UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

TED MAINES,

Intervenor-Plaintiff,

-vs- **Case No. 6:02-cv-1112-Orl-28DAB**

FEDERAL EXPRESS CORPORATION,

Defendant.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION:	**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Doc. No. 33)**
FILED:	**April 13, 2004**

THEREON it is **RECOMMENDED** that the motion be **DENIED**.

Plaintiff, the Equal Employment Opportunity Commission (herein "the EEOC") filed suit against Defendant ("FedEx"), to correct allegedly unlawful employment practices regarding retaliation and to provide appropriate relief to Ted Maines, allegedly adversely affected by such practices (Doc.

No. 1). Maines has intervened, and asserts a Title VII retaliation claim on his own behalf, as well as a claim under the Florida Civil Rights Act of 1992 (Fla. Stat. § 760.01) and Florida's Private Sector Whistleblower Act (Fla. Stat. § 448.101, *et seq.*).

Defendant moves for summary judgment (Doc. No. 33, with attached exhibits) and has filed deposition transcripts of Ted Maines, Karen Christian, Carmon Lannom, Eddie Jenkins, and Gregory Richards (Doc. Nos. 34-39; 43-44; 50-51). Plaintiffs filed a consolidated response in opposition to the motion (Doc. No. 45, with exhibits), and have also filed deposition transcripts (Volume I and II) of Ted Maines, and Karen Ings (Doc. Nos. 46-49). The Court has reviewed the record, the briefs, and the applicable law. It is **respectfully recommended** that the motion be **DENIED.**

FACTUAL BACKGROUND

The parties' papers forcefully present a myriad of disputed issues of fact. For present purposes, it appears that the parties agree on the following matters,[1] although the inferences to be drawn from these agreed-to events are disputed.

Maines was employed by Federal Express for 21 years, most recently as a Senior Manager in the Orlando Customer Care Facility. Maines reported to Managing Director Karen Christian, who in turn reported to Vice-President of Worldwide Revenue Operations, Diane Mattman. By all accounts, prior to the incidents described below, Maines was considered to be an outstanding employee. In March of 2000, Christian and Mattman conferred a "FedEx Superstar" rating on Maines, signifying a rating in the top 1% of salaried employees in his division.

[1]The Court has distilled these facts from each of the parties' "statement of undisputed material facts," to the extent there was general agreement. Where the parties agreed to what occurred, but drew different conclusions from an event, the Court reads the facts, as required at this stage, in the light most favorable to Plaintiffs. The parties have, to a substantial degree, mistakenly equated "undisputed material facts" with any contention that finds some support in the record.

In December 2000, two additional Customer Account Services manager positions were approved for the Orlando facility.[2] These positions would report directly to Maines. Maines and a subordinate manager (Smith) served as the members of the interview panel. The applicants included several existing FedEx managers, as well as Maines' secretary, Guadalupe Miller (an Hispanic), and Annette Reece (an African American). The parties sharply dispute whether Ms. Miller met the minimum qualifications for the new position.[3] Ms. Reece's qualifications, however, are apparently not in dispute.

After completing the interviews, Maines and Smith reviewed their notes and agreed that the top two candidates were Reece and Miller. In accordance with company policy which states that Personnel must audit the qualifications of selected candidates before the job offer is made, Maines hand-delivered the interview packages and application materials for all of the candidates to Senior Personnel Representative, Eddie Jenkins. Jenkins reviewed the selection matrix and authorized the selection of Reece and Miller. On February 2, 2001, Maines then extended offer letters to the two successful candidates.

Mattman learned of the selections and that Lauren Ruston, one of her own managers who applied for the job, was not selected and emailed Christian on February 5, 2001, that she was "concerned" about Maines' hiring selections and stated "unless she is exceptional, i doubt i would have approved hiring an admin. into a mgr slot." Mattman decided to nullify the selection process.

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[2]There is some dispute as to whether FedEx intended to fill two positions or just one. For present purposes, it is undisputed that Maines was directed by his superior to hire for two positions.

[3]For example, as indicated in the papers, the position required a bachelors degree "or equivalent." It is undisputed that Miller attended Fordham University but did not receive a degree.

Christian spoke with Maines regarding Mattman's unhappiness with the hire, and Mattman's direction to rescind both promotions.

On February 7, 2001, Maines called Greg Richards, Senior Counsel of Defendant's legal department, and objected to what he believed to be discriminatory employment practices against both Reece and Miller, and in favor of Caucasian applicant, Lauren Ruston. Richards relayed the discrimination complaint to Mattman later that day.

The next day, February 8, 2001, Mattman formally nullified the selection of Reece and Miller, summarily removed and demoted Christian from her position as Maines' Managing Director, appointing Mr. Carmon Lannom in her stead, and directed that Ted Maines and his organization be "moved" from Customer Account Services to Strategic Planning and Alliances. That same day, Ruston filed an internal complaint against Maines regarding her non-selection.

On February 16, 2001, Maines received a phone call from Lannom advising him that Lannom was issuing a warning letter, and Maines had the choice of either accepting the warning letter, or a five-level demotion to a non-management position (at a pay cut of approximately $50,000). The letter addressed Maines' "lack of judgment and leadership failure" in the hiring decision and noted that "there were at least four candidates who were existing FedEx managers who were not chosen, one of which was an internal WRO manager with excellent credentials."[4] The letter, which stated that it was active for 12 months during which he would not be allowed to submit a Job Change Application, warned that a repeat of any other leadership or behavioral problem may result in more severe discipline up to and including termination. Maines testified in deposition that he was told by Lannom

[4]In deposition, Mattman testified that Lauren Ruston was the referenced "internal WRO manager with excellent credentials."

that "Diane [Mattman] wants you to know that the next mistake you make you will be terminated." (Maines Deposition, at 194-95).

Maines sent Lannom an email on February 20, 2001, in which he indicated that he had done nothing wrong, and therefore declined to accept either the warning letter or the demotion. Lannom issued the warning letter on February 21, 2001.

The parties dispute what happened next. Maines asserts that FedEx began a pattern of immediate and harmful retaliation, which included monitoring his phone calls and emails, curtailing his access to email so that he could not communicate with his subordinates in the field, monitoring his subordinate manager's computers and telephone, and other acts designed to set him up for a "mistake" that would be grounds for termination. Maines asserts that he filed an internal complaint of retaliation, which the company routed directly to Mattman, the alleged perpetrator of the retaliation.

FedEx disputes any retaliatory conduct and asserts that Maines resigned from his position on April 9, 2001, after refusing to accept a severance package offer requested by Maines. Maines asserts that on April 9, 2001, he informed FedEx that he was constructively discharged.

The customer service manager position was filled in April 2001 by Lauren Ruston. Apparently, she did not stay in the position very long. After Ted Maines left, Annette Reece, who had not filed an internal complaint of discrimination, was promoted. Miller filed an EEOC charge of discrimination (Doc. No. 35, Exhibit 9), and the EEOC issued a letter of determination finding reasonable cause to believe that violations occurred (Doc. No. 35, Exhibit 10).

SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(c), a party is entitled to judgment as a matter of law when the party can show that there is no genuine issue as to any material fact. FED. R. CIV. PRO.

56(c). The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex*, 477 U.S. at 323. In determining whether the moving party has satisfied its burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255.

STANDARDS OF LAW

Plaintiffs EEOC and Maines assert Title VII retaliation claims, and Maines asserts additional claims under the Florida Civil Rights Act of 1992 (Fla. Stat. § 760.01) and Florida's Private Sector Whistleblower Act (Fla. Stat. § 448.101). The Florida Civil Rights Act ("FCRA") is patterned after Title VII, and Florida courts have construed the FCRA in conformity with decisions construing Title VII. *Harper v. Blockbuster Entertainment Corp.,* 139 F. 3d 1385, 1387 (11th Cir. 1998). Similarly, Florida courts analyze retaliation claims under Florida's Private Sector Whistleblower Act using the same framework used for Title VII retaliation claims. *Sierminski v. Transouth Fin. Corp.,* 216 F. 3d 945, 950 (11th Cir. 2000). Thus, all four claims are subject to the same burden shifting analytical framework.

To establish a prima facie case of retaliation under Title VII, a plaintiff must prove the following elements: (1) he participated in an activity protected by Title VII; (2) he suffered an adverse employment action; and (3) there is a causal connection between the participation in the protected activity and the adverse employment decision. *Shannon v. BellSouth Telecommunications, Inc.*, 292

F.3d 712, 715 (11th Cir. 2002) (citing *Johnson v. Booker T. Washington Broad. Serv., Inc.,* 234 F.3d 501, 507 (11th Cir. 2000)); *Pipkins v. City of Temple Terrace, Fla.*, 267 F.3d 1197, 1201 (11th Cir. 2001) (citing *Gupta v. Fla. Bd. of Regents,* 212 F.3d 571, 587 (11th Cir. 2000)). Once a plaintiff makes out a prima facie case of retaliation, the burden shifts to the defendant to produce legitimate reasons for the adverse employment action. *See Shannon*, 292 F.3d at 715. If the defendant produces legitimate reasons for the action, the plaintiff must show that the reasons given were pretextual. *Id.*

Statutorily protected expression may include internal complaints of discrimination to superiors as well as complaints lodged with the EEOC. *See Shannon*, 292 F.3d at 716 n.2 (statutorily protected activity included plaintiff's voicing of complaints of discrimination to supervisors); *Pipkins,* 267 F.3d at 1201; *see also Rollins v. Fla. Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989) (Title VII protects not just individuals who have filed formal complaints, but also those who informally voice complaints to their superiors.)

Here, Defendant argues that Plaintiffs have failed to establish a prima facie case of discrimination, and, alternatively, have failed to establish pretext. The Court addresses each contention below.

Statutorily Protected Expression

The parties agree that in order to establish prong one of the prima facie case for retaliation, Plaintiffs must establish that Maines had a good faith, reasonable belief, both objectively and subjectively, that FedEx was engaged in unlawful employment practices. *See Little v. United Technologies,* 103 F. 3d 956, 960 (11th Cir. 1997). As shown above, on February 7, 2001, Maines communicated a complaint to FedEx's legal department regarding what he believed to be discrimination against two minority candidates, in favor of a Caucasian candidate. FedEx argues that

Maines could not have had a subjective or objective belief that the activity constituted discrimination in that no experienced manager could reasonably believe that an individual who did not meet minimum qualifications for the position was discriminated against. This argument is unpersuasive for several reasons.

First, Maines complained about discrimination against *both* Miller and Reece. There is no evidence that Reece did not meet minimum qualifications for the position. Moreover, there is no evidence that *at the time of the complaint* it was established that Miller did not meet minimum qualifications, and Maines knew it. In fact, the issue of Miller's qualifications is very much in dispute. Plaintiffs point out that Miller's application indicated that she met the minimum qualifications and the selection of Miller was approved by Eddie Jenkins, who was tasked with implementing FedEx policy of auditing the qualifications of candidates prior to job offers being made. Defendant argues that "the lack of an objective, good faith belief of discrimination is confirmed by the fact that Annette Reece . . . was [eventually] promoted into the CAS manager position a few months after the initial nullification." This act, of course, took place well after Maines' complaint. If ex post facto reasoning is allowed, Plaintiffs could well argue that Maines' good faith belief that discrimination occurred was confirmed by the EEOC's finding of cause, with respect to Miller's EEOC complaint of discrimination.

On this record, viewed in Plaintiffs' favor, a reasonable jury could well find that Maines had a good faith, reasonable belief, both objectively and subjectively, that FedEx was engaged in unlawful employment practices.

Adverse Employment Action

An adverse employment action has been defined as a "serious and material change in the terms, conditions, or privileges of employment . . . as viewed by a reasonable person in the circumstances." *Davis v. Town of Lake Park, Florida,* 245 F.3d 1232, 1239 (11th Cir. 2001). Not "every unkind act" is sufficiently adverse. *Shotz v. City of Plantation, Florida,* 344 F. 3d 1161, 1181 (11th Cir. 2003) (internal citation omitted). The sufficiency is analyzed on a case-by-case basis, using both a subjective and an objective standard. *Id., citing Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587 (11th Cir.2000).

In *Stavropoulos v. Firestone*, 361 F.3d 610, 616-17 (11th Cir. 2004), the Eleventh Circuit recently reviewed these standards and reconciled precedent:

> To be considered an adverse employment action for purposes of Title VII's anti-retaliation provision, the action must either be an ultimate employment decision or else must "meet some threshold level of substantiality." [*citing Bass v. Bd. of County Comm'rs, Orange County, Fla.*, 256 F.3d 1095, 1118 (11th Cir. 2001)]. Ultimate employment decisions include decisions such as termination, failure to hire, or demotion. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998). The conduct Stavropoulos complains of was not an ultimate employment action, because she did not lose her job or suffer a lessening of pay, position, or benefits. Thus, we must ask whether it rises to the level of substantiality.
> In *Wideman*, 141 F.3d at 1455-56, we concluded that the plaintiff had crossed the threshold of substantiality where she established that her employer had improperly listed her as a no-show on a day she was scheduled to have off, gave her written reprimands which resulted in a one-day suspension, solicited comments on her performance from only those employees with negative things to say about her, failed to schedule her for work, threatened to shoot her in the head, and delayed authorizing medical treatment for an allergic reaction she was having. *Id*. at 1455-56 (holding that the totality of these acts meet the threshold of substantiality, but declining to decide whether anything less than the totality would meet the threshold). In *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571 (11th Cir. 2000), we characterized the threshold as requiring the employment action to be "'objectively serious and tangible enough' to alter [the employee's] 'compensation, terms, conditions, or privileges of employment ...,'" and held that scheduling the employee to teach on three different campuses in one term did not meet the threshold because she never actually had to follow this schedule, denying

> her the opportunity to teach a particular class did not suffice because she chose not to teach at all that term, and delaying the return of the employee's visa application was not serious enough because the university returned it to her in time for her to file it with the Immigration and Naturalization Service. *Id*. at 588 (quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3rd Cir. 1997)). Our reason for rejecting these three acts as insubstantial was that "[a]n action which, it turns out, had no effect on an employee is not an 'adverse' action." *Id.* at 588. Applying this standard in *Bass*, 256 F.3d at 1118, we decided there was an adverse employment action when, comparing the plaintiff to other employees of the same rank, the employer forced plaintiff to perform more menial tasks under less senior personnel; denied the plaintiff opportunities to earn several types of extra pay available to his co-workers; and forced plaintiff to take tests in order to maintain his paramedic pay, while not requiring his co-workers to take the tests. We rejected, however, the employer's ordering plaintiff not to record certain tasks in his work log and ordering him to destroy certain materials he had created as insubstantial because they "in no way punished or affected Bass' employment status." *Id.*

Thus, Plaintiffs must show that FedEx's employment actions were objectively serious and tangible enough to punish or affect Maines' employment status. Applying the objective case-by-case standards, Plaintiffs' claims survive summary judgment.

There is a genuine issue of material fact on the ultimate question of whether Maines resigned (as argued by FedEx) or was constructively discharged (as urged by Maines and EEOC). FedEx contends, however, that even if the Court were to credit all of the reasons Maines has set forth as constituting the constructive discharge, the actions are not legally sufficient to constitute an adverse employment action. The Court disagrees.

Maines has set forth several actions he believes constitute adverse employment action: 1) the ultimatum between accepting a serious demotion and pay cut or a warning letter, coupled with the threat of immediate termination upon the next mistake; 2) having his email and telephone communications monitored; 3) reduced email capacity so that he could not communicate with his team, thus setting him up for a mistake which would lead to immediate termination; 4) various threats

communicated by co-workers regarding being "watched" and that Mattman was angry at him and could do whatever she wanted; 5) being unfairly criticized by a new supervisor; and 6) various acts constituting, in Maines' view, a total lack of respect. Maines contends that these acts justify his conclusion that he was constructively discharged and that constructive discharge is, itself, an adverse employment action. Alternatively, Maines argues that the letter alone constituted adverse employment action under the "imminent discharge" theory.

The United States Supreme Court recently confirmed that Title VII encompasses employer liability for constructive discharge. *Pennsylvania State Police v. Suders,* ___U.S.___, 124 S. Ct. 2342 (2004). In order for Maines to state a case for constructive discharge, he must "demonstrate that working conditions were 'so intolerable that a reasonable person in [his] position would have been compelled to resign." *Poole v. Country Club of Columbus, Inc*., 129 F.3d 551, 553 (11th Cir. 1997); *see also Pennsylvania State Police*, 124 S. Ct. at 2346 (a plaintiff must show that the abusive working environment became so intolerable that resignation qualified as a fitting response).

In *Downey v. Southern Natural Gas Co.,* 649 F. 2d 302 (5th Cir. 1981),[5] the 62 year old demoted plaintiff was told by his supervisor that he might be discharged because the company did not want to keep him around until the mandatory retirement age, and he would lose his stock benefits if the company discharged him. Rather than risk the loss of the benefits, Downey requested (and received) early retirement, and then promptly filed a charge of age discrimination. The Fifth Circuit reversed the district court's granting of summary judgment finding no constructive discharge, reasoning:

[5]The Eleventh Circuit has adopted the decisions of the Fifth Circuit, rendered prior to October 1, 1981, as binding precedent. *Bonner v. City of Prichard,* 661 F. 2d 1206 (11th Cir. 1981). *Downey* was decided on June 30, 1981.

> Essentially, the test is whether a reasonable person in the employee's position would have felt compelled to resign. Downey asserts that his superior specifically advised him that he might be discharged, with a consequent loss of benefits. We regard that testimony as sufficient to create a contested issue of material fact regarding constructive discharge. A reasonable person might well feel compelled to resign in the face of such a statement.

649. F2d at 305.

Here, Maines testified in deposition that his supervisor told him in no uncertain terms that the "next mistake you make you will be terminated." (Maines Deposition, pp. 194-95). This, coupled with evidence from Maines *and* his co-workers that a) Maines was subject to immediate and unusual scrutiny of both email and telephone communications, b) was given an overly "harsh" and allegedly inaccurate disciplinary letter, and c) was being set up by a new supervisor hand-picked by Mattman, is likewise sufficient to present a contested issue of material fact regarding constructive discharge. The second prong of the prima facie case is established.

Causation and Pretext

To establish the third prong of the prima facie case, Plaintiff must point to evidence sufficient to infer causation. "Close temporal proximity between the protected activity and the adverse action may be sufficient to show that the two were not wholly unrelated." *Shannon v. BellSouth Telecommunications, Inc.,* 292 F.3d 712, 716-717 (11th Cir. 2002) (citing *Bass v. Board of County Commissioners,* 256 F.3d 1095, 1119 (11th Cir. 2001)). As shown above, the complaint of discrimination was followed by immediate reassignment, and the ultimatum and warning letter were issued within days. Defendant does not dispute the temporal proximity. Rather, in arguing that Plaintiff Maines has failed to establish the third prong of his prima facie case, Defendant does no more than reiterate its asserted legitimate, non-discriminatory reason for the adverse employment action – namely, that Maines was disciplined not for complaining about discrimination, but for

"misrepresent[ing] his secretary's qualifications in an effort to get her promoted." (Doc. No. 33 at 21). The record indicates that this is a disputed issue, incapable of resolution at the summary judgment stage.

Likewise, Plaintiffs' assertion of pretext is a genuine issue of material fact that must be resolved by a jury. As FedEx has met its burden of articulating a legitimate non-discriminatory reason for the adverse employment action, the burden shifts back to Plaintiff to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for [retaliation]." *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Plaintiff may establish pretext by undermining the credibility of Defendant's proffered explanations. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997). It is incumbent on a plaintiff to come forward with evidence demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find them unworthy of credence." *Id*., *Smith v. Alabama*, 252 F.Supp.2d 1317, 1335 (M.D. Ala. 2003), *affirmed,* __ F. 3d __ (11th Cir. April 2004). Plaintiffs have met this burden here.

FedEx asserts that Maines intentionally misrepresented his secretary's qualifications in order to get her promoted and it is that act that warranted the resulting discipline and not the complaint Maines made to the legal department regarding perceived illegal discrimination. It is, however, undisputed that Maines' employment record was without blemish until the ill-fated promotion of Reece and Miller, and yet FedEx's response to a first offense by a stellar, long term employee included an ultimatum choice of a five level demotion out of management and a $50,000 pay cut – a punishment that was considered by his long-time supervisor as well as other co-workers to be overly

harsh. While the Court does not sit as a super-personnel board determining the justness or not of a particular punishment, the severity of the offered punishment could well be seen as so out of proportion to the asserted wrong (an attempt to promote an unqualified person) as to be deemed implausible that this was the real or only wrong being punished. Moreover, Plaintiff cites to the conflicting deposition testimony of Mattman and Lannom which appears to indicate that the discipline was imposed even though neither Mattman nor Lannom conducted an investigation of the matter. *See* Doc. No. 45 at 29 and cited excerpts. Most importantly, Plaintiff has presented evidence that disputes the factual conclusions upon which FedEx justified its disciplinary actions toward Maines: namely, that Maines' actions were violative of existing written policies. Plaintiff's evidence, interpreted in his favor, indicates that his actions were not violative of FedEx's written policies and were undertaken with the knowledge and approval of his supervisors. All of this, coupled with Mattman's deposition testimony that she had been accused of racial discrimination at FedEx before this incident,[6] can legitimately give rise to an inference that it was the complaint to the legal department and not a fraudulent promotion that motivated Mattman. There is enough here to present a genuine issue for trial.

CONCLUSION

Because the record contains genuine issues of disputed material fact, summary judgment is not appropriate. It is **respectfully recommended** that the motion be **DENIED.**

[6]Mattman testified to "two or three" separate claims of racial discrimination filed against her internally with FedEx, including a 1998 "class allegation" brought by 15 FedEx employees. (Mattman deposition at 263-68).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Recommended in Orlando, Florida this 30th day of July, 2004.

David A. Baker

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Courtroom Deputy