STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VALERIA GASKIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-5281
	)	
SEMINOLE COUNTY PUBLIC SCHOOLS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held on February 4, 2010, in Sanford, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jerry Girley, Esquire
The Girley Law Firm, P.A.
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Orlando, Florida 32803

For Respondent: Serita D. Beamon, Esquire
Seminole County School Board
Educational Support Center
400 East Lake Mary Boulevard
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STATEMENT OF THE ISSUE

The issue is whether Seminole County School Board (Respondent) engaged in disparate treatment of Valeria Gaskin (Petitioner) such that the treatment of Petitioner constituted

gender discrimination that resulted in a constructive discharge of Petitioner from her position with the school district.

PRELIMINARY STATEMENT

On July 31, 2008, Petitioner filed a complaint with the Florida Commission on Human Relations (FCHR) that alleged Respondent had subjected Petitioner to disparate treatment constituting gender discrimination. Further, Petitioner claimed that she had been constructively discharged from her employment with Respondent as a result of such disparate treatment. The FCHR conducted an investigation of the complaint and issued its Determination of No Cause dated September 14, 2009. Thereafter, Petitioner timely filed a Petition for Relief that was forwarded to the Division of Administrative Hearings for formal proceedings on September 28, 2009.

At the hearing, Petitioner testified on her own behalf and presented the testimony of Kathy Dent, Julie Murphy, Kenneth Lewis, John Reichert, and William Boone. Petitioner's Exhibit 35 was admitted into evidence. Respondent presented testimony from Carolyn Perry as well as the same witnesses Petitioner offered. Respondent's Exhibits 4-9, and Composite Exhibits 10, 16, 18, 20-23, 27, 29, 31, 32 and 35 were admitted into evidence. The two-volume Transcript of the hearing was filed on March 2, 2010. Thereafter, both parties timely filed Proposed Recommended Orders that have been considered in the

preparation of this order. All citations to the Florida Statutes are to Florida Statutes (2009) unless otherwise stated.

FINDINGS OF FACT

1. Petitioner is a female who was hired by Respondent on November 25, 1991, as a school bus driver. At all times material to this case, Petitioner's performance of her duties as a school bus driver relate to the ultimate issues of law and fact to be resolved.

2. The employment relationship between Petitioner and Respondent was governed by a Collective Bargaining Agreement entitled "Agreement with the Seminole County Bus Drivers' Association, Inc. and the School Board of Seminole County (union contract)." Respondent is the entity charged by law to operate the School District of Seminole County, Florida, and in that capacity entered into the union contract.

3. Petitioner was charged with the responsibility of reading the union contract and complying with its terms. Petitioner acknowledged that she was directed to review the contract and familiarize herself with it not less than annually. The union contract required Petitioner to comply with school board policies related to her employment duties.

4. Kenneth Lewis is Respondent's Director of Transportation under whose leadership all school buses are operated and maintained. In the structure of the Transportation

Department, Mr. Lewis is followed by Julie Murphy, Assistant Director of Transportation, who, in turn, supervises Area Managers who perform the daily supervision of bus drivers. At all times material to this matter, Kathy Dent was the Area Manager under whom Petitioner served.

5. It is undisputed that Respondent's policy prohibits the use of cell phones while driving a school bus. All school bus drivers are made aware of the policy and the policy is reiterated in the Transportation Handbook (handbook) and is discussed repeatedly throughout the school year during department meetings. Petitioner acknowledged that she was provided a handbook and knew that Respondent's policy prohibited the use of cell phones by school bus drivers while on a school bus.

6. On or about October 3, 2007, Ms. Dent met with the bus drivers under her charge (including Petitioner) to remind them of the policy against cell phone use while on school buses.

7. On November 30, 2007, Ms. Dent met with Petitioner individually to advise her again that cell phone use was not permitted while driving a school bus.

8. On January 17, 2008, Petitioner was involved in a vehicular accident and was talking on a cell phone at the time of the crash. Petitioner acknowledged that she was using a cell phone while driving on January 17, 2008, and that such use

violated school board policy. In fact, because Petitioner's school bus carried a digital video camera that recorded Petitioner's actions on January 17, 2008, Petitioner knew that she could be terminated for cell phone use while driving a school bus. More specifically, at the time of the accident the video captured Petitioner exclaiming, "I'm going to lose my job because I'm on the cell phone."

9. Subsequent to the accident Petitioner was on workers' compensation/leave but returned to work to face a five-day suspension without pay for her violation of the cell phone policy. The letter advising Petitioner of the proposed punishment clearly indicated that the recommendation for a five-day suspension without pay from the Transportation Department would be forwarded to the school superintendent for review and action.

10. The school superintendent accepted the recommendation and Petitioner was advised that she would serve the unpaid suspension on May 13, 14, 20, 21, and June 3, 2008. These were the first dates available after Petitioner returned to work.

11. On May 7, 2008, a date that Petitioner was driving her bus on her designated route, a student complained that an ipod had been stolen. To attempt to solve the complaint, a law enforcement officer requested that the Transportation Department pull the video from Petitioner's bus to see if it could reveal

who might have taken the device. To that end, Assistant Director Murphy contacted Ms. Dent to ask her to retrieve the video and review it for the purpose requested.

12. Ms. Dent pulled the video hard drive from Petitioner's bus and viewed the footage for the purpose directed. Ms. Dent discovered conduct she had not expected.

13. First, the video clearly showed that Petitioner continued to use her cell phone while on the school bus. Even in the face of her impending suspension, Petitioner disregarded the school board policy and the directives from her supervisor. Petitioner continued to talk on a cell phone while on the school bus.

14. Second, the video clearly showed unbecoming conduct between Petitioner and another school bus driver, William Boone. During the video Mr. Boone can be seen approaching Petitioner while she is seated at the driver's position, place his hand and arm under her skirt for an extended period of time, and then later giving her an unspecified amount of money before departing. This conduct occurred while Petitioner was in line awaiting the start of her bus duties. Students were not on the bus at the time.

15. Given the unexpected discoveries on the video, both Petitioner and Mr. Boone were called to the transportation office to meet with Mr. Lewis. Beforehand, however, the video

from Mr. Boone's bus was retrieved to determine if any inappropriate conduct could be seen on it. The video did not disclose any such conduct. Mr. Boone was not observed using a cell phone while on his bus and no additional unbecoming conduct was depicted.

16. On May 9, 2008, a meeting was conducted with Petitioner, Ms. Murphy, Ms. Dent, and Mr. Boone. Later Mr. Lewis joined the group. Petitioner and Mr. Boone were advised that their unbecoming conduct had been captured by the bus video. Additionally, Petitioner was advised that her continued use of a cell phone while on the school bus had also been shown on the video.

17. The video spoke for itself. The video contained irrefutable evidence of the conduct described above. Petitioner and Mr. Boone were given the opportunity to see the video for themselves. Both employees displayed embarrassment and concern. Mr. Lewis advised Petitioner that her continued use of the cell phone was in violation of the school board policy and advised both employees that the unbecoming conduct that appeared to be of a sexual nature was also not acceptable.

18. At some point Petitioner claimed that she and Mr. Boone had been involved in a romantic relationship for an extended period of time. Mr. Boone expressed concern that his wife would find out about the incident. Mr. Boone denied that

he was engaged in sexual conduct but accepted that it appeared that way. Further, Mr. Boone who held a previously untarnished personnel record did not want to lose his job.

19. Mr. Lewis advised both Mr. Boone and Petitioner that he would likely recommend termination for both of them. He did not ask for their resignations, did not attempt to intimidate them in any manner, but expressed concern at their lack of judgment. As to Petitioner, since the video depicted her continued use of the cell phone (an act not applicable to Mr. Boone), Mr. Lewis expressed serious issue with Petitioner's behavior. Nevertheless, no one demanded that Petitioner resign her position with the school district.

20. Later in the day, Petitioner and her union representative met with Mr. Lewis to review the allegations. Since Mr. Lewis did not change his position and the union did not seem supportive of her cause, Petitioner became upset. Ms. Murphy offered to speak to Mr. Lewis on Petitioner's behalf to see if she would be eligible for another employment position within the school district.

21. Petitioner was afforded additional opportunities to meet with her union representative and to determine what, if any, response she would make regarding the allegations. At that point in time, Petitioner knew or should have known that the conduct depicted on the bus video would lead to the

recommendation from Mr. Lewis to the school superintendent that Petitioner's employment as a bus driver be terminated.

22. Petitioner knew or should have known based upon the previous disciplinary action against her that her supervisors could not take disciplinary action against her based upon their authority. Moreover, for Petitioner to be terminated, the school superintendent would have to make the recommendation to the school board for its action. In this case, that recommendation never happened.

23. Instead, Petitioner submitted a letter of resignation to Ms. Murphy. Additionally, Petitioner stated to Ms. Murphy that she did not want Ms. Murphy to look for another employment opportunity within the school district for her. Petitioner's letter of resignation selected May 30, 2008, as its effective date.

24. It is undisputed that Petitioner continued to use a cell phone in violation of the school board policy despite being aware of the consequences for violation of the policy.

25. Mr. Boone also faced disciplinary action for his part in the recorded conduct. As previously indicated, Mr. Boone had an unblemished record with the school district prior to the conduct described in this cause. He had worked for the school district almost 20 years without serious incident of any kind. Ultimately, Mr. Reichert, the Executive Director of Human

Resources and Professional Standards for the Respondent, determined that there was insufficient evidence against Mr. Boone to recommend his termination to the school board. Instead, Mr. Boone was suspended without pay for five days. Mr. Boone did not challenge that decision and duly served his suspension.

26. Mr. Boone did not admit that he had fondled Petitioner but did acknowledge that his conduct was unbecoming a school board employee. While more direct in admitting what occurred between Mr. Boone and herself, Petitioner also acknowledged that their behavior was inappropriate. Petitioner argues that both employees should have been treated similarly. Further, Petitioner maintains that Mr. Boone received better treatment, that is to say, less severe disciplinary measures, than she. Petitioner claims that her resignation was influenced by gender discrimination and ultimately a constructive discharge based upon the disparate treatment she received when compared to Mr. Boone.

27. Petitioner did not file a complaint against the school board at the time of the incident claiming that her resignation was being coerced or was involuntarily tendered. At the time of resignation, Petitioner did not know what disciplinary action would be taken against Mr. Boone. Additionally, Petitioner knew or should have known that she could contest any disciplinary

action brought against her and that she would be entitled to a hearing. Finally, Petitioner knew or should have known that her union could advise her and participate (as guided by their decision) in any disciplinary action against her based upon the terms of the union contract.

28. Petitioner did not attempt to withdraw her letter of resignation prior to its effective date.

29. Petitioner and Mr. Boone are no longer on friendly terms.

30. Petitioner timely filed her claim with the FCHR seeking relief based upon gender-related disparate treatment. She maintains that conditions of her job environment constitute a constructive termination of her employment with Respondent. FCHR issued its determination of no cause and Petitioner timely pursued the instant administrative action.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this cause pursuant to Sections 120.569, 760.11, and Subsection 120.57(1), Florida Statutes.

32. The Florida Civil Rights Act of 1992 (FCRA), Chapter 760, Florida Statutes, prohibits employers from discriminating against employees based upon their gender.

33. Subsection 760.10(1)(a), Florida Statutes, states:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

34. Respondent is an "employer" as defined in Subsection 760.02(7), Florida Statutes, which provides:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.

35. Florida courts interpreting the provisions of Section 760.11, Florida Statutes, have held that federal discrimination laws should be used as guidance when construing the provisions of the Florida law. See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991). Federal case law interpreting Title VII is applicable to cases arising under Chapter 760, Florida Statutes. See Florida State University v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998).

36. Petitioner has the ultimate burden to establish discrimination either by direct or indirect evidence. Direct evidence is evidence that, if believed, would prove the

existence of discrimination without inference or presumption. Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989). For example, blatant remarks, the content of which could be nothing other than to discriminate, constitute direct evidence of discrimination. See Earley v. Champion International Corporation, 907 F.2d 1077 (11th Cir. 1990). There is no evidence of direct discrimination on Respondent's part in this case. Petitioner was never spoken to in a derogatory fashion by anyone. Her gender was never the subject of any conversation or disciplinary action.

37. Therefore, Petitioner must establish a prima facie case of discrimination. To do so Petitioner must establish: she is a member of a protected group; she is qualified for the job; she was the subject of adverse employment action; and she was treated less favorably than a similarly situated person outside her protected class. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

38. If Petitioner establishes the facts necessary to demonstrate a prima facie case, the employer must then articulate some legitimate, nondiscriminatory reason for the challenged employment action. 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." Burdine, supra at 257. If a petitioner in an employment discrimination case cannot establish each element of a prima facie case of discrimination, the burden of persuasion never shifts to the employer to articulate its legitimate nondiscriminatory reason for taking the challenged action. See Pace v. Southern Railway System, 701 F.2d 1383, (11th Cir. 1983).

39. Additionally, to establish a prima facie case of constructive discharge, Petitioner must show, under an objective standard, that her working conditions were so difficult, intolerable, or unpleasant that a reasonable person in her position would feel compelled to resign. See Bourgue v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980); McCaw Cellular Communications of Florida, Inc. v. Kwiatek, 763 So. 2d 1063 (Fla. 4th DCA 1999).

40. Petitioner failed to meet her burden of proof in this cause. Although a member of a protected class (female), Petitioner did not prove that she was treated in a disparate manner. Moreover, Petitioner failed to prove Respondent ignored or failed to correct a difficult or intolerable work environment. Mr. Boone did not have a history of conduct that had been previously cited for discipline. Mr. Boone did not repeat that conduct despite warnings and disciplinary measures.

Mr. Boone did not resign his employment with the school district. In short, to compare Petitioner's behavior with Mr. Boone's is not factually accurate. Petitioner probably knew her employment could be terminated based upon her continued use of the cell phone while on the school bus; further, Petitioner could not deny her conduct with Mr. Boone. In that context she resigned. Obviously she regretted her decision to do so, but Respondent did nothing to coerce that decision. On the other hand, Mr. Boone faced the disciplinary action meted out by Respondent and accepted the consequences of his behavior. With no prior history of discipline, Mr. Boone received a punishment that Petitioner had already been given for her prior violation of policy. Therefore, the circumstances of the work environment did not cause Petitioner's resignation. The likely consequences of her behavior led to the resignation. Petitioner was not qualified to continue her position as a school bus driver, as she was unable or unwilling to comply with the cell phone policy. By continuing to use the cell phone while on the bus she placed herself and occupants of the bus in danger. By resigning prior to an adverse employment decision, Petitioner eliminated the possibility that she could be treated differently from another person similarly situated that was outside her protected class. Respondent took no adverse action against

Petitioner. Thus Petitioner failed to establish a prima facie case of 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 dismissing Petitioner's claim for relief as she was not treated in a disparate manner, did not experience a hostile work environment, and did not establish that she was qualified to continue her position as a bus driver for Respondent.

DONE AND ENTERED this 15th day of April, 2010, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 15th day of April, 2010.

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.