IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

TAMMY MONK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 5:07cv00020**
	)	
STUART M. PERRY, INC.	)	
	)	**By: Michael F. Urbanski**
	)	**United States Magistrate Judge**
Defendant.	)	

REPORT AND RECOMMENDATION

This matter is before the undersigned on defendant's motion for summary judgment. The undersigned heard argument on this matter on June 30, 2008. In this action, plaintiff, Tammy Monk ("Monk"), contends that defendant, Stuart M. Perry, Inc. ("Perry"), created a hostile work environment in retaliation for plaintiff's prior employment lawsuit against Perry.

While Monk alleges a host of petty slights and minor workplace annoyances, nothing she claims rises to the level of materially adverse action. Nor does Monk show that Perry's reasons for its conduct were pretexual. Finally, Monk fails to show that a causal connection exists between her protected lawsuit and Perry's failure to fit her assigned truck with an electric tarp. As such, Monk cannot establish a prima facie case of retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-3(a), or under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3). The undersigned **RECOMMENDS** that defendant's motion for summary judgment be **GRANTED**.

I.

Perry employed Monk as a truck driver, from 1996 through June, 2005. In March, 2002, Monk filed suit in federal court against Perry alleging sexual harassment and sexual discrimination in violation of the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), and Title VII, 42 U.S.C. § 2000e-2. A bench trial was held on March 14, 2003, and the court awarded Monk $410 under the EPA and dismissed her Title VII claims. Monk claims that on the evening before the March 14, 2003 trial, defense counsel John G. Kruchko told her that if she showed up for court, Perry would make it hard on her when she went back to work. Perry denies that its counsel made such a threat. Monk seeks to use this statement to taint everything that happened to her at work after the trial. On March 17, 2003, Monk returned to work for Perry and alleges that shortly thereafter she was subjected to a hostile work environment in retaliation for filing a charge of discrimination.

Monk's allegations consist of a litany of minor workplace slights, only a few of which merit individual consideration. In the months after the lawsuit, Perry required Monk to haul stone instead of hauling asphalt as she had before the lawsuit. On December 1, 2003, Perry suspended Monk for two days without pay for two absences. Finally, Monk alleges that Perry retaliated against her by not providing her with an electric tarp to replace the manual tarp on her truck. Monk claims she injured her right arm and shoulder operating the manual tarp and had shoulder surgery in 2005. She claims that despite her shoulder injury, Perry refused to provide an electric tarp, effectively terminating her employment in June, 2005.

Monk filed this action on February 21, 2007 alleging sexual discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1), and retaliatory conduct in violation of Title VII,

42 U.S.C. § 2000e-3(a) and the FLSA, 29 U.S.C. § 215(a)(3). Only the retaliation claims remain pending and require consideration.[1]

II.

Upon motion for summary judgment, the court must view the facts and the inferences to be drawn from those facts in the light most favorable to the party opposing the motion. Varghese v. Honeywell Int'l., Inc., 424 F.3d 411, 418 (4th Cir. 2005). However, the court need not treat the complaint's legal conclusions as true. See, e.g., Custer v. Sweeney, 89 F.3d 1156, 1163 (4th Cir. 1996) ("court need not accept plaintiff's unwarranted deductions, footless conclusions of law, or sweeping legal conclusions cast in the form of factual allegations" (internal quotations and citations omitted)); Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Judgment as a matter of law is proper only if there can be but one reasonable conclusion as to the verdict." Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 331 (4th Cir. 2003) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)) (internal quotations omitted).

III.

In order to make out a prima facie case of retaliation, under Title VII, Monk must proceed under the McDonnell Douglas framework. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Lettieri v. Equant, Inc., 478 F.3d 640, 649 (4th Cir. 2007). Monk must first

[1] In plaintiff's opposition brief to defendant's motion for summary judgment, Monk states that she is no longer pursuing her claims of sexual discrimination. Thus, it is **RECOMMENDED** that summary judgment be **GRANTED** as to these claims.

make a prima facie case of retaliation showing (1) that she was engaged in protected activity; (2) that Perry took adverse employment action against her; and (3) that a casual connection exists between the protected activity and the adverse employment action. Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989). The burden then shifts to Perry to show legitimate and nondiscriminatory reasons for the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Cerberonics, 871 F.2d at 457. After Perry makes this showing, the burden shifts back to Monk to show that Perry's reasons are pretextual. See McDonnell Douglas, 411 U.S. at 804; Cerberonics, 871 F.2d at 457.[2]

Considering the first element of a prima facie case of retaliation, there is no question that Monk engaged in protected activity in filing a complaint with the EEOC and a lawsuit in federal court. 42 U.S.C. § 2000e-3(a) (protected activity includes making "a charge . . . or participat[ing] in any manner in an investigation, proceeding, or hearing" under 42 U.S.C. § 2000e, et seq.); see also Carter v. Ball, 33 F.3d 450, 460 (4th Cir. 1994) (filing an EEOC charge is a protected activity); McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991) (bringing unlawful employment discrimination lawsuit is protected activity). Accordingly, Monk has established the first element.

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[2] As a threshold matter, Perry asserts that Monk may only use those events which fall within 300 days of her EEOC claim to show retaliatory conduct. In her amended complaint, Monk claims that Perry's alleged misconduct constituted a hostile work environment. Pl.'s Am. Compl. ¶ 15, Dkt. #46. In Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116-18 (2002), the Court held that if the actions constituting the alleged retaliatory conduct are part of "the same actionable hostile work environment practice," as long as one act falls within the filing time period, the entire period, including subsequent events, may be considered. Morgan, 536 U.S. at 117-18. The parties do not dispute that at least one of the alleged acts constituting the alleged hostile work environment claim fall within the filing time period, consequently, all of Monk's claims from March 14, 2003 through June 2, 2005 will be considered.

In a retaliation case, the second element requires Monk to "show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Lettieri, 478 F.3d at 650 n.2 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)) (internal quotations omitted). 42 U.S.C. § 2000e-3(a) protects plaintiffs from "retaliation that produces an injury or harm" and does not serve to shield employees from "trivial harms," "petty slights," "minor annoyances," "the ordinary tribulations of the workplace," or "simple lack of good manners." White, 548 U.S. at 68. Title VII does not set forth "a general civility code for the American workplace." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998).

Third, Monk must prove a causal connection existed between the protected activity and the materially adverse retaliation. Lettieri, 478 F.3d at 650; Von Gunten v. Maryland, 243 F.3d 858, 863 (4th Cir. 2001). As the protected activity in this case is the 2003 federal court trial, Monk must prove the existence of a causal connection between that lawsuit and any materially adverse actions that ensued.

If Monk is able to show materially adverse action, causally connected to protected conduct, the burden then shifts to Perry under the McDonnell Douglas framework to provide legitimate, non-retaliatory reasons for the action. McDonnell Douglas, 411 U.S. at 802. Perry "need not persuade the court that it was actually motivated by the proffered reasons." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). Perry must only "clearly set forth, through the introduction of admissible evidence," the reasons for the claimed adverse employment action. Id. at 255. If Perry meets this burden, the burden shifts back to Monk to

show pretext. McDonnell Douglas, 411 U.S. at 804. To make this showing, Monk must "demonstrate that the proffered reason was not the true reason for the employment decision," and either directly show that "a discriminatory reason more likely motivated the employer" or indirectly show that "the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256.

A.

The vast majority of Monk's allegations of a hostile work environment are insufficient to meet the materially adverse standard. Rather, they constitute a laundry list of petty workplace annoyances and slights. These include Monk's allegations that she received write-ups for absences and tardiness; she could not take breaks at the end of her shift; she could not follow other drivers while hauling; she was held to a higher standard of accuracy for the weight of her loads than other drivers; she had to come in rain or shine; she was told she took too long to clean her truck; she was required to get a second opinion concerning her migraine headaches; she could not take a sick day when other employees were able to; she heard about complaints about her from other drivers but was not told who complained or the nature of the complaint; her bulletin, posted on the company message board requesting a meeting of the drivers, was removed while other messages from drivers were not removed; her superior said that drivers would not get raises until the company recovered the money it spent on her lawsuit;[3] her supervisor unsuccessfully attempted to dock her fifteen minutes for her lunch hour; her supervisor unsuccessfully attempted to withhold pay when she was waiting for her truck to be repaired at an

[3] This specific allegation is contradicted by evidence in the record that Monk received raises after her first lawsuit. Tammy Monk Dep. 173:19-21 (Ex. B at 28, Dkt. #59).

off-site shop; she received Performance Improvement Plan ("PIP") write-ups for various minor infractions. None of these events, even when examined as a whole, constitute material adverse action which produced an injury or harm, and certainly do not constitute actions which would dissuade a reasonable employee from making a charge of discrimination. Even taken in combination, such minor annoyances do not rise to the level of materially adverse actions. See White, 548 U.S. at 68; see also Fitzgerald v. Ennis Bus. Forms, Inc., No. 7:05CV00782, 2007 WL 81797, *7 (W.D. Va. Jan. 8, 2007) (failure to provide time clock, refusal of vacation request, failure to allow manager to alter employees' schedules all petty slights not constituting adverse employment action).

B.

Monk asserts retaliatory conduct in a few instances which require further examination. In the months following the first trial, Perry required Monk to haul stone instead of hauling asphalt. Monk alleges that she was told by Steve Miller, one of Perry's officers responsible for operations, in July, 2003, that she was taken out of asphalt because she sued Perry. Retaliatory work assignments are a "classic and widely recognized example of forbidden retaliation," however, "reassignment of job duties is not automatically actionable." Burlington Northern, 548 U.S. at 71. Assuming Monk's allegations to be true, being moved from hauling asphalt to hauling stone for filing a lawsuit is only actionable as Title VII retaliation if it is materially adverse in some respect. At oral argument, Monk was unable to provide anything adverse about hauling stone as opposed to hauling asphalt. She was not paid less, the conditions were not worse, such as being "more arduous and dirtier," id., and the record is devoid of any indication of prestige associated with hauling asphalt as opposed to stone. See also Shannon v. Virginia

Dep't of Juvenile Justice, No. 3:06CV413, 2007 WL 1071973, *4 (E.D. Va. Apr. 4, 2007) (employee's transfer was not adverse employment action because it did not affect salary or benefits). The switch did not produce any injury or harm to Monk. Indeed, because of Monk's complaints of migraine headaches which she attributed to odors from asphalt, the move from asphalt to stone appears to have improved her work conditions. Because Monk has failed to demonstrate that hauling stone instead of asphalt is materially adverse in the slightest respect, this claim is of no moment.

C.

On the other hand, Monk's two-day suspension in December, 2003 could be considered to be materially adverse. See Prince-Garrison v. Md. Dep't of Health & Human Hygiene, 566 F.Supp.2d 550, 555 (E.D. Va. 2007) (one day suspension could, arguably, be an adverse employment action). However, Monk fails to establish a causal connection between her March, 2003 trial and the December, 2003 two-day suspension. There is no temporal proximity between the March, 2003 trial and the December, 2003 two-day suspension sufficient to establish a causal connection. See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) ("The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close[.]") (Internal quotation marks and citation omitted). Absent temporal proximity, the element of causation may be met if evidence of recurring retaliatory animus during the intervening period is presented. Lettieri, 478 F.3d at 650. As noted previously, while Monk alleges a host of workplace slights following her trial, they do not rise to the level of recurring retaliatory animus required to link the alleged Kutchko

statement in March, 2003 and the two-day suspension for absences in December, 2003. Further, Monk is unable to rebut Perry's proffered legitimate reasons for the suspension. Perry asserts that Monk was suspended because of two unexcused absences in November. Stuart Perry PIP, December 1, 2003 (Ex. C at 18, Dkt. #59). Monk offers nothing in rebuttal to cast doubt on Perry's proffered legitimate reason and show that it was pretextual. Thus, she fails to meet her burden under McDonnell Douglas.

D.

Finally, Monk asserts that she did not voluntarily quit Perry's employ, but rather was discharged on June 2, 2005, when Perry notified her that she would be driving the same truck without any modifications upon her return to work after her recovery from shoulder surgery.[4] Whether Monk's allegation is viewed as alleging a discharge or constructive discharge, there are no genuine issues of material fact in dispute that allow Monk's claim of retaliation to proceed to trial. Constructive discharge is "the ultimate adverse action," James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 378 (4th Cir. 2004), established by showing that the employer "deliberately made [the] working conditions intolerable in an effort to induce [the employee] to quit." Heiko v. Colombo Savings Bank, F.S.B., 434 F.3d 249, 262 (4th Cir. 2006) (quoting Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001)). Monk must demonstrate: "(1) that the employer's actions were deliberate, and (2) that working conditions were intolerable." Id. (citing Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 186-87 (4th Cir. 2004)).

[4] Monk also asserts inconsistently that she was discharged on January 17, 2005, when her superior sent her home, telling her that she could not work. However, it is untenable for Monk to take this position as Perry later placed her on medical leave and she and Perry communicated about her return date.

Deliberate employer actions are calculated actions "by the employer as an effort to force the plaintiff to quit." Id. (quoting Matvia, 259 F.3d at 272). Intolerable working conditions are "determined from the objective perspective of a reasonable person." Id. (citing Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004)).

Monk asserts that throughout her employment, she requested an electric tarp be added to her truck because she had difficulty using the manual one. There is no suggestion in the record that Perry, in the years before the March, 2003 trial or afterwards ever assigned Monk to a truck having an electric, as opposed to a manual, tarp. Perry responds that it did not provide Monk with a truck having an electric tarp for several reasons. First, Monk had driven a truck with a manual tarp for Perry since she was first employed in 1996. Second, Perry claims that Monk did not adequately clean asphalt off of the tarp before rolling or unrolling it, thus she would have a problem with it whether it was manually or electrically powered. Perry asserts that whether the tarp is manual or electric, asphalt debris will clog it if it is not properly cleaned. Third, notwithstanding this fact, it is undisputed that Perry had Monk's manual tarp serviced many times, replaced it more than once and even hired independent consultants examine the manual tarp on the truck assigned to Monk.[5] Fourth, Perry explained that it was not its practice to put

[5] The consultants found that the initial force required to use the manual tarp was 12-lbs and the sustained force average was 5-lbs. Valley Health, Ergonomic Task Analysis, December 14, 2004 at 1 (Ex. I at 4, Dkt. #59). For this type of horizontal force, "the Maximal accepted initial push would be approximately 35-lbs. for a female and sustained maximal force of 18-lbs for a female." Id. The report concluded:

> This make[s] the task acceptable for all but 10% of the female population. Since the forces were far below what is acceptable the only person that would be limited with this task would be someone with a diagnosed problem with both upper extremities as only one extremity would be required to perform the task.

new electric tarps on old trucks, such as the one driven by Monk, and only bought electric tarps when they came on new trucks. Dennis Perry Dep. 56:14-57:7 (Ex. E at 3-4, Dkt. #59). Finally, Perry points out that it refused a similar request for an electric tarp from another employee. Id.

Beginning in the summer of 2003, Monk began complaining of having trouble with rolling up her tarp and requested that Perry provide an electric one. Monk sought medical attention for an injury to her right shoulder in late 2003, and ultimately had surgery on that shoulder in March, 2005.

On December 3, 2004 Monk called in to work reporting that she hurt her arm rolling her tarp. Monk claims that when she reported for work on December 6, 2004, she requested to have small loads which she would not have to cover, but instead was sent home and issued a Disciplinary Report for refusing to do what was asked of her. Monk called in the next day, stating that she still had not seen the doctor. Monk saw an orthopedist, Dr. John Zoller, on December 20, 2004 and January 14, 2005. On December 20, Dr. Zoller instructed Monk not to use her right arm, and on January 14, 2005, he completed a Physical Capabilities Form indicating that she was restricted from reaching with her right arm but could drive 5 - 10 hours. Monk returned to work on January 17, 2005, and claims she hauled a load of stone without incident. Monk claims she was told to go home that day at noon, ostensibly because she could not drive. Monk was granted five weeks of paid temporary disability leave, and Perry put her on medical leave on March 14, 2005.

Id. The report also noted that a "light grasp is required and one driver demonstrated being able to perform the cranking using only two fingers." Id. Another report stated that "very little force is required," that "the crank was very easy to operate," and that "[a] person can easily operate the crank with either hand." Scott Insurance, Risk Performance, January 3, 2005 (Ex. I at 6, Dkt. #59).

In March, 2005, counsel for Monk and Perry communicated with each other about the tarp issue in an effort to resolve that dispute.[6] On March 7, 2005, Perry's counsel, John Kruchko, sent a letter to Monk's previous counsel, Charles Joseph, "for settlement discussion purposes only" stating that Perry was prepared "to make necessary arrangements" if Monk was willing to pay for the installation of an electric tarp. Kruchko Letter to Joseph of March 7, 2005 at 2 (Ex. 25 at 2, Dkt. #69). The letter stated that Perry would obtain the necessary cost information and provide it to Monk. Id.

Monk had surgery on her right shoulder on March 24, 2005 and notified Perry of her surgery a few days later. On May 11, 2005, Monk wrote Perry indicating that she had a doctor's appointment on May 20, 2005 and might be released to work at that time. In that letter, Monk also inquired about "truck modification(s), if any, concerning the addition of the electric tarp." Perry responded the next day that it had forwarded her letter to counsel and that they would get back with her as soon as possible. After a course of physical therapy, Monk was released to work by her doctor on May 20, 2005. By letter dated May 23, 2005, Monk notified Perry that she had been released by her doctor to work and requested that the company let her know when she was to report to work. Monk Letter to Perry of May 23, 2005 at 1 (Ex. 20 at 8, Dkt. #69). Perry responded three days later, on May 26, 2005, writing that "[a]ssuming that you can perform all of the duties that are required of [a truck driver], we would like for you to report to work on Tuesday, May 31st." Perry Letter to Monk of May 26, 2005 at 1 (Ex. 24 at 3, Dkt. #69). Instead of reporting for work as directed on May 31, 2005, however, Monk wrote Perry on

[6] Monk was represented by counsel in connection with two EEOC charges filed in late 2004 and early 2005.

that day asking if her truck had been outfitted with an electric tarp and, if not, how much would it cost for her to buy one for the truck. Monk Letter to Perry of May 31, 2005 at 1 (Ex. 20 at 9, Dkt. # 69). On June 2, 2005, Perry wrote Monk stating that the tarp had not been replaced and, because she was cleared to work, she would be expected to perform the same duties she performed before the surgery. Perry Letter to Monk of June 2, 2005 at 1 (Ex. 24 at 4, Dkt. #69). Perry explained that the company had scheduled a physical for Monk on June 6, 2005 to have her Department of Transportation card updated and if she did not report to the physical or to work on June 7, the company would "treat [her] as having resigned [her] employment." Id. Monk never responded to this letter and never returned to work for Perry.

It is undisputed that Monk did not report to the scheduled physical, never reported to work, and never responded to Perry's June 2, 2005 letter. By the same token, there is no evidence in the record to suggest that Perry provided Monk with the cost information it promised to provide in its counsel's March 7, 2005 letter or that Perry got back with Monk as it said it would do in its May 21, 2005 letter. Certainly, a factfinder could infer from Perry's June 2, 2005 letter that Monk was expected to work driving a truck with a manual tarp.

While the standoff over the tarp precipitated Monk's separation from Perry's employ, the legal question becomes whether Perry's position on the electric tarp constitutes actionable retaliation. Even assuming that Perry refused to provide an electric tarp, there are three reasons why it cannot be considered to be Title VII retaliation.

First, there is no causal connection between the protected lawsuit and the refusal to provide an electric tarp. Perry never provided Monk with an electric tarp. Perry did not have an electric tarp before she filed her lawsuit. Nor did she have one in the years after suit was filed.

Perry's position regarding the electric tarp was the same before and after the lawsuit – it did not replace manual tarps with electric ones on old trucks. Because Perry did not provide an electric tarp to Monk before she filed her lawsuit, she can hardly contend that its failure to do so after the lawsuit was retaliatory.

Second, the failure to provide an electric tarp cannot be considered to be materially adverse. It is undisputed that the manual tarp required little force and could be cranked with either hand. In Monk's Physical Capabilities Form of May 20, 2005, completed by her surgeon, no restrictions were placed on the use of her left arm. Winchester Orthopaedic Associates, Ltd., Physical Capabilities Form of May 20, 2005 at 1 (Ex. 22 at 4, Dkt. #69). Indeed, Monk was at all times able to use her left hand to perform this task. Given that Monk could operate the manual crank with her left arm, there is no basis for Monk's assertion that her working environment was intolerable from the objective perspective of a reasonable person. "[D]ifficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign." James, 368 F.3d at 378 (quoting Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994)). Further, not being able to use her right arm to operate the tarp is a "minor annoyance" which would not "dissuade a reasonable worker from making or supporting a charge of discrimination." White, 548 U.S. at 68.

Third, Monk cannot show that the reasons Perry did not provide her with a electric tarp were pretextual. As such, she cannot meet her burden under McDonnell Douglas. It is undisputed that Perry never replaced any manual tarps with electric tarps. Dennis Perry Dep. 56:19-22 (Ex. E at 3, Dkt. #59). Indeed, Perry had similarly rejected the request of another truck driver, Ed Allanson, to replace his manual tarp with an electric tarp. Dennis Perry Dep. 56:14-

57:7 (Ex. E at 3-4, Dkt. #59). Perry's consistent position regarding no replacement of manual tarps with electric tarps on old trucks is hardly suggestive of retaliation.[7]

IV.

The elements of a prima facie case under Title VII and the FLSA are nearly identical, therefore, the result under Monk's FLSA retaliation claim is the same. See Darveau v. Detecon, Inc., 515 F.3d 334, 340, 342 (4th Cir. 2008) ("we and other courts have looked to Title VII cases in interpreting the FLSA"); Whitten v. City of Easley, 62 F.App'x 477, 480 (4th Cir. 2003)

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[7] Monk asserts that pretext is shown from the fact that in February, 2004, two employees other than her were assigned new trucks with electric tarps. Perry asserts that new trucks were assigned on the basis of seniority and productivity and that Monk had consistently low productivity rankings. See Cecil Hahn Dep. 190:17-20 (Ex. 2 at 35, Dkt. #69); Dennis Perry Dep. 75:7-11 (Ex. 5 at 9, Dkt. #69); Maurice Perry Dep. 40:19-20 (Ex. 11 at 2, Dkt. #69); Maurice Perry Decl. ¶ 11 (Ex. J at 3, Dkt. #59). Monk alleges this reason is pretextual because in Perry's EEOC filing, it stated new trucks were assigned on the basis of seniority. EEOC Position Letter of January 21, 2005 at 3 (Ex. 8 at 4, Dkt. #69). Although inconsistent positions may, in some cases, be evidence of pretext, the difference between counsel's letter to the EEOC stating that new trucks are assigned based on seniority and the deposition testimony of Perry's executives that new trucks are assigned based on seniority and productivity plainly does not rise to that level. The alleged inconsistency in this case is a far cry from that noted in EEOC v. Town & Country Toyota, Inc., 7 F. App'x 226, 233 (4th Cir. 2001), and Alvarado v. Bd. of Trs. of Montgomery Cmty. Coll., 928 F.2d 118, 112 (4th Cir. 1991). Each of those cases involved inconsistencies as to the reason for the termination itself. The claimed inconsistency in this case, in contrast, does not directly relate to the reason for the alleged termination. Also, as is not the case here, the inconsistencies in those cases were rather stark. For example, in Town & Country, the company told the EEOC that the terminated salesman's "selling skills seemed satisfactory," and later represented in its motion for summary judgment that he "lacked basic sales skills and abilities." Town & Country, 7 F. App'x at 233. Likewise, in Alvarado, the court found pretext from the plain conflict between the reasons provided to plaintiff for his termination, noting that while on the day he was fired Alvarado was told there was a lack of work, at trial the employer asserted that he was fired for unsatisfactory job performance. Alvarado, 928 F.2d at 122-23. The claimed inconsistency in this case does not directly involve the reason for Monk's alleged discharge, but rather concerns why others were assigned to new trucks ahead of her. Further, the alleged conflict between the statement made to the EEOC that new trucks were assigned on the basis of seniority and the deposition testimony that new trucks were assigned on the basis of seniority and productivity hardly suggests pretext.

(unpublished); see also Conner v. Schnuck Mkts., Inc. 121 F.3d 1390, 1394 (10th Cir. 1997). To establish a prima facie case of retaliation under the FLSA, Monk must show that "(1) [she] engaged in an activity protected by the FLSA; (2) [she] suffered adverse action by the employer subsequent to or contemporaneous with such protected activity; and (3) a casual connection exists between the employee's activity and the employer's adverse action." Darveau, 515 F.3d 334, 340 (citing Wolf v. Coca-Cola Co., 200 F.3d 1337, 1342-43 (11th Cir. 2000); Conner, 121 F.3d at 1394). If Monk can establish these elements, the burden shifts to Perry to offer a non-discriminatory reason for the adverse employment action. Whitten, 62 F.App'x at 480 (citing Conner, 121 F.3d at 1394). After Perry has made this showing, the burden shifts back to Monk to show that Perry's proffered reasons are pretextual. Id.

Monk's FLSA claim fails for the same reasons as her Title VII claim – she has not made a prima facie case for retaliation, specifically regarding the second element requiring a showing of materially adverse action and the third element of causation. The Fourth Circuit has found "no significant differences in either the language or intent of [Title VII and the FLSA] regarding the type of adverse action their retaliation provisions prohibit." Darveau, 515 F.3d at 342.

V.

Monk cannot make a prima facie case for retaliation under Title VII or the FLSA using the McDonnell Douglas and Burlington Northern framework. Specifically, Monk cannot prove that her laundry list of complaints constitutes materially adverse action or show that Perry's legitimate, non-retaliatory reasons for its conduct are pretextual. Further, as Monk was never assigned a truck with an electric tarp before or after she filed her EEOC charge and lawsuit,

Perry's consistent practice cannot be considered to be materially adverse action resulting from the exercise of any protected right. Monk's allegations do not sufficiently establish a prima facie case for retaliation under Title VII or the FLSA. Accordingly, it is **RECOMMENDED** that Perry's motion for summary judgment be **GRANTED** in its entirety.

The Clerk is directed to transmit the record in this case to Honorable Glen E. Conrad, United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned that is not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusion reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court is directed to send copies of this Report and Recommendation to all counsel of record.

Enter this 18th day of July, 2008.

/s/ Michael F. Urbanski
United States Magistrate Judge