STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ADDIE L. MCMILLAN,

Petitioner,

vs. Case No. 16-6582

FIRST TRANSIT, INC.,

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: Matthew Dunning, EEO Manager
First Transit, Inc.
600 Vine Street, Suite 1400
Cincinnati, Ohio 45202

STATEMENT OF THE ISSUE

The issue is whether First Transit, Inc. ("Escambia County Area Transit" or "ECAT")[1/] committed an unlawful employment practice against Petitioner ("Addie L. McMillan") by subjecting her to disparate treatment and/or by retaliating against her.

PRELIMINARY STATEMENT

On December 10, 2015, Ms. McMillan filed a Charge of Discrimination with the Florida Commission on Human Relations ("the Commission") alleging that ECAT subjected her to disparate treatment by firing Ms. McMillan from her job as a bus driver. The firing occurred after Ms. McMillan violated a company policy prohibiting drivers from using cell phones while driving. Ms. McMillan alleged that those outside her protected class had committed the same infraction without losing their jobs. Ms. McMillan further alleged that she was experiencing "medical problems" that she had incurred while working.

On October 5, 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] filed a charge of discrimination against [ECAT] alleging that she was subjected to different terms and conditions of employment and discharged based on her race, religion, sex and disability and that she was denied a reasonable accommodation based on her disability. The facts and evidence as set forth in the Investigative Memorandum do not support [Ms. McMillan]'s allegation. The evidence in this matter reveals that [Ms. McMillan] was terminated because she did not comply with [ECAT]'s rule and policy against talking on her cell phone while operating [ECAT]'s city bus. [Ms. McMillan] was not subjected to different terms and conditions of employment and discharged

> based on her race, religion, sex and disability or denied a reasonable accommodation and no credible evidence was provided to prove otherwise.[2/]

Ms. McMillan filed a Petition for Relief with the Commission on November 9, 2016, and the Commission transferred the case to DOAH that same day.

Via a Notice of Hearing issued on November 28, 2016, the undersigned scheduled the final hearing to occur in Pensacola, Florida, on December 15, 2016.

On December 8, 2016, Matthew H. Dunning, Esquire, filed a request to appear as ECAT's qualified representative. After considering the assertions set forth therein, the undersigned issued an Order on December 8, 2016, granting that request.

After holding a telephonic, pre-hearing conference on December 13, 2016, the undersigned determined that the parties were not adequately prepared to proceed with the December 15, 2016, final hearing. Accordingly, the undersigned issued two Orders on December 15, 2016. One Order canceled the final hearing, and the other required the parties to: (a) identify every witness expected to testify at the final hearing; and (b) provide days in January and February of 2017, when both parties would be available for a final hearing.

Ms. McMillan also filed an unlawful discrimination claim against the Amalgamated Transit Union Local 1395 ("the Union"),

the union that represents ECAT bus drivers. That case was also referred to DOAH and assigned Case No. 16-4424.

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 will be 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.

ECAT tendered no witnesses and relied on cross-examination of Ms. McMillan's witnesses in support of its case. ECAT's Exhibits 1 through 13 were accepted into evidence.

The Transcript from the final hearing was filed with DOAH 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 an Order on April 4, 2017, granting that request.

ECAT filed a timely Proposed Recommended Order on April 28, 2017, that was considered in the preparation of this Recommended Order.

Ms. McMillan filed a Proposed Recommended Order in her case against the Union. Because that Proposed Recommended Order appeared to be relevant to the instant case, the undersigned also considered it 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 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 June 19, 2012, Ms. McMillan signed a document entitled "Escambia County Area Transit Cellular Phone Policy" which provided that:

> While on duty the use of a cellular phone or any other personal communication device is limited as follows:
>
> **Employees on Company Business:** 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. 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.
>
> If it becomes necessary to use a cellular phone, employees must be at the end of the line/trip (on layover, if applicable), request a 10-7, and exit the driver's seat prior to using the cellular phone. 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.
>
> The use of a cellular phone or other communications device by an employee while on the shop floor is prohibited, other than a Push-to-Talk communications 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.

4. 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.

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

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

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. Roberta Millender has been a customer service representative at ECAT for the last four years.

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

14. Ms. McMillan also drives that route.

15. ECAT's buses are equipped with video cameras. Therefore, ECAT reviewed the videotape from the Route 57 bus in order to investigate the complaint.

16. Because the 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.

17. There is no dispute that Ms. McMillan is not the bus driver who took the cigarette break on July 28, 2015.[3/]

18. 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.

19. Via a letter dated August 3, 2015, Mike Crittenden, ECAT's General Manager, notified Ms. McMillan that she was being terminated for violating Article 52 of the labor agreement. Mr. Crittenden's letter deemed Ms. McMillan's cell phone use to be a violation of section 1 which prohibited cell phone use while a transit vehicle is not secured. In addition, Mr. Crittenden's letter noted that the termination was effective immediately.

20. During the final hearing in this matter, Ms. McMillan was unable to present any evidence that any other similarly-situated bus drivers had not been terminated for using a cell phone while the buses they were driving were unsecured.

21. Mr. Crittenden testified that 4 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.

22. Mr. Crittenden was unaware of any driver being retained by ECAT after violating the cell phone policy.[4/]

23. In addition to Mr. Crittenden, Ms. McMillan called three other ECAT employees, none of whom were aware of any bus driver being retained after violating the cell phone policy.

24. The greater weight of the evidence demonstrates that Ms. McMillan was not discharged because of her race.

CONCLUSIONS OF LAW

25. 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),[5/] and Florida Administrative Code Rule 60Y-4.016(1).

26. 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.

27. Section 760.10 prohibits discrimination "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." § 760.10(1)(a), Fla. Stat.

28. Ms. McMillan alleges that she was the victim of disparate treatment. See Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 808 n.2 (11th Cir. 2010)(en banc)("We reiterate that disparate treatment under 42 U.S.C. § 2000e-2(a)(1) is the proper framework under which to evaluate hostile work environment claims."). The United States Supreme Court has noted that "[d]isparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic]." Teamsters v. U.S., 431 U.S. 324, 335 n.15 (1977).

29. Liability in a disparate treatment case "depends on whether the protected trait . . . actually motivated the employer's decision." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000).

30. 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). When a petitioner alleges disparate treatment under the FCRA, the petitioner must prove that his or her race "actually motivated the employer's decision. That is, the [petitioner's race] must have 'actually played a role [in the employer's decision-making] process and had a determinative influence on the outcome.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (quoting Hazen Paper Co. v. Biggins, 507 U.S. at 610) (alteration in original).

31. Direct evidence is evidence that, "if believed, proves [the] existence of [a] fact in issue without inference or presumption." Burrell v. Bd. of Trs. of Ga. Mil. Coll., 125 F.3d 1390, 1393 (11th Cir. 1997). Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of an impermissible factor. Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

32. There is no direct evidence of unlawful race discrimination in the instant case. That is not uncommon because "direct evidence of intent is often unavailable." Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996). Accordingly, those who claim to be victims of intentional discrimination "are permitted to establish their cases through

inferential and circumstantial proof." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

33. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, then the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 25 (Fla. 3d DCA 2009). Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

34. Under the McDonnell Douglas framework, one can establish a prima facie case of discrimination by demonstrating that: (a) she is a member of a protected class; (b) she was qualified for the position held; (c) she was subjected to an adverse employment action; and (d) other similarly-situated employees, who are not members of the protected group, were treated more favorably. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "When comparing similarly situated individuals to raise an inference of discriminatory motivation, these individuals must be similarly situated in all relevant

respects." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1273 (11th Cir. 2004).

35. The first three elements of Ms. McMillan's discrimination claim are not in dispute. As a result, the instant case turns on whether Ms. McMillan can demonstrate that ECAT treated similarly-situated employees more favorably.

36. As discussed above, there was no evidence that ECAT has not terminated any bus drivers who violated the cell phone policy. Instead, the testimony demonstrated that there have been four instances since the labor agreement took effect on October 23, 2013 of bus drivers (including Ms. McMillan) violating the cell phone policy, and ECAT terminated each driver.[6/]

37. 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.").[7/]

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 31th day of May, 2017, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

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

ENDNOTES

[1/] First Transit Inc. does business as Escambia County Area Transit.

[2/] The Commission appears to have deemed Ms. McMillan's reference to "medical problems" in her Charge of Discrimination as an allegation that ECAT denied her a reasonable accommodation. However, Ms. McMillan's testimony at the final hearing indicated this allegation is more appropriately described as a retaliation claim.

[3/] 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.

[4/] 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.

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

[6/] Ms. McMillan's Petition for Relief also contained an allegation that ECAT discriminated against her because of her age. However, this claim cannot serve as a basis for relief because Ms. McMillan was unable to demonstrate that ECAT did not fire any other bus drivers who violated the cell phone policy. Likewise, to whatever extent that Ms. McMillan alleged any other basis on which ECAT discriminated against her, such a claim would be meritless because Ms. McMillan was unable to demonstrate any disparate treatment.

[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, the undersigned did not consider the statement in Ms. McMillan's Charge of Discrimination to be sufficient to put ECAT on notice that she was alleging that her termination was retaliation for her filing a workers' compensation claim. See generally Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)(reversing a final order and directing that a complaint be dismissed because the administrative complaint at issue "did not contain any specific factual allegations that Appellant failed to retain possession of the medical records. The single reference to the statute without supporting factual allegations was not sufficient to place Appellant on notice of the charges against him.").

Nevertheless, even if ECAT was sufficiently on notice of this allegation, the undersigned would conclude that Ms. McMillan has failed to establish a retaliation claim. In order to establish a prima facie case for retaliation, a petitioner must show that she engaged in a statutorily protected activity, that an adverse employment action occurred, and that the adverse action was causally related to the petitioner's protected activities. Because the evidence indicated that ECAT has

terminated every bus driver who violated the labor agreement's prohibition against cell phone use, Ms. McMillan cannot establish that her termination resulted from her workers' compensation claim.

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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.