STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ADDIE L. MCMILLAN,

Petitioner,

vs. Case No. 16-4424

AMALGAMATED TRANSIT UNION LOCAL 1395,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on March 2, 2017, in Pensacola, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Addie Landrun McMillan, pro se
710 West Jordan Street
Pensacola, Florida 32501

For Respondent: M. Linville Atkins, Esquire
902 North Gadsden Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

The issue is whether Amalgamated Transit Union Local 1395 ("the Union") committed an unlawful employment practice against Petitioner ("Addie L. McMillan") by failing to provide her with the same level of advocacy provided to Union members and non-African-Americans.

PRELIMINARY STATEMENT

On December 10, 2015, Ms. McMillan filed a Charge of Discrimination with the Florida Commission on Human Relations ("the Commission") alleging that the Union subjected her to disparate treatment by failing to provide her with the same level of advocacy provided to Union members and non-African-Americans. Ms. McMillan needed representation because First Transit, Inc. ("Escambia County Area Transit" or "ECAT") fired Ms. McMillan after she violated a company policy prohibiting bus drivers from using cell phones while driving. Ms. McMillan alleged that "Caucasians and members of the [U]nion committed infractions and they were terminated and the [U]nion represented them and they were given their jobs back."

On June 28, 2016, the Commission issued a letter notifying Ms. McMillan that it had determined that there was "no reasonable cause" to conclude that an unlawful employment practice had occurred:

> [Ms. McMillan] was a bus operator working for an employer whose employees were represented by [the Union], a labor organization. [Ms. McMillan] alleged [the Union] denied her equal representation in her dispute with her employer over her termination on the basis of race, religion, sex, and disability. [Ms. McMillan] did not establish a prima facie case of discrimination. [Ms. McMillan] did not show that she had a disability or that [the Union] was aware of her religion. [Ms. McMillan] identified comparators who

> may or may not have been outside her protected class for sex or race, but [Ms. McMillan] did not show that [the Union] treated them more favorably. [Ms. McMillan] drew attention to the more favorable outcomes they achieved in their disputes with the employer, but [Ms. McMillan] did not describe how or if they were represented differently. [Ms. McMillan] does not identify any other evidence indicating discrimination on any protected basis.

Ms. McMillan filed a Petition for Relief with the Commission on August 2, 2016, and the Commission transferred the case to DOAH that same day.

Via a Notice of Hearing issued on August 22, 2016, the undersigned scheduled the final hearing to occur in Pensacola, Florida, on September 23, 2016.

On August 23, 2016, the Union's counsel filed a motion requesting that the final hearing be continued to a later date. In support thereof, the Union's counsel cited a scheduling conflict and noted that she had just been retained by the Union on August 23, 2016.

After holding a telephonic, pre-hearing conference on September 8, 2016, the undersigned issued an Amended Notice of Hearing re-scheduling the final hearing to occur on October 27, 2016.

On October 24, 2016, Ms. McMillan transmitted a letter to the undersigned asking that the final hearing scheduled for October 27, 2016, be continued to a later date. In support

thereof, Ms. McMillan noted that the parties had yet to exchange documents as required by the Order of Pre-hearing Instructions. In addition, Ms. McMillan noted that her husband was experiencing some unexpected health issues.

The undersigned determined that Ms. McMillan had shown good cause for continuing the final hearing. Accordingly, the undersigned issued an Order on October 25, 2016, canceling the final hearing scheduled for October 27, 2016. Furthermore, the undersigned required the parties to provide dates in November and December 2016, when both parties would be available for a final hearing.

After receiving the parties' response, the undersigned issued an Order on November 7, 2016, re-scheduling the final hearing for December 15, 2016.

Ms. McMillan also filed an unlawful discrimination claim against ECAT, her former employer. That case was also referred to DOAH and assigned Case No. 16-6582.

Because the cases originated from the same facts and several of the witnesses were expected to testify at both final hearings, the undersigned elected to conduct the final hearings for both of Ms. McMillan's cases on March 2 and 3, 2017, in Pensacola, Florida. However, the cases were not consolidated, and separate recommended orders have been issued for each one.

The final hearing in the instant case was held as scheduled on March 2, 2017, and completed that day.

In addition to her own testimony, Ms. McMillan presented the testimony of the following witnesses during the final hearing: Roberta Millender, a customer service lead at ECAT; Mike Crittenden, the General Manager of ECAT; Dianne Hall, a former general manager of ECAT; Kenneth Edgerton, an ECAT employee; Gwendolyn McCormick, an ECAT employee; Greg Thomas, an ECAT employee; Ted Woolcock, the Director of Safety and Training at ECAT; and Michael Lowery, the President of the Union.

Ms. McMillan's Exhibits 1 through 5 were accepted into evidence. Ms. McMillan's Exhibit 6 was not accepted into evidence due to a lack of relevance.

The Union tendered no witnesses and relied on cross-examination of Ms. McMillan's witnesses in order to present its case. The Union moved Exhibits 1, 9 through 12, 15 through 17, and 20 through 22 into evidence, and the undersigned accepted all of the aforementioned exhibits into evidence.

The Transcript from the final hearing was filed on March 22, 2017.

On April 3, 2017, the attorneys for ECAT and the Union filed a joint request asking that the due date for the proposed recommended orders be extended to April 28, 2016. The

undersigned issued Orders on April 4, 2017, granting that request.

Ms. McMillan filed a Proposed Recommended Order on April 4, 2017, and her Proposed Recommended Order was considered in the preparation of this Recommended Order.

Ms. McMillan filed a series of documents on April 5, 2017, pertaining to discussions she had after the final hearing in this matter. The undersigned reviewed the documents but did not utilize them in the preparation of this Recommended Order.

The Union filed a Proposed Recommended Order on May 1, 2017, that was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Ms. McMillan is a 55-year-old, African-American female who had worked at ECAT for 22 years. She began as a part-time beach trolley operator and progressed to becoming a full-time bus driver.

2. The Union and ECAT had a labor agreement[1/] in place between October 23, 2013, and September 30, 2016 ("the labor agreement"). Article 52 of the labor agreement had a policy regarding the use of cell phones by ECAT employees and provided as follows:

> While on duty the use of cellular phone or any other personal communication device is limited as follows:

SECTION 1: The use by an employee of a cellular phone or any other personal communication device while behind the wheel of a transit vehicle, or any other Company motor vehicle is prohibited while the vehicle is not secured. Push to talk communication devices issued by the Company may be used for work related purposes only where authorized by the Company and permitted by law, but must be used in a manner, which would not create an unsafe situation.

Note – Secured definition: Vehicle must be in neutral/park position and emergency brake on.

SECTION 2: If it becomes necessary to use a cellular phone, employees must be at the end of the line/trip (on layover, if applicable) or in a safe location with the bus secure. At no time is it permissible to use a cellular phone if the use will cause the trip to be late at its next scheduled time point.

SECTION 3: The use of a cellular phone or other communication device by an employee while on the shop floor or during work time (unless previously approved) is prohibited, other than a Push to Talk communication device issued by the Company for work related purposes, and only where authorized by the Company and permitted by law.

Federal and State law supersede the above policy.

SECTION 4: Disciplinary Action:

Failure to comply with any portion of this policy may result in disciplinary action as follows:

Violation of Section 2 or Section 3 of this Article: 1st offense: 3-day suspension
2nd offense: Termination

Violation of Section 1 of this
Article: 1st offense: Termination

3. On the morning of July 29, 2015, Ms. McMillan was driving a route that went through the Naval Air Station in Pensacola, Florida. At that time, the navy base had been on alert status for approximately one month. As a result, every vehicle entering the navy base had to be searched, and that caused Ms. McMillan's bus to run behind schedule.

4. At approximately 10:30 that morning, Ms. McMillan needed to use a bathroom and called a dispatcher via a radio provided by ECAT.

5. The dispatcher contacted by Ms. McMillan was not receptive to her request for a bathroom break and cut off communications.

6. Because Ms. McMillan was unsuccessful in re-establishing contact with the dispatcher over the radio, she used her personal cell phone to call a coworker, Elaine Wiggins. Ms. McMillan was hoping that Ms. Wiggins could assist her with contacting an ECAT general manager.

7. At this point in time, the bus driven by Ms. McMillan was in traffic and moving. In other words, it was not "secured" by being in the neutral/park position with the emergency brake on.

8. Diane Hall was an assistant general manager for ECAT during the time period at issue, and Ms. Hall talked to Ms. McMillan via Ms. Wiggins' cell phone.

9. Ms. Hall stated to Ms. McMillan that the route she was driving had a pre-arranged break point at a bowling alley and that Ms. McMillan could use a bathroom there.

10. It is possible that Ms. McMillan would not have suffered any consequences for her violation of the cell phone policy but for a customer complaint provided to ECAT on July 28, 2015.

11. On July 28, 2015, at 12:25 p.m., Roberta Millender, a customer service representative at ECAT, received a phone call from a customer who reported that the bus driver for Route 57 had left the bus at approximately 11:00 a.m. in order to smoke a cigarette, even though the bus was 25 minutes behind schedule.

12. Ms. McMillan also drives that route.

13. ECAT's buses are equipped with video cameras. Therefore, ECAT reviewed the videotape from that particular bus in order to investigate the complaint.

14. Because the bus videotapes are on a continuous loop, ECAT had to pull video corresponding to days before and after July 28, 2015. While looking for the incident on July 28, 2015,

that led to the customer complaint, an ECAT employee noticed that Ms. McMillan was using her cell phone on July 29, 2015.

15. There is no dispute that Ms. McMillan is not the bus driver who took the cigarette break on July 28, 2015.[2/]

16. On July 30, 2015, ECAT began an investigation of Ms. McMillan's cell phone use. ECAT notified Ms. McMillan that she would continue to work during the investigation.

17. ECAT terminated Ms. McMillan on August 3, 2015, for violating section 1 of Article 52 of the labor agreement.

18. Article 5 of the labor agreement sets forth the procedures that ECAT and the Union follow in order to resolve labor issues.

19. Pursuant to Section 2 of Article 5, Michael Lowery, the President of the Union, filed an "Official Grievance Form" ("the McMillan grievance") with Mike Crittenden, ECAT's General Manager.

20. Ms. McMillan had reservations about Mr. Lowery handling her grievance. Because she had not joined a recent strike and was not a Union member, Ms. McMillan feared that Mr. Lowery would not use his best efforts on her behalf.

21. However, Mr. Lowery handles the majority of the grievances, and he handles all of the grievances involving termination.[3/]

22. The McMillan grievance stated the following:

> The employee does not dispute the offered video and will stipulate that she used her personal cellphone while operating a transit bus while not secure. This professional bus operator understood the Company policy but did not clearly understand the proper procedure to request assistance to disembark her motor coach while under tremendous physical bodily stress to relieve herself of a bodily function.
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> Operator McMillan understood the procedure to request a 10-7 (Operator off Motor Coach) but was concerned with her bodily stress and finding a safe, clean rest room which was continuing to cause significant additional stress.
>
> The Company has clearly FAILED to work at providing known secure, clean, safe facilities for professional bus operators to utilize while operating ECAT buses. The Union has brought this topic forward to Management numerous times and no action has been taken to formulate the needs of the professional bus operators on many bus routes including the bus route that Operator McMillan was driving on the day in question.
>
> Operator McMillan was dealing with other related stress on that particular run. The military base was under alert and traffic was extremely backed up. She was dealing with one Dispatcher Supervisor and had reached agreement with him on how to proceed on the bus route. But when another Dispatch Supervisor came on duty it was clear that neither of those Supervisors had shared information on dealing with Route 57 with the military heighten[ed] alert. The new Dispatch was difficult to communicate with about established procedures set earlier with another Dispatcher. This did not help the already adverse or very demanding circumstance.

23. Mr. Lowery concluded the grievance by asking that ECAT rescind its termination of Ms. McMillan, pay her lost wages and benefits, and remove any discipline from her file.

24. Ordinarily, the first step in resolving a grievance involves settlement discussions between ECAT officials and the Union.

25. However, because Ms. McMillan's grievance involved a termination, it went directly to Mr. Crittenden for his consideration.

26. Via an e-mail dated August 4, 2015, Mr. Crittenden notified Mr. Lowery that he was "denying this grievance and upholding the termination of the subject employee."

27. Because Ms. McMillan's grievance was denied, the next step in the process called for the Union to decide whether it wanted to submit the grievance to arbitration.[4/]

28. As part of this next step, Mr. Crittenden prepared a draft version of a "Last Chance Agreement" for the Union to review.

29. A Last Chance Agreement is an agreement between an employee, ECAT, and the Union.

30. The draft Last Chance Agreement prepared by Mr. Crittenden contained the following provisions:

> 1. The employee violated the Company's cell phone [policy] which is a serious safety

infraction that warrants immediate termination.

2. In lieu of terminating her employment, the Employee's discipline record will reflect this infraction as suspended without pay from August 3, 2015 to August 14, 2015 and returning to work on August 17, 2015 upon acceptance of this agreement, and placed on a twelve month probation/Last Chance Agreement. The employee will retain her rate of pay and security.

3. The employee understands that in the event she violates company policy by being charged with any infraction that warrants immediate termination, her employment will be terminated without any further consideration.

4. This agreement will be in effect for a period of twelve (12) months from the date of signature.

5. The Employee attests that her signature below was in no way coerced by any party or by the representative of any party.

6. By entering into this agreement, the employee acknowledges that she has read and considered each of the provisions of this Agreement and that she voluntarily enters into this Agreement with full knowledge of the consequences.

7. This Agreement is made on a one-time only, non-precedent basis that shall not be used or referred to in any future discipline or termination case or during any grievance/arbitration hearings between the parties.

31. Mr. Lowery presented the proposed Last Chance Agreement to the Union's legal counsel, and the Union had an

issue with the seventh provision's reference to "non-precedent basis."

32. Mr. Lowery attempted to reach an agreement with Mr. Crittenden for amending that provision, but his efforts were unsuccessful. Mr. Crittenden would not consent to the removal of that language.

33. Ms. McMillan was disturbed by the fact that she had no input into the Last Chance Agreement proposed by Mr. Crittenden and that it was not presented to her for approval.

34. However, after the Union decided not to accept Mr. Crittenden's proposal, Ms. McMillan's approval or disapproval became irrelevant. As noted above, a Last Chance Agreement involves three consenting parties: the employee, ECAT, and the Union. Thus, even if Ms. McMillan had been satisfied with the Last Chance Agreement proposed by Mr. Crittenden, it would not go into effect without the Union's approval.

35. In order for the Union's Executive Board to vote on whether to refer Ms. McMillan's case to arbitration, Mr. Lowery put Ms. McMillan's grievance on the agenda of the Executive Board's August 23, 2015, meeting.

36. The five members of the Executive Board who were present and eligible to vote unanimously recommended against

pursuing arbitration for Ms. McMillan's grievance because her case lacked merit.

37. As for why Ms. McMillan's case lacked merit, Mr. Lowery testified that

> Well, basically, it's pretty simple, we negotiated the policy in the labor agreement, and this was a video. And the video showed that she had clearly violated the policy. And so from there, it was going to be very difficult, based on that evidence, that we were not going to be able to go forward. And that's why the membership voted not to go forward.

38. The Executive Board's recommendation was considered by the full Union membership later that day, and the Union voted to accept the Executive Board's recommendation.

39. When asked to explain why the Union elected not to arbitrate Ms. McMillan's grievance, Mr. Lowery testified that

> Simply it's the severity of the policy, which was it's in the labor agreement. It was negotiated between the Union and the company. And because they had a solid video, we would not be able to demonstrate a way to achieve a victory in that arbitration case. And, potentially, because it's in the Labor Agreement, that would be used against us in an arbitration because we negotiated it. We negotiated the policy.

40. When subsequently asked a very similar question, Mr. Lowery reiterated that

> Well, basically, it's pretty simple, we negotiated the policy in the labor agreement, and this was a video. And the video showed that she had clearly violated

> the policy. And so from there, it was going to be very difficult, based on that evidence, that we were not going to be able to go forward. And that's why the membership voted not to go forward.

41. The Union has not arbitrated any grievances in which a driver has been terminated for using a cell phone while a bus was not secured.

42. Including Ms. McMillan, four drivers have been terminated for violating section 1 of Article 52 since the labor agreement has been in place. Three of those drivers were African-American (two females and one male), and one was a Caucasian female.

43. Mr. Crittenden was unaware of any driver being retained by ECAT after violating the cell phone policy.[5/]

44. In addition to Mr. Crittenden, Ms. McMillan called three other ECAT employees who were unaware of any bus driver being retained after violating the cell phone policy.

45. Mr. Lowery represents every grievance to the best of his ability, and he represented Ms. McMillan's grievance to the best of his ability. The greater weight of the evidence demonstrates that he handled Ms. McMillan's grievance no differently than any other grievance.[6/]

46. Mr. Lowery did not consider Ms. McMillan's race or religion in the course of representing her.[7/]

47. The Union did not discriminate against Ms. McMillan based on her race or non-union status. In addition, to whatever extent that Ms. McMillan is alleging that she was discriminated against on any other grounds, there is no evidence to support such allegations.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (2016),[8/] and Florida Administrative Code Rule 60Y-4.016(1).

49. The State of Florida, under the legislative scheme contained in sections 760.01–760.11 and 509.092, Florida Statutes, known as the Florida Civil Rights Act of 1992 ("the FCRA"), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq.

50. The FCRA protects individuals from discrimination by a labor organization. See § 760.10(3), Fla. Stat. (providing that it is an unlawful employment practice for a labor organization "[t]o exclude or to expel from its membership, or otherwise to discriminate against, any individual because of race, color,

religion, sex, pregnancy, national origin, age, handicap, or marital status.").

51. A party may prove unlawful race discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631 (M.D. Fla. May 27, 2009); 2009 U.S. Dist. LEXIS 44885 (M.D. Fla. 2009). Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind the employment decision without any inference or presumption. Demney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "only the most blatant remarks, whose intent could be nothing other than to discriminate . . . will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(internal citations omitted).

52. Ms. McMillan presented no direct or statistical evidence of discrimination by the Union.

53. In the absence of direct or statistical evidence of discriminatory intent, Ms. McMillan must rely on circumstantial evidence of discrimination to prove her case. For discrimination claims involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework

set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

54. As explained in Radford v. Union Here Local 2, 2011 U.S. Dist. LEXIS 70159 *32-33 (N.D. Cal. 2011):

> The standard burden-shifting framework established in McDonnell Douglas also applies to a Title VII action against a union. See Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 674 (9th Cir. 1988). A union member can make a prima facie claim of discrimination by introducing evidence that the member "was singled out and treated less favorably than others similarly situated on account of race or any other criterion impermissible under the statute." Gay v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982); see also Pejic, 840 F.2d at 674. As in McDonnell Douglas, such a showing of disparate treatment raises an inference of discrimination "because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).
>
> A prima facie case of discrimination may be established against a union by showing that: "(1) the employer violated the collective bargaining agreement with respect to the employee; (2) the union breached its duty of fair representation by allowing the breach to go unrepaired; and (3) there is some evidence of [illegal] animus among the union." Beck v. UFCW Local 99, 506 F.3d 874, 885 (9th Cir. 2007)(citing Bugg v. Int'l Union of Allied Indus. Workers of Am., 674 F.2d 595 (7th Cir. 1982).
>
> If the plaintiff succeeds in establishing a prima facie case of discrimination against the union, the burden of production shifts

> to the union to articulate a legitimate, non-discriminatory reason for the less favorable treatment. Pejic, 840 F.2d at 674. The union must provide "reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the . . . action." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 113 S.Ct. 2742,. 125 L.Ed.2d 407 (1993). Once the defendant produces sufficient evidence to satisfy this burden, "'the McDonnell Douglas framework - with its presumptions and burdens' - disappear[s]," Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)(quoting Hicks, 509 U.S. at 510), and the plaintiff "retains that ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." Hicks, 509 U.S. at 508 (internal quotations omitted).

55. With regard to the instant case, there is no evidence that the employer, ECAT, violated the labor agreement. As discussed above, every driver who violated the labor agreement's pertinent prohibition against cell phone use has been terminated.

56. Even if Ms. McMillan could satisfy the first element of a prima facie case, she cannot demonstrate that the Union breached any duty of fair representation or treated similarly-situated ECAT employees more favorably.

57. The greater weight of the evidence demonstrates that Mr. Lowery handled Ms. McMillan's grievance no differently than any other grievance involving a similar level of severity.

58. In addition, Mr. Lowery did not consider Ms. McMillan's race or religion in the course of representing her.

59. In sum, the Union did not discriminate against Ms. McMillan based on her race or non-union status. In addition, to whatever extent that Ms. McMillan is alleging that she was discriminated against on other grounds, there is no evidence to support such allegations.

60. Accordingly, Ms. McMillan failed to prove her disparate treatment claim. See Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir. 1998)(noting that "[i]f Plaintiff fails to identify similarly situated, nonminority employees who were treated more favorably, her case must fail because the burden is on her to establish her prima facie case.").

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing Addie L. McMillan's Petition for Relief from an Unlawful Employment Practice.

DONE AND ENTERED this 31st day of May, 2017, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of May, 2017.

ENDNOTES

[1/] Mike Crittenden, the General Manager of ECAT, described the labor agreement as follows: "[I]t's a bargained contract between employees represented by the Union and management as to how work will be conducted, how discipline will be carried out, and a certain number of other work rules, or how the business is managed, what's determined to be management rights and, also, contains a grievance process when issues arise that we need to resolve. There's a formal process in place to do that." While the labor agreement does not apply to all ECAT employees, it did apply to bus drivers.

[2/] Ms. McMillan argued during the hearing that ECAT should not have disciplined her because she was not the subject of the customer complaint that led ECAT to examine the video from the bus she drove.

[3/] Mr. Crittenden and Mr. Lowery testified that the Union is required to represent all of the employees covered by the labor agreement, regardless of whether those employees are Union members. Mr. Lowery testified that the National Labor Relations Act requires private sector unions to represent all bargaining unit employees, regardless of whether they are union members.

[4/] Mr. Lowery explained that "[a]rbitration is where the grievance is moved by the membership. It's – the grievance is usually taken in front of the Union membership for them to consider. And based on the merits of the grievance, the membership will vote to forward the grievance to arbitration or not to move to arbitration. Then, from there, the Collective Bargaining Agreement outlines the steps to select an arbitrator through the Federal Mediation Conciliation Services. And, at some point, the company will intermingle, once we receive a panel of arbitrators, we will then meet and strike names until one arbitrator remains. And from there, we will set a date for an arbitration."

[5/] Mr. Crittenden testified that the African-American male driver who was terminated for violating the cell phone policy was involved in an earlier incident in which a customer filed a complaint alleging that he had been improperly using his cell phone. Because that complaint could not be substantiated, the driver received verbal counseling rather than a termination.

[6/] Ms. McMillan is of the opinion that Mr. Lowery should have communicated with her more frequently or in person. However, Ms. McMillan's Exhibit 4 indicates that Mr. Lowery frequently used text messages to update her on the status of her grievance. While Ms. McMillan may have preferred more frequent communication and for that communication to be transmitted through telephone calls, the evidence indicates that Mr. Lowery kept Ms. McMillan informed about the status of her grievance.

[7/] In the last sentence of her Charge of Discrimination, Ms. McMillan stated the following: "I was experiencing problems with the medical problems I received on the job previously this year." During the final hearing, Ms. McMillan substantially expanded on that statement by testifying that she had been involved in an accident and put on light duty. While on light duty, Ms. McMillan was using a rolling chair and "flipped over." During the final hearing, Ms. McMillan alleged that her termination was in retaliation for Ms. McMillan having a workers' compensation claim. However, that allegation pertains to Ms. McMillan's case against ECAT rather than the Union. Therefore, the undersigned chose not to address that allegation in the instant case.

[8/] Unless stated otherwise, all statutory citations are to the 2016 edition of the Florida Statutes.

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.