitioner, as Lead Grader, was required to learn and implement.

28. The only evidence the Petitioner provided concerning Mr. Garrett's discriminatory animus towards women is the alleged statement referenced above. Mr. Garrett denied making that comment. In fact, however, he did admit, regarding concerns he had about working as a supervisor, (which had not been his permanent assignment), that he asked a promotion board to help him work better with women. This was because he feared that his

size (he is 6'5") was intimidating to women. This statement does not indicate any discriminatory intent toward women, nor does the alleged statement about not caring about working with women indicate any such intent, especially because of its isolated nature. Moreover, the persuasive evidence shows that Mr. Garrett actually worked well with women and that he promoted several women during his tenure in a supervisory role. The Petitioner herself recalled a conversation with Mr. Garrett in about March 2004 in which he stated that he thought he and the Petitioner were getting along a lot better.

29. Mr. Garrett's only supervisory authority over the Petitioner was as a set-up supervisor near the end of 2003 and the beginning of 2004, during which time he did not have actual disciplinary authority over the Petitioner. That responsibility remained with Mr. Orcutt. He did apparently have the ability to make recommendations concerning employee matters, including discipline, to Mr. Orcutt.

30. In fact, the evidence reveals that the only disciplinary issue concerning the Petitioner in which Mr. Garrett was actually involved occurred on or about March 2004. Mr. Garrett had been instructed by Mr. Orcutt to issue disciplinary sanctions to the Petitioner. Mr. Garrett therefore met with the Petitioner and allowed her to explain her version of the situation. After listening to her side of the story he

accepted her explanation as correct and tore up the disciplinary memo and imposed no discipline. Therefore, although she received a less satisfactory performance evaluation in February 2004 and was placed upon a Performance Improvement Plan in late February 2004, no formal discipline was imposed upon the Petitioner until her demotion in August 2004.

31. The Petitioner contends that she was denied a raise because of her sex. The only evidence related to a raise was testimony provided by Mr. Garrett, who indicated that the Petitioner could not receive a raise because she was already receiving the maximum pay for her grade level as a Lead Grader. The raise in question at that time was given to the other graders but not to the Lead Grader, the Petitioner, because she was already making the maximum of her pay range. Indeed, the Petitioner admitted that the raise was given to all graders, including black graders and female graders. The Petitioner acknowledges that she was the only individual denied a raise at the time in question. Mr. Garrett's explanation as to the reason she was not given a raise, when the others of both races and sexes were, is accepted as accurate.

32. Further, the Petitioner admitted that she was also given the same rate of pay as the highest ranking, AA graders once she was demoted out of the lead grader position. The Petitioner's contention based upon her own opinion that she was

denied a raise because of her race or sex is not deemed credible and persuasive under these circumstances.

33. On June 8, 2005, the Petitioner filed her charge of discrimination with the Commission. In the charge she claimed that she had been discriminated against between August 2004 and December 2004, based upon her race and sex. She claimed discriminatory demotion as well as being discriminatorily denied a raise. The Commission after its investigation issued a Determination of No Reasonable Cause to believe that an unlawful practice had occurred. That determination was issued on December 13, 2005, and the Petition for Relief was filed January 26, 2006, initiating this proceeding.

34. The Petitioner claimed in her Petition for Relief that in addition to being demoted and denied a raise because of her race and sex that the Respondent maintained a hostile work environment based upon issues of sex and race. The Petitioner also maintained that she was replaced when demoted by a white male, who took over the position of Lead Grader. She contends that the white male, Mr. LePage, was allowed to maintain a count of his own boards or pieces of lumber that he had reviewed while monitoring the graders, while the Petitioner's numbers of reviewed or inspected boards were maintained in the computer record by the company receptionist. She also maintained that Mr. LePage gave a non-proctored skill test to graders, but was

not demoted for it, whereas the Petitioner was demoted for allegedly giving a non-proctored skill test to a grader or where no one else was present in the test room.

35. The persuasive evidence shows that the Petitioner was not similarly situated with her replacement, Mr. LePage. Although she contends that Mr. LePage also provided a test to a grader individually instead of giving the test only in a group setting and yet was not demoted, their circumstances are not comparable. Mr. LePage had only held the Lead Grader position for a few months when the allegation against him was raised. When it was raised, his first disciplinary incident in that position, Mr. Ford counseled him and admonished him that he was only to give test in group settings. The Petitioner, however, had been in the Lead Grader position for a number of years and had been warned about the testing issue at least twice previously. Moreover, she had been admonished about her performance in conjunction with her February 2004 performance evaluation and had already been placed on a performance improvement plan at that time in part for that same issue concerning individualized testing. Thus she was not similarly situated as an employee to Mr. LePage who was disciplined less harshly because it was his first such transgression and warning. In a similar context, it is inferred that Mr. LePage was allowed to input his own board counts into the computer system because,

unlike the Petitioner, he had not told management that he had performed and reported the proper board counts when that was proved not to be the case.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Florida Statutes (2005).

37. Section 760.10, Florida Statutes, forbids the imposition of an adverse employment action by an employer on an employee for discriminatory reasons regarding race or sex. There is no dispute that the Petitioner meets the statutory definition of employee, as does the Respondent meet the definition of employer.

38. Section 760.11(1), Florida Statutes, provides pertinently as follows:

> (1) Any person aggrieved by a violation of ss. 760.01-760.10 may file a compliant with the commission within 365 days of the alleged violation . . . .

39. The Petitioner filed her Charge of Discrimination on June 8, 2005. Therefore, any discriminatory act that occurred on or before June 8, 2004, is time-barred because of this statutory provision, unless the Petitioner is able to prove that actions occurring before that time were continued into the jurisdictional time period, referenced above, and were part of a

continuing pattern of discriminatory conduct or hostile, discriminatory working environment conditions and circumstances.

40. Throughout the hearing the Petitioner opined in her testimony that she was discriminated against by Jamey Garrett. Although those allegations, based upon the above findings of fact, are not established as factually accurate, they are also time-barred by Section 760.11(1), Florida Statutes, because they all occurred long before June 8, 2004. Moreover, the preponderant persuasive evidence, and the above findings of fact based thereon does not show that any conduct or circumstances occurring during the time that the Petitioner was partially supervised by Mr. Garrett had any relationship or continuing influence on the circumstances occurring, and decisions made, regarding the Petitioner's discipline, commencing in February 2004. Indeed, the Petitioner herself testified that Mr. Garrett moved to the other side of the mill, in an unrelated operation, by April 2004 and that her interaction with him after April 2004 was "non-existent." Thus any allegations concerning Mr. Garrett discriminating against the Petitioner are time-barred.

41. In any event, the above found facts concerning Mr. Garrett's relationship with the Petitioner failed to show that he had any discriminatory animus toward her or was acting in a discriminatory fashion. In fact, even if his isolated comment referenced in the above findings of fact occurred, neither it,

nor the other circumstances regarding his relationship with the Petitioner established any discriminatory environment or discriminatory intent on his part with regard to any employment decision affecting the Petitioner. In fact, his conduct toward the Petitioner in March 2004, when he tore up a disciplinary memorandum, and when he acknowledged that he and the Petitioner were getting along better, shows just the opposite.

42. Further, the Petitioner's June 8, 2005, Charge of Discrimination was limited to her claims that she was discriminatorily demoted in August 2004, and denied a pay raise. The Petitioner did not indicate on her charge filed with the Commission that there was a continuing pattern of discriminatory practice and nothing in the charge indicates that allegedly discriminatory conduct occurred prior to her demotion. Therefore, allegations unrelated to her demotion or alleged denial of a pay raise are time barred and may not be addressed in this proceeding.

43. The Division of Administrative Hearings and the undersigned is without jurisdiction of any claim not raised in the initial charge of discrimination before the Commission. New or different types of discrimination cannot be alleged in the Petition for Relief or at the formal proceeding instituted under Sections 120.569 and 120.57(1), Florida Statutes, unless they were originally alleged in the Charge of Discrimination and

investigated by the Commission. The Commission must first investigate the allegations of the charge, and only when it enters its "cause finding" may a Petition for Relief attacking the proposed final agency action be filed. Because more than 365 days elapsed since the occurrence of any purported events underlying any such additional allegation, her charges can not now be amended. See § 760.11(1), Fla. Stat.; Williams v. Shands at Alachua General Hospital and Santa Fe Health Care, DOAH Case No. 98-2539 (Recommended Order entered January 8, 1999; Final Order July 16, 1999); Luke v. Pic N Save Drug Company, Inc., DOAH Case No. 93-4425 (Recommended Order filed August 25, 1994; Final Order December 25, 1994); Haynes Abet v. Trans America Mailing, Inc., 159 F.3d 246, 254 (6th Cir. 1998).

44. The legislative scheme, contained in Chapter 760, Florida Statutes, incorporates and adopts the legal principles established in the federal anti-discrimination laws under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000E, et seq. Florida courts have determined that federal discrimination law provides guidance for construing the relevant provisions of Chapter 760, Florida Statutes. Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

45. The United States Supreme Court has delineated the burden of proof in discrimination cases in the opinions in

McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Under that standard the Petitioner has the initial burden of proving a prima facie case of discrimination. After the establishment of a prima facie case the burden to go forward with evidence shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action at issue. Thereafter, it is incumbent upon the Petitioner, the employee, to adduce evidence which would show that the employer's professed reason for the adverse employment action is in fact pretextual and actually involved a discriminatory intent or was the product in the context of this case of a racially or sexually hostile working environment. The ultimate burden of persuasion in the case, however, always remains with the Petitioner bringing the action. St. Mary's Honor Center v. Hicks, supra.

46. In order to establish a prima facie case of discriminatory demotion or denial of pay raise, the Petitioner must establish: (a) That she is a member of a protected class; (b that she was qualified for the position; (c) that she suffered an adverse employment action such as the demotion; (d) that she was replaced by someone of comparable or lesser qualifications, not a member of her protected class and/or that

other employees not members of her protected class who were similarly situated, as for instance by committing violations of employer policies or rules, were treated differently and more favorably. See Stumiolo v. Sheaffer Eaton, Inc., 15 F.3d 1023, 1025 (11th Cir. 1994); Underwood v. North Port Health Services, 57 F. Supp. 2nd, 1289, 1300 (M.D. Ala. 1999).

47. The Petitioner has established that she is a member of a protected class that she is a woman and that she is African-American, a minority. She has also established that she suffered an adverse employment action by the demotion. She was replaced by someone of comparable qualifications who was not a member of her protected class, a white male, Paul LePage. She did not, however, prove by preponderant persuasive evidence that he was similarly situated to her. As explained in the above findings of fact, although he also administered a test to a grader individually, instead of in a group session, and thus violated company rules, that was the only incident established in the evidence whereby he violated policy or rules. She had done so, and had been warned against doing so, more than once and was already on a Performance Improvement Plan partially because of that sort of conduct. Thus her conduct was more serious as a violation, by its recurrent nature, than was his and he was not already on a graduated discipline status, (i.e. the Performance Improvement Plan). Thus, their circumstances

were different and LePage was not truly a comparable, exemplary employee.

48. Moreover, the Petitioner did not establish that she was qualified for the position that she held because she failed to comply with the Lead Grader performance expectations and standards. As described in the above findings of fact, the Petitioner failed to re-grade 1200 boards for each grader for the period ending in August 2004 either through mistake, because she didn't understand the performance standards she was to adhere to or intentionally. It does not matter which of these was the reason, the fact remains that she did not perform up to the appropriately adopted performance expectations for the Lead Grader position. Similarly, she gave a grading test to an individual instead of giving the test in a group setting, as she had been required by company policy and rules, concerning which she had been admonished previously. Because she was either unable or unwilling to comply with the Lead Grader performance expectations in this regard, she did not establish that she was actually qualified to be a Lead Grader and it was for that reason that Mr. Ford demoted her.

49. Moreover, the fact that Mr. Ford is of the same race as the Petitioner undermines somewhat the Petitioner's claims that she was discriminated against on the basis of her race. See Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, n. 3

(Dist. of N.J. 1996) holding that where the decision-makers are members of the plaintiff's protected class "weakens any possible inference of discrimination."

50. If the Petitioner were to satisfy her initial burden of presenting a prima facie case, the employer, in articulating or producing evidence of legitimate, non-discriminatory reason for its action:

> . . . need only articulate-it need not prove-the existence of a legitimate, non-discriminatory reason for its action. The plaintiff then retains the burden of persuading the court that the offered reason is a pretext and that a discriminatory reason more likely motivated the employer in its actions.

Texas Department of Community Affairs v. Burdine, supra at 1209. Evening assuming arguendo that the Petitioner established a prima facie case, she did not establish that the legitimate, non-discriminatory reason articulated by the Respondent for the demotion was pretextual. The proof elicited by the Respondent established persuasively that the Petitioner failed to comply with the Lead Grader performance expectations after having been given ample notice and training as to what was expected. The Petitioner has adduced no persuasive, preponderant evidence that the articulated reason for her demotion and the reason she was not given the relevant pay raise was a pretext for discrimination.

51. Even if it be assumed arguendo that Mr. Orcutt was wrong in his belief that the Petitioner had failed to re-grade a sufficient number of boards (which the evidence shows he was not), a mistaken belief by the employer or the supervisor who imposes the employment action at issue does not demonstrate pretext or discriminatory intent. Mitchell v. Worldwide Underwriters Insurance Company, 967 F.2d 565, 567 (11th Cir. 1992); Elrod v. Sears Roebuck and Company, 939 F.2nd 1466, 1470 (11th Cir. 1991).

52. The Petitioner always retains the ultimate burden of persuasion. St. Mary's Honor Center v. Hicks, supra. In order to establish pretext the Petitioner herein asserted conclusory allegations based upon her own opinions, not supported by other testimony and evidence. Her argument appears to be that Mr. Garrett influenced the determination to demote her because he did not like working with women. See Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236, 1248 (11th Cir. 1998) (when the harasser and the decision-maker are not the same person, the plaintiff must prove that the harasser's discriminatory animus caused the employer to terminate the plaintiff in order to establish an inference of causation); Zakalama v. Mt. Sinai Medical Center, 842 F.2d 291, 294 (11th Cir. 1988). In the instant situation, the decision-maker was Jessie Ford. Mr. Ford considered the opinions of Mr. Orcutt, but he did not discuss

the Petitioner's situation with Mr. Garrett in any manner. At the time of the disciplinary events in question Mr. Garrett had no supervisory authority over the Petitioner and was employed in a different part of the sawmill operation. The Petitioner contends that Mr. Garrett had a great deal of influence over his supervisor Mr. Orcutt. However, other than her conclusory assertions based upon her unsupported opinion she provided no evidential support for this allegation. A petitioner's unsupported conclusory assertions or opinions cannot, standing alone, establish discriminatory intent or a discriminatorily hostile working environment. Swanson v. General Services Administration, 110 F.3d 1180, 1188 (5th Cir. 1997).

53. Additionally, the only support the Petitioner provides for her allegation that Mr. Garrett had a discriminatory bent against women is the alleged statement made by him in 2002: "I really don't care for working with women." This was an isolated statement. No such other utterance or similar utterance by Mr. Garrett or any other person in a supervisory or even in a co-employee capacity was proven. Mr. Garrett denies making the comment. He does admit that, in response to a question about concerns he had while working as a supervisor that he had asked a promotion board to help him work better with women because he feared that his size was intimidating to women. This does not indicate that he harbored any hostile or discriminatory intent

towards women; rather, it indicates otherwise. Additionally, the evidence showed that Mr. Garrett worked well with women and that he promoted several women during his tenure. Indeed, the Petitioner herself recalled a conversation with Mr. Garrett in about March of 2004 wherein he stated that he thought he and the Petitioner were getting along better. In any event, off-hand comments and isolated incidents are insufficient to establish a hostile work environment or discriminatory intent. Blevins v. Helig-Myers Corp., 52 F. Supp. 1337 (M.D. Ala. 1998).

54. Mr. Garrett's only supervisory authority over the Petitioner was as a "set-up supervisor" at the end of 2003 and beginning of 2004, during which time he did not have actual disciplinary authority over the Petitioner (although he could recommend). That responsibility remained with Mr. Orcutt. Additionally, the evidence reveals that the only disciplinary issue regarding the Petitioner with which Mr. Garrett was involved occurred in or about March 2004. Mr. Orcutt had instructed Mr. Garrett to issue the disciplinary action to the Petitioner. Mr. Garrett met with the Petitioner and allowed her to explained her side of the story or circumstances. After hearing her version of the events in question, he accepted her explanation and tore up the disciplinary memorandum and did not impose the discipline.

55. Inasmuch as the Petitioner provided no evidence that she was demoted because of her race or her sex, her discriminatory demotion claim must fail. The evidence rather is preponderant and persuasive to the effect that, as the employer maintains, she was demoted because she failed to perform the duties of her job in a passably acceptable manner, as delineated in the above findings of fact.

56. The Petitioner has not presented any evidence that shows that she was denied a raise because of her sex or her race. The only evidence related to a raise was testimony provided by Mr. Garrett, who indicated that the Petitioner could not get a raise under the regular company pay policy and rules because she had already reached the top of her pay range as a Lead Grader. The raise at that time was given to graders, but not to the Lead Grader, because she was already at the maximum pay level for her position. The Petitioner in her testimony admitted that the raise was given to all graders, including black graders and female graders, not just male graders.

57. The Petitioner claimed that she was the only individual denied a raise. Whether or not that was true, the fact that she did not get a raise was for the above-mentioned legitimate reason and had nothing to do with her race or her sex. Further, the Petitioner also admitted that she was given the highest rate of pay for a grader, that of AA grader, even

when she was demoted out of the lead grader position. Consequently, there is no preponderant, persuasive evidence that the Petitioner was denied a raise because of her race or her sex.

58. The Respondent has requested that it be awarded a reasonable attorney's fee and cost, citing Section 760.11(6), Florida Statutes, which provides that the Commission discretionarily may award a prevailing party a reasonable attorney fee and costs. No evidence has been adduced in support of attorney's fees or costs. It is also true that, as yet, the Respondent is not a prevailing party since the final order of the Commission has not been entered. Consequently, any decision regarding attorney's fees or costs must be made by the Commission upon the entry of a final order, determining the prevailing party.

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 a final order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 3rd day of November, 2006, in Tallahassee, Leon County, Florida.

S

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 3rd day of November, 2006.

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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.