IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC01-472

FRANK POER, ROBERT ANDERSON, STANLEY CORCELL and ARTHUR CARRATT,

Petitioners

vs.

CALDER RACE COURSE, INC.,

Respondent

On Discretionary Review of a Decision of the Florida District Court of Appeal, Third District

Lower Tribunal Case No. 3D00-524

ANSWER BRIEF OF RESPONDENT, CALDER RACE COURSE, INC.,

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioners, Frank Poer, Robert Anderson, Stanley Corcell and Arthur Carratt, Plaintiffs below, seek review of the *per curiam* affirmance by the District Court of Appeal of Florida, Third District, of a Final Judgment entered by the Honorable Paul Siegel, Circuit Court Judge, on January 20, 2000, in favor of Calder Race Course, Inc. ("Calder") [R.II-269] pursuant to an order granting Calder's motion for summary judgment dated December 28, 1999 [R.II-266-268].

I. Nature of the Case

Petitioners are former employees of Calder. Petitioners brought an action against Calder in the Circuit Court of the Eleventh Judicial Circuit pursuant to the Florida Civil Rights Act of 1992, Fla. Stat. § 760.01 *et seq.*, based on Calder's alleged removal, discharge, constructive discharge, failure to hire and/or rehire them based on their ages. [R.I-4-31].

II. Undisputed Facts

Calder is a pari-mutuel race track that is open to the public on a seasonal basis. [R.II-150-166 (Mahony Aff. at ¶ 2)]. For many years at the beginning of each racing season, Calder has hired hundreds of employees to work at its betting windows and to manage the flow of money at the race track in what are called "money rooms." [*Id*. at ¶ 3]. The hiring is on a season to season basis and each employee is hired to work

only during the current season. [*Id.*]. Many of the teller and money room personnel hired seasonally by Calder also typically work at other race tracks such as Hialeah and Gulfstream during their respective racing seasons. [*Id.*]. If a teller works at least seventy-five days during two consecutive racing meets, that teller attains a seniority status and, as a result, attains a place on Calder's seniority list. [*Id.* at ¶ 4]. That seniority list is utilized by Calder in determining which tellers are entitled to priority in the rehiring for the next racing season, as well as which tellers are entitled to work priority on any given day within the season. [*Id.*].

Like the teller positions, Calder's money room employees also are hired seasonally. [*Id.* at ¶ 5]. However, these positions are not determined solely on the basis of seniority. [*Id.*]. These employees consist of the head cashier, assistant head cashier, division heads, terminal operator/mini dealers and terminal operators/money counters. [Gantz Depo. at p. 15].[1] Calder's money rooms are a crucial part of Calder's mutuel operations and its employees deal daily with large amounts of cash.

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[1] On August 20, 1999, in connection with the filing of its summary judgment motion in the circuit court, Calder filed numerous depositions under "Defendant's Notice of Filing Deposition Transcripts in Support of Motion for Summary Judgment." The Index of Record on Appeal, however, did not reflect this filing. Accordingly, Calder moved to supplement the record in the Third District and that motion was granted by the appellate court below by order dated June 21, 2000. Accordingly, references in this Answer Brief to deposition testimony is made by referring to the name of the deponent and the page number of the transcript of those depositions filed below.

[R.II-150-166 (Mahony Aff. at ¶ 5)]. For those reasons, Calder's money room employees, necessarily, are assigned their positions on the basis of their skill levels and qualifications, as well as on considerations of seniority. [*Id.*].

Prior to May 1996, Calder had nine satellite money rooms strategically located around the race track. [*Id*. at ¶ 7]. The nine satellite money rooms are called divisions and each is under the direct charge of an individual called a division head. [*Id*.]. The division heads report to the head cashier who, in turn, reports to the Vice-President of Mutuels. [*Id*.].

Each of the Petitioners had long employment histories at Calder and, prior to May 1996, each had been division head of one of Calder's money rooms. [*Id*. at ¶ 9]. Mr. Anderson was first hired by Calder in 1970 when he was 48 years old. [*Id*. at ¶ 10]. Mr. Anderson's date of birth is March 26, 1922 and, thus, as of May 1996, Mr. Anderson was 74 years of age and he previously had been the division head of Calder's third floor club (lower club) division. [*Id.*; Anderson Depo. at pp. 8, 35]. Mr. Carratt was first hired by Calder in 1974 when he was 49 years old. [R.II-150-166 (Mahony Aff. at ¶ 11)]. Mr. Carratt's date of birth is December 8, 1925 and, thus, as of May 1996, Mr. Carratt was 70 years old and he previously had been the division head for the second floor grandstand west division. [*Id.;* Carratt Depo. at p. 22]. Mr. Corcell was first hired by Calder in 1987 when he was 58 years old. [R.II-150-166

(Mahony Aff. at ¶ 12). Mr. Corcell's date of birth is April 1, 1929 and, thus, as of May, 1996, Mr. Corcell was 68 years old and previously had been the division head for the paddock division. [*Id*.; Corcell Depo. at p. 33]. Mr. Poer was first hired by Calder in 1982 when he was 55 years old. [R.II-150-166 (Mahony Aff. at ¶ 13)]. Mr. Poer's date of birth is December 12, 1927 and, thus, as of May, 1996, Mr. Poer was 68 years old and he previously had been the division head for the third floor (upper) grandstand division. [*Id*.; Poer Depo. at pp. 23-24].

In December 1995, Patrick Mahony, Calder's Vice-President of Mutuels, prepared Calder's budget for the 1996-1997 racing season. [R.II-150-166 (Mahony Aff. at ¶ 15)]. Because of Calder's declining on-track business, Mr. Mahony deemed it economically necessary to streamline its operations and take steps to reduce overhead expense. [*Id*.]. In an effort to cut costs, Mr. Mahony decided to cut about 10-15% of Calder's employees. [*Id*.]. At the same time, due to the advent of night time simulcast racing, it was necessary to change the manner in which Calder's money rooms operated for the 1996-1997 season. [*Id.* at ¶ 16; Gantz Depo. at pp. 12-13]. It was no longer possible to count all the money after the finish of the last live race, as had been the case in prior seasons, because, after the last live race, betting windows were still open for the night time simulcast racing. [*Id.*]. As a result, all money was counted the following morning and, under the new system, fewer counters were

required. [*Id.*]. John Gantz and Ed Mackie had worked at Hialeah prior to the opening of Calder's 1996-1997 season and had implemented a new system to accommodate the night time simulcast racing and that system was implemented by Calder for the 1996-1997 season. [*Id.*].

Because of the decline in on-track business and the advent of night time simulcast racing, Patrick Mahony identified the four least busy money rooms at Calder that had the smallest number of clerks and he earmarked those rooms for immediate closure. [*Id.* at ¶ 17; Gantz Depo. at p. 14; Mahony Depo. at p. 31]. Those rooms were the divisions previously headed by Robert Anderson, Art Carratt, Stanley Corcell and Frank Poer. [R.II-150-166 (Mahony Aff. at ¶14)]. Of the nine money rooms within Calder, the division headed by Mr. Anderson was one of the slowest and Mr. Anderson himself testified that, through the years, he saw less and less people on his floor. [Anderson Depo. at pp. 37-39]. Mr. Poer explained that, although the third floor (upper) grandstand division he headed had approximately thirty (30) windows, on average, only thirteen (13) windows were opened during the week, with only one or two additional windows opening up on weekends. [Poer Depo at pp. 29-31]. The turf club division previously had been closed. [R.II-150-166 (Mahony Aff. at ¶ 14)].

Because some felt that Mr. Mahony had earmarked too many money rooms for closure, Mr. Mahony subsequently decided to keep the paddock division open for the

1996-1997 season. Given the changes in money room operations due to simulcast racing and the corresponding increases in the responsibilities of the head cashier, Bill Doolen, who had been experiencing some medical problems, opted not to hold the position of head cashier during the 1996-1997 racing season. [*Id.* at ¶ 18]. Mr. Doolen, who had been employed at Calder for over 20 years and who, as head cashier, had been the supervisor of all division heads, including the Petitioners, wished to decrease his responsibilities and assume the position of division head. [*Id.*]. Because, of the four division heads of the slowest rooms that had been marked for closure, Stanley Corcell had the least seniority, Patrick Mahony made the decision to place Mr. Doolen in the paddock money room as division head. [*Id.*; Ganz Depo. at pp. 29-30]. Ed Mackie was promoted to the position of head cashier to fill the position previously held by Mr. Doolen. [*Id.*].

As part of the restructuring of Calder's money rooms, a new position of teller/mini-dealer was created. [*Id.* at ¶ 19]. This new position was a hybrid of teller and division head and was needed to ensure, with the closure of satellite money rooms, that the mutuel clerks got the money they needed without having to leave the division to go to an open money room. [*Id.*]. The position required proficiency on the teller machine which, in turn, required training and testing. [*Id.*; Poer Depo. at pp. 38-39; Carratt Depo. at pp 31-32; Anderson Depo. at pp. 43, 47 and 49; Corcell Depo.

at pp. 54-56; Gantz Depo. at pp. 18 and 25]. However, Kathy Hildago, the person responsible for administering the testing, testified that the test consists of seventy-five questions, an applicant is permitted to miss twenty-three and that virtually everyone that takes the test passes it. [Hildago Depo. at p. 9; *see also* Zumberg Depo. at pp 13-14; R.II-150-166 (Mahony Aff. at ¶ 19)].

At the beginning of each new Calder racing season, each employee who wishes to be hired or rehired for the season must submit a written application. [R.II-150-166 (Mahony Aff. at ¶ 3)]. Approximately one week prior to the start of Calder's 1996/1997 racing season, at the time of the application process, Mr. Mahony individually advised each of the Petitioners that Calder was downsizing, that divisions were being closed and that certain jobs were being eliminated. [*Id.* at ¶ 20]. The Petitioners described what transpired at these meetings as follows:

> Q. . . . What were you told at the time?
> A. He said that my job had been eliminated.
> Q. What did you understand by that?
> A. That there was no longer a money room on the third floor.
>
> * * *
>
> Q. . . . [D]id he tell you why that job was being eliminated?
> A. If I recall, he just said that there were - - how would I say it? Downsizing or down -- let's say, call it downsizing as a cost -saving measure.

[Anderson Depo. at pp. 41, 68].

> Q. You walked into Mr. Mahony's office, and what did he say to you?
> A. He was telling me that my job was being eliminated.

Q. Eliminated?
A. My room was being eliminated.

* * *

Q. Did he say why?
A. They were consolidating it, making it just five main money rooms.
Q. Okay. Did he say why he was doing that?
A. Yes, business reasons. He used that word, business reasons.

[Carratt Depo. at pp. 29-30].

Q. What happened when you got there?
A. I was told my duties would be changed, that I would have to take a test on the machine, that he was going to convert four of the money rooms to teller mini-dealer, a new designation that didn't even exist until that point. That was it.
Q. Did he tell you why?
A. He said they selected the best four or the best five to keep. I didn't believe it, but that's what he told me.

[Poer Depo. at p. 36].

Mr. Mahony discussed the issue of the impact of the closure of the money rooms on personnel with Ed Mackie and John Gantz and considered their recommendations as to which division heads should be rehired. [Mahony Depo. at pp. 37-38]. While Mr. Mahony consulted with Edward Mackie, the incoming money room manager, as to the rooms he had budgeted for closure, Mr. Mahony independently made the decision of which rooms to close. [Mahony Depo at p. 31]. Considering the job duties and volume of business in the rooms being left open, the

recommendation was that those people who already were in place in the money rooms that were being left open were the best qualified to continuing operating those rooms. [Mahony Depo. at p. 39]. As a result of this recommendation, the individuals who previously had headed up those divisions -- John Gantz, Betty Comegys, Dave Levy and Tom Barrett - - simply were rehired for the season in the same positions they previously had held. [R.II-150-166 (Mahony Aff. at ¶¶ 14, 23); Carratt Depo. at pp. 69-70]. As Mr. Anderson explained:

> Q. . . . Were they [the other division heads] hired, to the best of your knowledge, as money room division heads for the '96 season at Calder?
> A. They had been division heads for many years and retained their job.

[Anderson Depo. at p. 89]. With the closure of the money rooms at issue, in order for the Petitioners to have obtained positions as division heads for the '96 season in money rooms that remained open, those other division heads would have had to have been displaced. [Poer Depo. at p. 55; R.II-150-166 (Mahony Aff. at ¶ 23)].

Despite the fact that the positions held by the Petitioners were eliminated, Mr. Mahony also advised each of the Petitioners that Calder, nevertheless, was offering them the requisite training so that they could assume the position of teller/mini-dealer, the new position that had been created to ensure that the mutuel clerks could obtain the money they needed without having to leave their positions. [R.II-150-166 (Mahony

Aff. at ¶ 19); Poer Depo. at p. 36; Anderson Depo. at p. 4; Corcell Depo. at p. 52; Gantz Depo. at p. 14]. Donald Zumberg, who works as a teller/mini-dealer at Calder, testified that working as a teller/mini-dealer is considered a higher position than most of the money room positions and that the work is generally "easier." [Zumberg Depo. at p. 6].

Mr. Anderson acknowledged that he was offered the position of teller/mini-dealer and that he declined on the spot. [Anderson Depo. at pp. 43-44, 47, 49; R.II-150-166 (Mahony Aff. at ¶ 20)]. Mr. Carratt acknowledged that he was offered the position of teller/mini-dealer, along with the requisite training and, that, while he was given time to think it over and call Mr. Mahony back, he simply went home and never called. [Carratt Depo. at pp. 42-44; R.II-150-166 (Mahony Aff. at ¶ 20)]. Mr. Poer also admits that Mr. Mahony offered him a position of teller/mini-dealer. Poer Depo. at p. 39. Mr. Poer, however, attended the training for one day and never returned. [*Id.* at p. 68; R.II-150-166 (Mahony Aff. at ¶ 20)]. Finally, Mr. Corcell agrees that he was given the opportunity to assume the position of teller/mini-dealer. [Corcell Depo. at p. 53]. Mr. Corcell underwent the requisite training, passed the test and worked a total of one day as a teller/mini-dealer before walking off the job. [Corcell Depo. at pp. 69-71; R.II-150-166 (Mahony Aff. at ¶ 20)].

Approximately one month after the start of Calder's 1996-1997 racing season,

Ed Mackie was offered and accepted the position of Mutuels Manager at Hialeah, the equivalent of Mr. Mahony's position at Calder. [*Id.* at ¶ 21]. Thus, it became necessary to replace Mr. Mackie in his position as Calder's head cashier. [*Id.*]. John Gantz was promoted to that position, thereby creating an open position of division head. [*Id.*]. At that point, however, each of the four Petitioners either had refused to come to work in the positions offered for the 1996-1997 racing season or had assumed the position and then quit and, thus, they were not then employed at Calder. [*Id.*]. The open division head position was given to an existing Calder employee, Ray Loretto, who had worked at Calder for eleven years. [*Id.*].[2]

Calder, overall, has an older than average, post-retirement work force in its tellers and money room personnel. [R.II-150-166 (Mahony Aff. at ¶ 8)]. Mr. Anderson explained that many of these workers were involved in post-retirement careers and that the work force was comprised of numerous retired police officers,

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[2] Mr. Corcell testified that he quit his job at Calder after one day of being a teller/mini-dealer based on his belief that Ray Loretta had replaced John Gantz as division head in the Main Line One division and that such job properly should have been offered to him. [Corcell Depo. at pp. 69-71]. Mr. Corcell was, however, unsure of exactly when Mr. Loretta took over Mr. Gantz's division. [Corcell Depo. at pp. 85-86]. In fact, Mr. Loretta did not take over Mr. Gantz's position until long after Mr. Corcell walked off the job. Mr. Loretto became the division head for the west grandstand division approximately one month into the 1996/1997 racing season. [Loretto Depo. at p.15]. On the single day that Mr. Corcell worked as a teller/mini-teller during the 1996-1997 racing season, Mr. Loretto was still working as a money counter -- a position below that of a teller/mini-dealer. [*Id*. at p. 28].

firemen and postal workers who were receiving a pension and were supplementing their income by working at Calder. [Anderson Depo. at p. 65]. On an average weekday, Calder employs 101 tellers who work according to their rankings on the seniority list. [R.II-150-166 (Mahony Aff. at ¶ 8)]. Of the 101 most senior tellers who were employed as tellers for the 1996-1997 racing season, only one individual was under the age of 40 and the vast majority (88 of the 101 most senior tellers) were over 50. [*Id.*]. Many were in their 70's (24 of the senior most 101 tellers) and several individuals were in their 80's. [*Id.*]. The average age of the 101 most senior tellers employed by Calder for the 1996-1997 racing season was 63. [*Id.*]. Calder's money room roster demonstrates similar statistics. Of the 21 individuals employed by Calder to work in the money rooms during the 1996-1997 racing season, the average age was 52. [*Id.*]. Only two such employees were under the age of 40 and neither of these individuals held the position of division head. [*Id.*].

Neither Robert Anderson, Arthur Carratt nor Frank Poer were replaced. [R.II-150-166 (Mahony Aff. at ¶ 22)]. Rather, the positions they previously had held were eliminated. [*Id.*]. The decisions that Mr. Mahony made regarding the closure of the money rooms previously headed by Robert Anderson, Art Carratt and Frank Poer and the consequent elimination of the previously held positions of division head of such money rooms were made for purely economic, business reasons and had absolutely

nothing to do with the ages of those individuals. [*Id.*]. It is undisputed that the rooms that were closed were the slowest money rooms at Calder and had the least number of clerks. [*Id.;* Gantz Depo. at pp. 13-14].

Similarly, the decision to place Bill Doolen in the position of division head of the paddock division previously headed by Stanley Corcell was based purely on business considerations and had nothing at all to do with Mr. Corcell's age. [R.II-150-166 (Mahony Aff. at ¶ 23)]. Mr. Doolen had far more seniority than did Mr. Corcell (approximately 12 years more) and was more qualified than was Mr. Corcell as a division head. [*Id.; See also* Ex. B to Mahony Aff.]. Mr. Doolen, for years prior to becoming head cashier, had held a position of division head and he was familiar with all aspects of the money room operations. [R.II-150-166 (Mahony Aff. at ¶23)]. Prior to the 1996-1997 season, Mr. Doolen had been head cashier and Mr. Corcell's supervisor. [*Id.*]. In order to provide Mr. Corcell with a division head position for the 1996-1997 racing season, it would have been necessary to refuse to rehire one of the division heads of one of the money rooms that were to remain open and all of those individuals were well qualified for those positions. [*Id.*]. The decision Mr. Mahony made was based on Mr. Doolen's qualifications, experience and seniority. [*Id.*].

III. Course of Proceedings

On August 5, 1996, Petitioners served the Florida Commission on Human Relations with Charges of Discrimination against Calder for an alleged violation of the Florida Civil Rights Act of 1992, Fla. Stat. §§760.01 *et seq*. Also on August 5, 1996, Petitioners served the Equal Employment Opportunity Commission ("EEOC") with Charges of Discrimination, based on the identical alleged acts of age discrimination by Calder and alleged violation of the Age Discrimination in Employment Act of 1967, §7(b), *as amended*, 29 U.S.C. §626(b) ("ADEA").

By complaint filed on December 18, 1997 and served on Calder on January 13, 1998, the EEOC, on behalf of the Petitioners, commenced an action against Calder in the United States District Court for the Southern District of Florida, Miami Division, ("district court") entitled *EEOC v. Calder Race Course, Inc.*, 97-4223-CIV-Ungaro-Benages (S.D. Fla.), seeking relief under the ADEA (the "Federal Action"). [R.I-121-127]. Just over one month after the commencement of the Federal Action, on January 21, 1998, Petitioners commenced this action below based on allegations identical to those which form the basis of the Federal Action. [R.I-4-31]. In the instant action, based on an alleged violation of the Florida Civil Rights Act of 1992, Petitioners sought relief that was identical to that sought in the Federal Action. Calder was served with the Complaint in the instant case on January 23, 1998 - - ten (10) days after service of the Federal Action complaint.

As the record herein indicates, there was virtually no activity in this case while the Federal Action was pending and was being vigorously litigated by the EEOC on behalf of Petitioners. No depositions at all were taken by Petitioners below. In fact, at one point, because of the pendency of the Federal Action, wherein the EEOC was seeking the identical relief for Petitioners that Petitioners were seeking below, based on identical allegations of age discrimination in the work place, the parties agreed, "in the interest of judicial economy," to stay the instant action pending the outcome of the Federal Action [R.I-86-89], which stay was granted. [R.I-90]. This agreed stay was based on an obvious recognition of the fact that the outcome in the Federal Action necessarily would determine the outcome below.

After the completion of all the discovery in the Federal Action, Calder filed a motion for summary judgment in that case. On March 31, 1999, following full briefing and oral argument, the District Court entered an order in the Federal Action, granting Calder's motion for summary judgment and finding that there existed no evidence in this record - - *the identical record as exists herein* - - to support the notion that Calder's termination of the positions that had been held by Messrs. Carratt, Anderson, Corcell and Poer was motivated by anything other than legitimate business considerations. [R.I-128-149]. The EEOC appealed that order to the Eleventh Circuit Court of Appeals but it subsequently voluntarily dismissed that appeal with prejudice.

An order dismissing the EEOC's appeal with prejudice was entered by the Eleventh Circuit Court of Appeal on September 7, 1999.

On August 20, 1999, Calder filed a motion for summary judgment in this case. [R.I-95-149]. After the EEOC's appeal was dismissed, Calder also filed a motion to amend its answer so as to assert the affirmative defense of collateral estoppel. [R.II-232-237]. Hearing on Calder's summary judgment motion was scheduled to take place on October 27, 1999 but, at that hearing, because the court granted Calder's motion for leave to amend its answer to assert the collateral estoppel defense, it deferred the hearing on summary judgment in order to afford Petitioners the opportunity to conduct whatever discovery they deemed necessary on this new defense. [R.II-238]. The hearing on Calder's motion for summary judgment was rescheduled to and did take place on December 20, 1999. In that almost two month period afforded Petitioners, they conducted no discovery on the collateral estoppel defense.

IV. Disposition Below

On December 28, 1999, following the December 20, 1999 hearing on Calder's motion for summary judgment, the lower court entered an order granting said motion. In pertinent part, the order provided:

> . . . Defendant's Motion for Summary Judgment is GRANTED. The Court clarifies its ruling as follows:

* * *

2. One of the grounds on which Defendant's Motion for Summary Judgment is premised is that certain key factual issues in the case are established as a matter of law pursuant to the doctrine of collateral estoppel and that Plaintiffs are, thus, barred from relitigating same. Specifically, Defendant contends that, by virtue of litigation initiated by the Equal Employment Opportunity Commission ("EEOC") in the United States District Court for the Southern District of Florida on behalf of the Plaintiffs in this case, it was established that Defendant terminated the employment of Plaintiffs and/or refused to rehire Plaintiffs for legitimate, non-discriminatory business reasons and that such reasons were not a pretext for age discrimination. Summary judgment was entered in favor of Defendant in that case and the EEOC timely filed a notice of appeal, although it thereafter voluntarily dismissed that appeal. Plaintiffs contend that the doctrine of collateral estoppel cannot properly be applied to bar their age discrimination claims in this Court because, by virtue of the fact that the EEOC did not see the appeal through to its conclusion, they did not have a full and fair opportunity to litigate their age discrimination claims.

* * *

4. The Court finds that, based on the record before it, the EEOC vigorously and extensively litigated the Plaintiffs' age discrimination claims on their behalf in the federal district court and lost. The district court judge underwent a thorough analysis of all of the evidence in the record and there exists no intimation that Plaintiffs' interests were not adequately protected. The fact that the EEOC dismissed its appeal of the adverse ruling does not detract from the Defendant's ability to assert the collateral estoppel defense. The EEOC acted on behalf of Plaintiffs and the Court finds that Plaintiffs had a full and fair opportunity to litigate in the federal district court action. The Court does not find any evidence of a divergency of interests between the EEOC and the Plaintiffs.

5. Because the Court's decision is based on Defendant's affirmative defense of collateral estoppel, the Court does not address the merits of Plaintiffs' claims on this motion. Should Plaintiffs appeal from this Order and should the appellate court decide that the doctrine of collateral estoppel was not properly applied in this case, the Court believes that the appellate court may review the issues raised in Defendant's Motion for

Summary Judgment on the merits.

[R.II-266-268].

On January 20, 2000, final judgment was entered in favor of Calder. [R.II-269]. An appeal to the Florida District Court of Appeal, Third District ensued. In that appeal, there was never any dispute that the applicable elements of collateral estoppel in the context of this case were those set forth in *Baxas Howell Mobley, Inc. . BP Oil Co.,* 630 So.2d 207 (Fla. 3d DCA 1993) and *All Pro Sports Camp, Inc. v. Walt Disney Co.,* 727 So.2d 363 (Fla. 5th DCA 1998) - - 1) the issue at stake is identical to the one involved in the prior litigation; 2) the issue has been actually litigated in the prior suit; 3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that action; and 4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. Both Calder and Petitioners agreed that those were the elements that must be satisfied in the instant case. However, Petitioners argued below, as they do here, that the fourth element was not met - - i.e., they contended that they did not have a full and fair opportunity to litigate in the Federal Action because the EEOC abandoned its appeal of the summary judgment that was entered in favor of Calder. In its Answer Brief in the Third District, Calder cited two cases - - *Equal Employment Opportunity Commission v. United States Steel Corp.,* 921 F.2d 489 (3d Cir. 1990) and *Equal Employment Opportunity Commission v. Harris Chernin, Inc.,* 10 F.3d 1286 (7th Cir.

1993) - - solely for the proposition that, in the Federal Action, the EEOC acted as the Petitioners' virtual representative and, thus, that the EEOC and Petitioners were in privity. The Third District affirmed *per curiam*, holding that the trial court properly applied the doctrine of collateral estoppel notwithstanding that Petitioners were not parties in the Federal Action. The Third District's decision, however, while legally correct with respect to the result reached, incorrectly cited the two cases referenced above as setting forth the elements of collateral estoppel when, in fact, such cases set forth the elements of claim, not issue, preclusion. In responding to Petitioners' motion for rehearing, Calder agreed with Petitioners that the cases were erroneously cited in the Third District's decision. The Third District, however, denied the motion for rehearing and Petitioners' application for discretionary review in this Court followed.

V. Issue Presented By This Appeal

In its application for discretionary review by this Court, Petitioners contended that the Third District's decision expressly and directly conflicts with the *Baxas* as *All Pro* decisions with respect to the applicable elements of collateral estoppel when one seeks to relitigate an issue in state court that previously was determined in a federal court action. While Calder agrees that the Third District's decision requires correction, it does not agree that the Third District applied any incorrect standard in its determination of the appeal below. The applicable standard was never in dispute

nor is it now. Petitioners have utilized what clearly was an inadvertent error on the part of the Third District to obtain a second, unwarranted appeal of the summary judgment entered in Calder's favor by the circuit court. Moreover, going far beyond the narrow issue originally set forth, Petitioners also herein improperly seek review of this entire case on the merits. Accordingly, Calder responds herein to all issues raised in Petitioners' Initial Brief.

SUMMARY OF THE ARGUMENT

The lower court properly applied the doctrine of collateral estoppel to this case and correctly determined that Petitioners were barred from relitigating certain key factual issues that were fully litigated and finally resolved in the Federal Action. Such determinations - - i.e., that Calder terminated the employment of Petitioners and/or refused to rehire Petitioners for legitimate, non-discriminatory business reasons and that such reasons were not a pretext for age discrimination - - mandated the entry of summary judgment in favor of Calder in this case. It is undisputed that such issues, which were fully litigated and finally determined in the Federal Action, were identical to dispositive issues in the instant case and that they were a critical and necessary part of the judgment entered in the Federal Action in favor of Calder. Further, it is undisputed that the EEOC was in privity with Petitioners in the Federal Action and there certainly is no contention that the EEOC (or the Petitioners on whose behalf it

was acting) was denied a full and fair opportunity to litigate the matter through entry of final judgment. Rather, the issue presented by Petitioners below and in this Court is a narrow one - - i.e., whether the fact that the EEOC, acting on behalf of Petitioners, made the decision to dismiss its Eleventh Circuit appeal deprived Petitioners of a full and fair opportunity to litigate. It is well established that application of the doctrine of collateral estoppel to bar relitigation of issues previously determined is not dependent on the completion of appellate proceedings in the prior case. Accordingly, the doctrine of collateral estoppel properly was applied.

It also is clear, even without applying the doctrine of collateral estoppel, that there exist no disputed issues of material fact and that Calder was entitled to summary judgment in its favor as a matter of law. Accordingly, a de novo review of the record mandates the conclusion that judgment properly was entered in Calder's favor.

ARGUMENT

I. Standard of Review

The trial court's grant of summary judgment is reviewed *de novo*. *Volusia County v. Aberdeen at Ormond Beach,* 760 So.2d 126, 131 (Fla. 2000).

II. Burdens of the Parties in Age Discrimination Cases

Where a state statute is modeled after federal law on the same subject, the state statute is construed in conformity with its federal prototype, insofar as such

interpretation is harmonious with the spirit and policy of the Florida legislation. *See Brand v. Florida Power Corporation*, 633 So.2d 504, 509 (Fla. 1st DCA 1994) (*citing Kidd v. City of Jacksonville*, 120 So. 556, 559 (Fla. 1929)). The Florida Civil Rights Act, pursuant to which Petitioners sued Calder below, is patterned and designed after Title VII of the Civil Rights Act 1964, 42 U.S.C § 2000e-2 ("Title VII") as well as the Age Discrimination in Employment Act ("ADEA"). *See School Board of Leon County v. Hargis,* 400 So. 2d 103 (Fla. 1st DCA 1981); *Florida State University v. Sondel,* 685 So.2d 923 (Fla. 1st DCA 1996); *Byrd v. Richardson-Greeenshields Securities, Inc.*, 552 So.2d 1099 (Fla.1989). Accordingly, age discrimination cases brought pursuant to the Florida Civil Rights Act should be evaluated in accordance with federal law interpreting the ADEA. *Florida Dept. of Community Affairs v. Bryant*, 586 So. 2d 1205 (Fla. 1st DCA 1991); *Sondel,* 685 So. 2d at 934.

In a case alleging unlawful age discrimination, the plaintiff bears the ultimate burden of proving, by a preponderance of the evidence, that age was a determining factor in the adverse employment decision complained of. *Zaben v. Air Products & Chemicals, Inc.,* 129 F.3d 1453, 1457 (11th Cir. 1997) (*citing Clark v. Coates & Clark, Inc.,* 990 F.2d 1217, 1226 (11th Cir. 1993)). In order to survive a motion for summary judgment, the plaintiff must first establish a *prima facie* case of age

discrimination. *Id.* This may be accomplished in one of three ways: (1) by presenting direct evidence of discriminatory intent; (2) by presenting statistical proof that the employer has engaged in a pattern of discrimination; or (3) by presenting circumstantial evidence that complies with the test set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *Id. See also Isenbergh v. Knight-Ridder Newspaper Sales, Inc.,* 97 F.3d 436, 439 (11th Cir. 1996), *cert. denied,* 521 U.S. 1119, (1997); *Earley v. Champion International Corp.,* 907 F.2d at 1077 (11th Cir. 1990); *See Sondel*, 685 So. 2d at 926 (adopting *McDonnell Douglas Corp v. Green*, among other federal cases as controlling case law in age discrimination cases brought pursuant to Florida Civil Rights Act.).

Direct evidence of age discrimination is evidence which, if believed, would prove the existence of a fact in issue without inference or presumption. *Carter v. City of Miami,* 870 F.2d 578, 581-82 (11th Cir. 1989). An example of direct evidence is a written memorandum which states: "Fire [the plaintiff] - - he is too old." *Earley,* 907 F.2d at 1081. "[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age . . . constitute direct evidence of discrimination." *Id.* (*quoting Carter,* 870 F.2d at 581-82). Where the evidence merely suggests discrimination, leaving the trier of fact to infer discrimination based on the evidence presented, that evidence is, by definition, circumstantial. *Id.* at 1081-82.

A variation of the *McDonnell Douglas* test for establishment of a *prima facie* case of discrimination in Title VII cases has been adopted for use in age discrimination cases based on circumstantial evidence. In an ADEA case involving discharge or demotion, a plaintiff may establish a *prima facie* case by showing: (1) that he was a member of the protected group of persons over the age of forty; (2) that he was subject to adverse employment action; (3) that a substantially younger person filled the position from which he was discharged; and (4) that he was qualified to do the job for which he was rejected. *Turlington v. Atlanta Gas Light Company,* 135 F.3d 1428, 1432 (11th Cir. 1998) (*citing O'Connor v. Consolidated Coin Caterers Corp.,* 517 U.S. 308, 313 (1996)). *See also Zaben,* 129 F.3d at 1457; *Jameson v. Arrow Co.,* 75 F.3d 1528, 1531 (11th Cir. 1996); *Mitchell v. Worldwide Underwriters Insurance Co.,* 967 F.2d 565, 566 (11th Cir. 1992). Where, however, a position is eliminated, the case is similar to a reduction in work force case and the elements of a *prima facie* case of age discrimination necessarily are altered. *Zaben,* 129 F.3d at 1457; *Mitchell,* 967 F.2d at 567. In such cases, the employer seldom seeks a replacement for the discharged employee, thereby rendering it impossible to establish the element of being replaced by a substantially younger person. Accordingly, in an age discrimination case where the position the plaintiff had filled was eliminated altogether, in order to establish a *prima facie* case of age discrimination, the plaintiff must show:

(1) that he was in a protected age group and was adversely affected by an employment decision; (2) that he was qualified for the position held at the time of discharge; and (3) evidence by which a fact finder could reasonably conclude that the employer intended to discriminate on the basis of age in reaching that decision. *Zaben,* 129 F.3d at 1457; *Jameson,* 75 F.3d at 1532; *Mitchell,* 967 F.2d at 567-68; *Earley,* 907 F.2d at 1082; *Barnes v. Southwest Forest Industries, Inc.,* 814 F.2d 607, 609 (11th Cir. 1987). It should be noted that, where positions have been eliminated, "nothing in the ADEA requires that younger employees be fired so that employees in the protected age group can be hired." *Barnes,* 814 F.2d at 610. Nor, when a company reduces its work force, does the employer have any duty to transfer those in positions eliminated to other positions within the company. *Earley,* 907 F.2d at 1083 (*citing Simpson v. Midland-Ross Corp.,* 823 F.2d 937, 942 n. 6 (6th Cir. 1987)).

III. Standard on Summary Judgment

Under Rule 1.510(b), *Florida Rules of Civil Procedure,* summary judgment is appropriate where there is no genuine issue of material fact. As this Court has made clear, "a motion for summary judgment is calculated to save valuable trial time and thus to assist in securing speedy and inexpensive justice." *Cook v. Navy Point, Inc.*, 88 So.2d 532, 534 (Fla. 1956); *see also General Truck Sales, Inc. v. American Fire & Casualty Company*, 100 So.2d 202 (Fla. 3d DCA 1958) ("the fundamental

purpose of the summary judgment procedure is to relieve the litigant and the court from the trial of unnecessary lawsuits"). In determining a summary judgment motion, the trial court must consider all of the evidence and resolve all reasonable doubts in a light most favorable to the non-moving party. *Moore v. Moore*, 475 So.2d 666 (Fla. 1985). However, once the movant sustains his initial burden of proof, the non-moving party has the burden of coming forward with evidence establishing a genuine issue of material fact. *Latour Auto Sales, Inc. v. Stromberg-Carlson Leasing Corp.*, 335 So.2d 600 (Fla. 3d DCA 1976). If the non-moving fails to come forward with the necessary evidence to establish a genuine issue of material fact, summary judgment should be entered by the court in favor of the moving party. *Id.* at 601.

Summary judgment in favor of the defendant in an age discrimination case is appropriate if the plaintiff fails to satisfy any one of the elements of a *prima facie* case. *Turlington,* 135 F.3d at 1432-33. "Consideration of a summary judgment motion does not lessen the burdens on the non-moving party: the non-moving party still bears the burden of coming forward with sufficient evidence on each element that must be proved." *Earley,* 907 F.2d at 1080. However, even if the plaintiff establishes a *prima facie* case of age discrimination, the possibility of summary judgment being granted in favor of the employer is not foreclosed. *Young v. General Foods Corp.,* 840 F.2d 825, 828 (11th Cir. 1988), *cert. denied,* 488 U.S. 1004 (1989). Rather, at that juncture,

"[b]y establishing a *prima facie* case, the plaintiff in an ADEA action creates a rebuttable presumption that the employer discriminated against him. *Mauter v. Hardy Corp.,* 825 F.2d 1554, 1557 (11th Cir. 1987) (*citing Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981)). The burden of production then shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment decision complained of. *Id.* If such a reason is articulated, the burden shifts back to the employee to prove, by a preponderance of the evidence, that age discrimination motivated the action. *Id.* If a defendant articulates a legitimate, non-discriminatory reason for the employment action, he may be entitled to summary judgment. *Earley,* 907 F.2d at 1081. "To survive summary judgment, the plaintiff must then present concrete evidence in the form of specific facts which show that the defendant's proffered reason is mere pretext." *Id.* "Because the plaintiff bears the burden of establishing pretext, he must present 'significantly probative' evidence on the issue to avoid summary judgment." *Young,* 840 F.2d at 829. "Mere conclusory allegations and assertions will not suffice." *Earley,* 907 F.2d at 1081. As both the United States Supreme Court and the Eleventh Circuit have made clear, "[m]ost important, the plaintiff always bears the ultimate burden of proving discriminatory treatment by a preponderance of the evidence." *Id.* (*citing Burdine,* 450 U.S. at 253).

IV. Summary Judgment was Properly Entered on Grounds of Collateral Estoppel

The district court in the EEOC's Federal Action determined that Calder was entitled to judgment in its favor because Calder had legitimate non-discriminatory reasons for the employment action complained of by Messrs. Poer, Anderson, Corcell and Carratt and, further, that such reasons were not a pretext for discrimination. These determinations, which were fully litigated, are dispositive of the instant case.

Collateral estoppel precludes the relitigation of issues actually adjudicated in another action. *Hochstadt v. Orange Broadcast,* 588 So.2d 51, 53 n. 1 (Fla. 3d DCA 1991). In determining whether a prior judgment entered in federal court is to be given issue preclusion or collateral estoppel effect, federal principles of issue preclusion apply. *Baxas.,* 630 So.2d at 209. The elements that must be met are well established:

> The theory of issue preclusion requires that: 1) the issue at stake is identical to the one involved in the prior litigation; 2) the issue has been actually litigated in the prior suit; 3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that action; and 4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding.

Id. (citations omitted). The principle of collateral estoppel applies to bar relitigation of those issues previously litigated and determined where the two lawsuits involved allege two different causes of action. *Stogniew v. McQueen,* 656 So.2d 917, 919 (Fla. 1995) (*quoting Gordon v. Gordon,* 59 So.2d 44 (Fla.), *cert. denied,* 344 U.S. 878 (1952)); *Daniel International Corporation v. Better Construction, Inc.,* 593 So.2d

524, 526 (Fla. 3d DCA 1991), *rev. denied,* 602 So.2d 941 (Fla. 1992).

All of the elements of collateral estoppel are met in this case:

1. The issues at stake are identical to the ones involved in the prior litigation.

As noted above, since Petitioners each asserted an age discrimination claim in the instant matter based upon the Florida Civil Rights Act which, in fact, was premised upon allegations identical to those asserted in the ADEA claim brought against Calder by the EEOC, federal case law interpreting the ADEA is applicable in evaluating Petitioners' claims against Calder in this case. Accordingly, the analysis of the business justification and pretext issues which the district court undertook in the Federal Action is identical to the analysis of such issues under the Florida Civil Rights Act.

2. The issues were actually litigated in the prior suit.

A review of the summary judgment order entered by the district court, a copy of which is attached to Calder's summary judgment motion as Exhibit B [R.I-128-149], demonstrates that the issue of Calder's legitimate, non-discriminatory reasons for the adverse employment action and the issue of pretext were actually litigated in that action. After a review of all of the evidence in the record - - the identical record that exists in this case - - and after hearing oral argument on the summary judgment motion, in pertinent part, the district court held:

> [T]he Court finds as a matter of law that the Defendant offered legitimate, non-discriminatory reasons for its decision not to rehire Anderson, Poer, and Carratt as division heads. . . . [T]he Defendant has articulated a legitimate, non-discriminatory reason for replacing Corcell. [T]he Plaintiff has failed to show that the reasons articulated by the Defendant were pretextual . . .

[R.I-145, 147-148]. The second prong of the collateral estoppel test clearly is met here.

3. The determination of the issue was a necessary and critical part of the prior judgment.

As set forth above, the respective burdens of the parties and the analysis of age discrimination claims brought are identical whether a plaintiff is proceeding under the ADEA or under the Florida Civil Rights Act. As the Eleventh Circuit has admonished, once a legitimate, non-discriminatory reason for the employment action at issue has been articulated, "[t]o survive summary judgment, the plaintiff must then present concrete evidence in the form of specific facts which show the defendant's proffered reason is mere pretext . . . [m]ere conclusory allegations and assertions will not suffice." *Earley,* 907 F.2d at 1081. Where the defendant's justification evidence completely overcomes any inference from the evidence submitted by the plaintiff, the district court may properly acknowledge that fact and award summary judgment to the defendant." *Young v. General Foods Corp.,* 840 F.2d 825, 828 (11th Cir. 1988), *cert. denied,* 488 U.S. 1004 (1989). Thus, as the district court's order demonstrates, the

determination of the factual issues relating to business justification and pretext was a necessary and critical part of the district court's judgment in favor of Calder in the Federal Action.

4. The party against whom the issue is asserted had a full and fair opportunity to litigate in the prior action.

Collateral estoppel may be asserted "'when the identical issue has been litigated between the same parties *or their privies*.'" *Stogniew v. McQueen,* 656 So.2d 917, 919 (Fla. 1995) (*quoting Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano,* 450 So.2d 843, 845 (Fla. 1984)) (emphasis added). "For one to be in privity with one who is a party to a lawsuit or for one to have been virtually represented by one who is a party to a lawsuit, one must have an interest in the action such that [he] will be bound by the final judgment as if [he] were a party." *Stogniew*, 656 So.2d at 920. "A person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his *virtual representative*." *Id.* (*quoting Aerojet-General Corp. v. Askew,* 511 F.2d 710, 719 (5th Cir.), *cert. denied,* 423 U.S. 908 (1975)).

The law is clear that, in age discrimination cases, the EEOC, as a matter of law, is in privity with the alleged victims of age discrimination on whose behalf it brings suit. As the Third Circuit explained, in holding that the EEOC and the employees it represents in an ADEA case are in privity as a matter of law:

> The distinctive enforcement scheme of the ADEA shows unmistakenly that ***the EEOC has representative responsibilities when it initiates litigation to enforce an employee's rights***. Although the ADEA expressly authorizes aggrieved individuals to bring civil actions for legal and equitable relief, the Act provides that "the right of any person to bring such actions shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under [the Act]."

*EEOC v. United States Steel Corporation,*921 F.2d 489, 494 (3d Cir. 1990). The Third Circuit explained that, in regard to the privity issue, the ADEA is somewhat unique:

> Congress would not have crafted this enforcement scheme - - on the one hand, creating an individual cause of action and, on the other, cutting off the individual's right to sue once the EEOC begins its action - - unless ***Congress intended for the EEOC to serve as the individual's representative when it seeks to enforce that individual's rights***. If Congress did not believe that the individual's claim would be adequately pressed by the EEOC, it would surely have preserved the individual's right to bring suit either during or after the EEOC suit. Thus, ***the conclusion that the EEOC is the individual's representative in ADEA suits, like the one before us here, seems inescapable.*** (Emphasis added).

Id. at 494-95. The Seventh Circuit has agreed with the Third Circuit's position that, in ADEA cases, "there is privity between the EEOC and individuals for whom it seeks individual benefits." *EEOC v. Harris Chernin, Inc.,* 10 F.3d 1286, 1291 (7th Cir. 1993). *See also EEOC v. North Gibson School Corporation,* 2001 WL 1083949 *4 (7th Cir., Sept. 11, 2001) (under "the distinctive enforcement scheme of the ADEA, which places the EEOC in privity with the individual for whom it seeks relief . . . the

EEOC steps into the shoes of the individual").[3]

In the Federal Action, a copy of which complaint is attached to Calder's summary judgment motion as Exhibit A [R.I-121-126], the EEOC specifically sought back pay as well as reinstatement and/or front pay for Messrs. Poer, Carratt, Corcell and Anderson - - the same relief that Petitioners sought below. The EEOC thoroughly and vigorously litigated on behalf of Petitioners in the Federal Action (and the lower court so found [R.II-267]), taking numerous depositions and engaging in substantial written discovery. Petitioners engaged in virtually no discovery below - - they did not take a single deposition and relied, instead, on the substantial work performed on their behalf and the record developed by the EEOC in the Federal Action. As a matter of law, Petitioners were in privity with the EEOC in the Federal Action and now are bound by the determination of those issues which actually were litigated in the Federal Action.

Petitioners herein concede that they were in privity with the EEOC in the Federal Action and that they had a full and fair opportunity to litigate up through entry of final

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[3] Petitioners cite *Riddle v. Cerro Wire & Cable Group, Inc.,* 902 F.2d 918 (11th Cir. 1990), for the proposition that, in ADEA cases, the EEOC and the private litigant are not always in privity as their interests may not be identical or compatible. In *Riddle,* however, the first case was brought by the EEOC pursuant to Title VII and not under the distinctive enforcement scheme of the ADEA where it is recognized that the EEOC, as a matter of law, is in privity with the private litigant on whose behalf it files suit. *Riddle* is, thus, completely inapposite.

judgment in favor of Calder. They argue, however, that the EEOC's dismissal of the appeal it filed from that judgment somehow operates to render improper the application of collateral estoppel. Petitioners' contention is contrary to well established legal principles. Clearly, because Petitioners, admittedly, were in privity with the EEOC in the federal proceedings, the EEOC's decision to dismiss the appeal it initially filed was tantamount to the decision having been made by the Petitioners themselves. There was no error in the federal court decision and the EEOC obviously made the determination that pursuing the appeal made no economic sense. Nevertheless, contrary to Petitioners' contention, *that decision to dismiss the appeal had absolutely no effect on the application of collateral estoppel by the lower court* nor should it have changed the outcome below. It is the federal law of collateral estoppel that applies here and, under federal law, "appeal rights generally do not affect the applicability of collateral estoppel." *In re Billy Clem Rae,* 1992 WL 372398 *1 (Bankr. D.C. 1992). Rather, it is well established in the federal courts that "a final judgment in the trial court may have collateral estoppel effect even though the loser has not exhausted his appellate remedies." *Pharmacia & Uphohn Company v. Mylan Pharmaceuticals, Inc.,* 170 F.3d 1373, 1381 (Fed. Cir. 1999) (*quoting, Williams v. Commissioner,* 1 F.3d 502, 504 (7th Cir. 1993). In short, "the bare act of taking an appeal is no more effective to defeat preclusion than a failure to appeal." 18 Wright,

Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction § 4433 (2000). *See also United States v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950 ("the judgment in the first suit would be binding in the subsequent ones if an appeal, though available, was not taken or perfected"); *Angel v. Bullington,* 330 U.S. 183, 189 (1947) ("[i]f a litigant chooses not to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him"); *Myers v. Bull,* 599 F.2d 863, 865 (8th Cir.), *cert. denied,* 444 U.S. 901 (1979) ("failure to appeal the previous decision does not affect the conclusive effect of that judgment"). The cases Petitioners cite in their motion for rehearing for the proposition that there can be no full and fair opportunity to litigate where a party has been deprived of his right to appeal are completely inapposite.[4] In

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[4] This Court's decision in *Gentile v. Bauder,* 718 So.2d 781 (Fla. 1998), does not support the position asserted by Petitioners. In that case, the doctrine of issue preclusion was found to have been improperly applied because the petitioner was not a party to, nor was she in privity with a party to, the prior suit and, in addition, the issue presented in the second suit was not identical to that determined in the first suit. Here, in contrast, Petitioners were in privity with the EEOC and the issues determined in the Federal Action were identical to those presented in the case below. The Seventh Circuit decision in *Gray v. Lacke,* 885 F.2d 399, 406 (7h Cir.), *cert. denied,* 494 U.S. 1029 (1990), stands for the proposition that collateral estoppel is not properly applied where a party has no right to appeal in the first suit. Here, of course, the EEOC, on behalf of Petitioners, had the right to appeal and did so, although it later made the strategic decision to dismiss that appeal. In *Standefer v. United States,* 447 U.S. 10 (1980), a criminal case, the United States Supreme Court recognized the applicability of the doctrine of collateral estoppel in civil cases such as the one at bar. However,

short, Petitioners clearly had a full and fair opportunity to litigate in the Federal Action and, thus, were properly precluded from relitigating issues litigated in and determined by that tribunal.

5. The federal district court was a court of competent jurisdiction to determine the issue of Calder's business justification.

In their Initial Brief, Petitioners also argue that the elements of collateral estoppel are not met because the federal district court is not a court of "competent jurisdiction"

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because the government, due to procedural, discovery and evidentiary bars *unique to the criminal case*, is often without the kind of full and fair opportunity to litigate that is a prerequisite of estoppel, the Court noted that criminal cases present considerations very different from those of civil cases with respect to application of the doctrine of collateral estoppel. In *United States v. Salemo,* 81 F.3d 1453 (9th Cir.), *cert. denied,* 519 U.S. 982 (1996), the court held that the doctrine of collateral estoppel was inapplicable, both because the government had no procedural ability to appeal and because the first court had made no ultimate factual determinations to which the doctrine of collateral estoppel could be applied. As in *Standefer,* on which the Ninth Circuit specifically relied, the court was dealing with procedural impediments to the government's full and fair opportunity to litigate that are unique to the criminal context. Again, this case has no application here. Finally, in *Lombardi v. City of El Cajon,* 117 F.3d 1117 (9th Cir. 1997), the Ninth Circuit held the doctrine of collateral estoppel to be inapplicable, both because the state court ruling was not final and because there is an exception to collateral estoppel under California law when the party, against whom preclusion is sought, could not, as a matter of law, have obtained review of the judgment in the initial action. Here, of course, unlike the situation in *Lombardi,* Petitioners had the right to appeal from the summary judgment entered against them but, through their representative, the EEOC, they chose not to do so. But more importantly, California law is unlike the federal law of collateral estoppel applicable here. *See, e.g., Performance Plus Fund, Ltd. v. Winfield & Co.,* 443 F.Supp. 1188, 1190 (D. Cal. 1977) ("[u]nder the minority California rule, a trial court judgment pending on appeal is not considered final . . . [t]he federal courts do consider such a judgment final for purposes of res judicata effect"). Accordingly, this case, too, lends no support to Petitioners' position.

for purposes of a Florida Civil Rights Act claim. Petitioners rely, for this proposition, on the Fourth District Court of Appeal case of *Andujar v. National Property & Casualty Underwriters*, 659 So.2d 1214 (Fla. 4h DCA 1995). The doctrine of collateral estoppel is nowhere mentioned in the *Andujar* case, however. Rather, in *Andujar,* it was contended that claims asserted under the Florida Civil Rights Act and Title VII were identical for purposes of *res judicata* (claim preclusion) and the court correctly rejected that contention. Unlike the doctrine of *res judicata,* which precludes relitigation of the *same claim* between the *same parties,* collateral estoppel, or issue preclusion, precludes relitigation of *issues* actually litigated. *Hochstadt v. Orange Broadcast,* 588 So.2d 51, 53 n.1 (Fla. 3d DCA 1991). In *Andujar,* the Fourth District correctly noted that, while the Florida Civil Rights Act and Title VII claims could not be considered identical for *res judicata* purposes, the same evidence would sustain both of the statutory causes of action. 659 So.2d at 1216. [5]

Here, the evidence in the record is identical to the evidence before the district court in the Federal Action. There can be no doubt that the issues of business

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[5] There clearly exists no conflict between the outcome in the instant case and that in *Andujar*. While *Andujar* specifically dealt only with the applicability of the federal doctrine of claim preclusion, the initial federal case had been disposed of solely on the ground that it had not been timely filed. Accordingly, unlike this case, no factual issues were litigated and determined by the federal district court that properly could have been the basis for collateral estoppel in the later state case.

justification and pretext - - issues which are dispositive of the instant case - - were actually litigated in the Federal Action for purposes of collateral estoppel. Further, there can be no credible contention that the district court was not competent to determine those issues in the Federal Action. Petitioners' disingenuous reliance on a wholly inapposite claim preclusion case to support their position that the elements of issue preclusion were not met should be rejected out of hand.

V. Calder was Entitled to Summary Judgment on the Merits

Because the lower court properly entered judgment in favor of Calder on the basis of collateral estoppel, it was unnecessary for the court to go through the exercise of analyzing the evidence in the record under the standards applicable to a Florida Civil Rights Act claim to determine whether Petitioners possibly could meet their burden of proving the claim they had asserted. In granting summary judgment in favor of Calder, however, the lower court noted that, should the appellate court determine that summary judgment was improvidently granted on the basis of the doctrine of collateral estoppel, it could review, on the merits, the issues presented on summary judgment. [R.II-268]. While that exercise was unnecessary, clearly, such an analysis leads inevitably to the conclusion that summary judgment properly was entered in favor of Calder. As set forth below, application of controlling legal principles to the undisputed facts of this case mandates the conclusion that Petitioners did not and cannot establish

a *prima facie* case of age discrimination. Moreover, even if such a *prima facie* case could be established, it is equally clear that Calder had legitimate, non-discriminatory reasons for the action it took and that there exists no evidence at all to support the notion that such reasons are pretextual. In short, on the merits, Calder was entitled to entry of summary judgment in its favor as a matter of law.

1. Petitioners did not establish a *prima facie* case of age discrimination.

Looking at the three different methods available to an age discrimination plaintiff to establish a *prima facie* case, it is clear that the only avenue available to the Petitioners in this case was through the presentation of circumstantial evidence.

(a) Direct Evidence. There exists not a scintilla of direct evidence of discriminatory intent on the part of Calder. Mr. Corcell testified that he occasionally had heard comments by money room employees, including Mr. Gantz, to the effect that the older workers received social security and, therefore, did not really need the money so that they should retire and leave the jobs to the younger guys. [Corcell Depo. at p. 89]. As set forth above, however, Mr. Gantz was not the decision maker, either with respect to the identity of the money rooms to be closed or the identity of the division heads to operate those money rooms that remained open. These decisions were solely ones made by Calder's Vice President of Mutuels, Patrick Mahony.

Comments, even if blatantly discriminatory, made by a person who is not the decision maker in the adverse employment decision complained of, do not constitute direct evidence of discrimination. *Evans v. McClain of Georgia, Inc.,* 131 F.3d 957, 962 (11th Cir. 1997). Moreover, even had Mr. Gantz been the decision maker in the adverse employment context at issue here, the comment attributed to Mr. Gantz is so innocuous as to not constitute evidence of anything. "Direct evidence is evidence which, if believed, proves [the] existence of fact in issue without inference or presumption." *Id. (quoting, Burrell v. Board of Trustees of Georgia Military College,* 125 F.3d 1390, 1393 (11th Cir. 1997)). Clearly, the comment attributed to Mr. Gantz and other money room employees cannot be held to prove the existence of age discrimination on the part of Calder without inference or presumption and, therefore, cannot constitute direct evidence of discrimination.

The standard for evaluation of comments made in the workplace is well established and set forth in *Wilde v. Florida Pneumatic Manufacturing Corp.,* 941 F. Supp. 1203, 1206-1207 (S.D. Fla. 1996). In that case, the court followed the majority of circuits which hold that "only those comments made by decision makers *in the context of the negative employment decision* to be supportive of a *prima facie* case." Here, Petitioners could not properly rely on a comment allegedly made by a non- decision maker with no reference whatever to when such comment allegedly was

made and no evidence that it was made in the context of the employment decision at issue in this case. Clearly, no direct evidence of discrimination was presented.[6]

(b) Statistical Proof. Any statistical analysis of Calder's work force, rather than operate to bolster Petitioners' case, actually serves to undermine completely the claim of age discrimination asserted here as, overwhelmingly, Calder's money room and teller work force is comprised of individuals performing post-retirement jobs, the overwhelming majority of whom are well within the protected age group.

(c) Circumstantial Evidence. An analysis of the facts of this case under the *McDonnell Douglas* test, as modified for ADEA cases that involve elimination of the subject position, mandates the conclusion that the Petitioners simply could not meet their burden of establishing a *prima facie* case of age discrimination.

Calder does not dispute the fact that each of its four former employees, Messrs. Anderson, Carratt, Poer and Corcell, are over forty years of age and, thus, within the protected age group. Nor does Calder dispute the fact that it eliminated the money room positions that each of these individuals formerly held with Calder and that each of these four former employees was adversely affected thereby. Nor, for purposes

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[6] The district court in the Federal Action, which action was based on the identical facts of this case and contained precisely the same evidence at that before the lower court, ruled that the record contained no direct evidence of age discrimination on behalf of Calder. [R.I-142].

of its summary judgment motion below, did Calder dispute that each of the four former employees was qualified for the position each held prior to the elimination of said position. Those facts, however, constituted the sum and substance of the Petitioners' age discrimination case against Calder and those facts simply do not form the basis of a viable claim of age discrimination as a matter of law.

The Petitioners did not present, and cannot present, *any* evidence whatever from which the district court, the circuit court below or the Third District could have concluded, or from which this Court reasonably could conclude, that, in deciding to close the money rooms in which Messrs. Anderson, Poer and Carratt worked, Calder *intended to discriminate on the basis of age.* That final element, upon which the Petitioners bear the burden of proof, is necessary to establish a *prima facie* case of age discrimination under the circumstances presented here. *See Zaben,* 129 F.3d at 1457; *Jameson,* 75 F.3d at 1532; *Mitchell,* 967 F.2d at 567-68; *Earley,* 907 F.2d at 1082; *Barnes,* 814 F.2d at 609. Nor, even if Mr. Corcell's situation is viewed, not as one where his position was eliminated but one where he was replaced by Mr. Doolen, could Petitioners demonstrate that Mr. Corcell was replaced by a "substantially younger" person under the circumstances of this case. Mr. Doolen, while eleven years younger than Mr. Corcell, at the time of the events in question, was 58 years of age as compared to Mr. Corcell's 69 years. R.II-150-166 (Mahony Aff., Ex. B)]. Thus, Mr.

Doolen was long within the protected age group, as were virtually every one of Calder's employees. While absolutely nothing in the Florida Civil Rights Act or the ADEA required Calder, once it had eliminated the positions at issue, to transfer Messrs. Anderson, Carratt, Poer and Corcell to alternate positions within the company (*Bryant,* 586 So. 2d at 1211; *Earley,* 907 F.2d at 1083), it nevertheless did so. It is undisputed that each of these individuals was offered an alternate position of teller/mini-dealer at Calder. Two of the individuals refused even to attempt to undergo the training necessary to perform that job, one individual went only to one day of training and then quit and the fourth individual underwent the training, passed the test and then walked off the job on the first day. Any alleged intention of Calder to discriminate against these individuals because of their ages simply cannot be reconciled with the fact that Calder took steps it was not required to take to retain these people within the company once their former positions were eliminated. Moreover, contrary to the assertions made, the four individuals were not the oldest money room employees Calder had. While Calder had no legal obligation, in reducing its work force, to fire its youngest employees and retain its oldest (*Barnes,* 814 F.2d at 610), a review of the ages of Calder's money room and teller personnel demonstrates that the ages of most of its employees were in precisely the same range as the ages as Messrs. Anderson, Carratt, Poer and Corcell. In short, there exists no evidence at all in the record of this case of discriminatory intent on the part of Calder.

On the contrary, all of the evidence in this case clearly indicates otherwise.

Each of the Petitioners has conceded that there exists no evidence of discriminatory intent on the part of Calder and admits that the age discrimination claim they have asserted is based solely on their *assumption* that the adverse employment taken was based on their ages:

> Q. What evidence do you have, Mr. Anderson, that Calder's decision to close the lower club room, thereby eliminating your position as division head for the lower club was motivated by an intent to discriminate against you on the basis of your age?
> A. Just the fact that I was the oldest person that was let go.

[Anderson Depo. at p. 59].

> Q. Mr. Carratt, do you have any evidence or facts to support your contention that the closing of the money rooms and the ultimate elimination of your position and not rehiring you as a money room division head was motivated by an intent to discriminate against you based on your age?
> A. Yes.
> Q. What would that be?
> A. I can run any of those divisions. I worked all those divisions, and most of those people they kept in the division head, they came through me one way or another through the training process. They came in there, just like when I first started 25 years ago. They didn't know much of anything, because they never handled money. I did have experience handling money when I first came in. They didn't. Most of them came from the back side, or they just didn't handle money, until they came into the money room, and we broke them in.
> Q. Anything else?
> A. No, not at that point.

[Carratt Depo. at pp. 63-64].

As far as any additional evidence of discriminatory intent on the part of Calder, the following exchange occurred at Mr. Corcell's deposition:

> Q. Other than hearing comments around that older guys are getting Social Security and they really don't need the money, and the money should go to the younger guys, is there anything else that you have by way of evidence or facts to support your contention that the decisions made with regards to your rehire were based on your age?
> A. The fact that the ones that were let go were all over 65, I would say yes. Other than that, you know, I have no proof.

[Corcell Depo. at pp. 90-91].

> Q. I ask you what evidence, if any, do you have of an intent on the behalf [sic] of Calder to discriminate against you on the basis of age?
> A. The age of the four individuals that were going to be changed. That was it.
> Q. Anything else?
> A. I don't know.

[Poer Depo. at p. 59].

In short, there exists in this case absolutely no evidence, circumstantial or otherwise, of an intent on the part of Calder to discriminate against the Petitioners on the basis of their ages. The Petitioners have not and cannot establish a *prima facie* case of age discrimination and, accordingly, summary judgment in favor of Calder was appropriate.

2. Petitioners cannot establish pretext.

The evidence herein dictates that, even had a *prima facie* case been established, summary judgment in favor of Calder, nevertheless, was appropriate based on the legitimate, non-discriminatory reasons Calder had to support the employment action it took. As set forth in the deposition testimony of Calder officers and employees and in the Affidavit of Pat Mahony, all of which were before the lower court, the decision to close the money rooms at issue was one based purely on economic considerations. The money rooms chosen for closure were those which were least busy and, thus, the least necessary to Calder's functioning. In short, Calder's reasons for the action it took had nothing at all to do with the ages of Anderson, Carratt, Poer and Corcell and everything to do with legitimate business considerations. Any assertions to the contrary are simply that, assertions without a shred of supporting evidence. For example, when asked if he had any basis to doubt the veracity of the business interest explanation given by Mr. Mahony to support the decision to eliminate his position, Mr. Anderson responded: "Just that I was 74 years old." [Anderson Depo. at p. 68].

As the Eleventh Circuit has admonished, once a legitimate, non-discriminatory reason for the employment action at issue has been articulated, "[t]o survive summary judgment, the plaintiff must then present concrete evidence in the form of specific facts which show that the defendant's proffered reason is mere pretext . . . [m]ere conclusory allegations and assertions will not suffice." *Earley,* 907 F.2d at 1081.

Here, there existed below nothing more than conclusory allegations and assertions of discrimination. "Where the defendant's justification evidence completely overcomes any inference to be drawn from the evidence submitted by the plaintiff, the district court may properly acknowledge that fact and award summary judgment to the defendant." *Young,* 840 F.2d at 831 (*quoting Grigsby v. Reynolds Metal Company,* 821 F.2d 590, 597 (11th Cir. 1987).

CONCLUSION

Application of the law to the facts of this case mandates the conclusion that summary judgment properly was entered by the lower court in favor of Calder. The factual issues of whether the adverse employment action complained of by Petitioners was premised, not on discriminatory factors but, rather, on legitimate non-discriminatory business considerations, were issues that were fully litigated and finally decided in the Federal Action. Petitioners were vigorously and competently represented by the EEOC in that case and all elements of collateral estoppel were met, such that summary judgment was properly entered by the lower court on that basis. Moreover, should this Court review the summary judgment evidence on the merits, it is clear that no *prima facie* case of age discrimination is established and, moreover, even were that not the case, that Petitioners cannot establish that the legitimate, non-discriminatory reasons articulated by Calder for the employment action taken was a

pretext for discrimination. In short, it is clear that Petitioners cannot and did not meet their burden of proving that Calder discriminated on the basis of the ages of Messrs. Anderson, Carratt, Poer and Corcell. This complete failure of proof is not surprising as Calder, quite simply, acted as it did for reasons having nothing at all to do with age. While the decision of the Third District may require correction to properly set forth the applicable elements of collateral estoppel, the determination of that court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via United States Mail upon Edward R. Curtis, Esq., Curtis & Curtis, P.A., P.O. Box 21607, Ft. Lauderdale, Florida 33335; and Bruce Botsford, Esq., Bruce Botsford, P.A., 3531 Griffin Road, Ft. Lauderdale, Florida 33312 this 12th day of October, 2001.

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Teresa Ragatz

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted in Times New Roman 14 point font.

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____ Teresa Ragatz

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