IN THE SUPREME COURT OF FLORIDA

Case No. SC10-2366

Third DCA Case No. 3D09-1932
Consolidated 3D09-1897

JUSTIN KOREN,

Appellant/Petitioner,

vs.

SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA, and PUIBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees/Respondents.

APPELLEE SCHOOL BOARD'S ANSWER BRIEF

On Discretionary Review from the
Third District Court of Appeal

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I. STATEMENT OF THE CASE AND FACTS

In Koren v. School District of Miami-Dade County, Florida & Public Employees Relations Commission, 46 So. 3d 1090, (Fla. 3d DCA 2010), the Third District determined that "after a thorough reading of the record, we cannot say that the events set forth in Koren's complaints rise to the level of retaliation or employment discrimination contemplated by sections 447.501(1)(a) and (d), Florida Statutes (2010) The Third District also concluded that the record revealed no basis for finding a prima facie violation of § 447.501. Koren, 46 So. 3d at 1093.

Petitioner Justin Koren (Appellant below) filed several Unfair Labor Practice ("ULP") charges with Respondent/Appellee, Public Employees Relations Commission ("PERC") pursuant to § 447.501(1)(a) and (d), Fla.Stat. (2010). The charges were based on Petitioner's allegations that he had been subjected to retaliation by his employer, Respondent/Appellee, The School Board of Miami-Dade County, Florida (hereinafter "Respondent" or "School Board") after he purportedly attempted to assist a fellow coworker with the filing of a complaint of harassment with the School Board, against his school principal. The coworker's complaint was not intended to be filed with, nor was it ever filed with PERC. As part of the asserted retaliation, Petitioner further alleged, among other things, that his school principal "snubbed" him when she did not promptly display his name on the school's marquee sign as his school's "Rookie Teacher of the Year," that his

school principal wrongly accused him of job abandonment, "blackballed" him, and that he was involuntarily transferred to a new school site. Petitioner also alleged that rather than suspend him from employment, the Respondent School Board issued him a written reprimand. Petitioner was neither suspended, nor terminated from his employment with the Respondent. *Petitioner's Initial Brief* at pp. 15-16, 34.

In order to sustain an unfair labor practice charge: "(T)he law requires that the charge and the supporting documents provide evidence to support a prima facie violation . . ." Cagle v. St. Johns County School District, 939 So. 2d 1085, 1089 (Fla. 5th DCA 2006). PERC dismissed Petitioner's ULP charges after it determined that the factual allegations made by Petitioner in support of his charges, even if true, were insufficient to support a prima facie case of ULP pursuant to § 447.503, Fla.Stat.(2010). On appeal, the Third District affirmed PERC's dismissal of the charges filed by Petitioner finding that the facts set forth in Koren's complaints did not rise to the level of retaliation or employment discrimination contemplated by sections 447.501(1)(a) and (d), Fla.Stat. (2010), and concluded that the record on appeal did not reveal a basis for finding a prima facie violation of said statute.

While Petitioner sought and obtained the jurisdiction of this honorable Court on the basis that the Third District's majority opinion was in conflict with other district courts of appeal on the legal issue of the requisite elements of a prima facie

case of retaliation under § 447.501, Respondent urges this Court to rescind the jurisdiction conferred by it as improvidently granted for the reasons more fully expressed hereinbelow.

The main premise of Petitioner's claim of retaliation stems from his having assisted a co-worker, a security guard, with the drafting and filing of a complaint of discrimination with his employer's Office of Civil Rights Compliance on February 21, 2008. *See Petitioner's Initial Brief* at pp. 2 and 33. Petitioner asserts that this "protected activity" resulted in a myriad of reactions by his supervisor, the school principal, culminating in the adverse employment action of being involuntarily transferred from his prior school site to a new work location on March 5, 2009 (over a year after he assisted a coworker with the filing of a discrimination complaint). *See Petitioner's Initial Brief* at pp. 2-4, 11, and 33-35.

Although the nexus between the alleged protected activity asserted by Petitioner is the February 21, 2008, ULP charge filed by Petitioner wherein he claims retaliation for having assisted his coworker, Petitioner also asserts that during this period of time, Petitioner also filed ULP charges with the PERC on February 6, 2009, and that twenty-seven (27) days after this filing he was involuntarily transferred to a new school site. *Petitioner's Initial Brief* at p.11-12. Nonetheless, the complained of retaliation in Petitioner's ULP charge of February 6, 2009 did not involve the involuntary transfer, but rather involved several alleged

snubs and "reactions" by Petitioner's supervisor. Appendix 1 to *Petitioner's Initial Brief* at pp. 4-5.

In accordance with PERC's rules, Petitioner's original ULP charges and his amended charges filed with PERC were dismissed via summary dismissal orders by PERC's General Counsel, which were later affirmed by PERC (R. 71-75; 120-123; 125-134; 188-191). These dismissals were the subject of the appeal reviewed by the Third District Court of Appeals.

II. SUMMARY OF THE ARGUMENT

The summary dismissals of Petitioner's ULP charges by the Public Employees Relations Commission were appropriate not only because Petitioner failed to establish a prima facie case of retaliation, but because PERC lacked subject matter jurisdiction under § 447.501 to entertain such charges. Section 447.501 of the Florida Statutes, entitled "Unfair labor practices," provides, in pertinent part that: (1) Public employers or their agents or representatives are prohibited from: (a) Interfering with, restraining, or coercing public employees in the *exercise of any rights guaranteed them under this part*. . . (d) Discharging or discriminating against a public employee because *he or she has filed charges or given testimony under this part* (emphasis added). The charges filed by Petitioner with PERC, namely that Respondent retaliated against him for assisting a co-worker in filing with Petitioner's employer of a civil rights complaint, involve rights or

complaints that are not traditonally filed with PERC, do not constitute a ULP as set forth under section 447.501, and do not fall *under this part* or under Chapter 447 of the Florida Statutes.

Even if the charges filed by Petitioner were properly within PERC's jurisdiction under § 447.501, Fla.Stat., Petitioner has not demonstrated that he has suffered an adverse employment action. Petitioner asserts that he suffered a litany of retaliatory acts for his having assisted a co-worker in the filing of a complaint against his supervisor, but that he ultimately suffered an adverse employment action when he was transferred from his school site. Petitioner's assertion of an adverse employment action must be rejected based upon the alleged facts of this case and the controlling case law of this state, as the actions by Petitioner did not amount to adverse employment action.

Lastly, in order for this Court to exercise its discretionary jurisdiction, conflict between decisions must be express and direct and "must appear within the four corners of the majority opinion." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). This Court accepted jurisdiction of the present case to review the decision of the Third District Court of Appeal below based on the presumption that it expressly and directly conflicts with the opinion of other district courts cited by Petitioner on the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(iv).

However, none of the opinions relied upon by the Third District are in conflict with the decisions cited by Petitioner in his brief on jurisdiction or in his Initial Brief. The Third District's ruling that: "(A) successful claim under this provision [of section 447.501] requires proof that the exercise of statutorily protected conduct motivated the employer to make a threatening or coercive decision or a decision against the employee's interest," is not contrary to the cases cited by Petitioner in his brief. See Koren, 46 So. 3d at 1093. Accordingly, Respondent respectfully requests that this Court, after further consideration, discharge its jurisdiction as improvidently granted and dismiss this review proceeding.

III. STANDARD OF REVIEW

The appropriate standard of review for this Court's determination of whether PERC's dismissal of Petitioner's ULP charges were appropriate is *de novo*. See Cagle v. St. Johns County School District, et al., District Court of Appeal of Florida, 939 So. 2d 1085, 1089 (Fla. 5th DCA 2006). See also Sullivan v. Fla. Dep't of Environmental Protection, 890 So. 2d 417, 420 (Fla. 1st DCA 2004)(finding that review of an agency's statutory interpretation is de novo). However, administrative agencies are "afforded wide discretion in the interpretation of a statute which it is given the power and duty to administer." Republic Media, Inc. v. Department of Transportation, 714 So. 2d 1203, 1205 (Fla. 5th DCA 1998).

Further, "a reviewing court must defer to an agency's interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence." Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n.,467 So. 2d 987, 989 (Fla.1985). If the agency's interpretation is within the range of possible and reasonable interpretations, it is not clearly erroneous and should be affirmed. Novick v. Dep't of Health, Board of Medicine, 816 So. 2d 1237, 1240 (Fla. 5th DCA 2002).

In addition, courts have long recognized that PERC has developed special expertise in addressing labor issues and is uniquely qualified to interpret and apply the policies enunciated in chapter 447, and its decisions in this area of the law are entitled to considerable deference. See Laborers' Int'l Union of N. Am. v. Greater Orlando Aviation Auth., 869 So. 2d 608, 610 (Fla. 5th DCA 2004); School Board of Dade County v. Dade Teachers Ass'n., 421 So. 2d 645, 647 (Fla. 3d DCA 1982).

IV. ARGUMENT

A. PERC'S DISMISSAL OF PETITIONER'S CHARGES OF UNFAIR LABOR PRACTICE WAS PROPER BECAUSE IT LACKED SUBJECT MATTER JURISDICTION OVER THESE CLAIMS.

Subject matter jurisdiction does not mean jurisdiction of a particular case, "but rather jurisdiction of the class of cases to which the particular controversy belongs." Payette v. Clark, 559 So. 2d 630, 632 (Fla. 2d DCA 1990); Florida Power

and Light Company v. Canal Authority, 423 So. 2d 421 (Fla. 5th DCA 1982); South Seas Marine, Inc., v. SAAB, 585 So. 2d 959 (Fla. 4th DCA 1991).

Whether a lower tribunal had subject matter jurisdiction is a question of law which is reviewed de novo. Dep't of Revenue ex rel. Smith v. Selles, 47 So. 3d 916, 918 (Fla. 1st DCA 2010). PERC and other " '[a]dministrative agencies are creatures of statute and have only such powers as statutes confer. State ex rel. Greenb[e]rg v. Florida State Bd. of Dentistry, 297 So. 2d 628, 634 (Fla. 1st DCA 1974).' " Fla. Elections Comm'n v. Davis, 44 So. 3d 1211, 1215 (Fla. 1st DCA 2010) (quoting Fiat Motors of N. Am. v. Calvin, 356 So. 2d 908, 909 (Fla. 1st DCA 1978)).

Courts have routinely acknowledged that subject matter jurisdiction cannot be conferred upon a court by consent, waiver, error, or inadvertence of the parties. Florida Nat. Bank v. Kassewitz, 25 So. 2d 271 (Fla. 1946). The lack of subject matter jurisdiction may be raised at any time. Tamiami Trail Tours v. Wooten, 47 So. 2d 743 (Fla. 1950). See also In Re A.W., 230 So. 2d 200 (Fla. 1st DCA 1970); Williams v. Starnes, 522 So. 2d 469 (Fla. 2d DCA 1988); Rodriguez v. State, 441 So. 2d 1129 (Fla. 3d DCA 1983); Department of Military Affairs v. Griffin, 530 So. 2d 1029, (Fla. 1st DCA1988).[1]

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1 Lack of subject matter jurisdiction may also be raised for the first time on appeal. MCR Funding v. CMG Funding Corp., 771 So. 2d 32, 35 (Fla. 4th DCA 2000); Holub v. Holub, 54 So. 3d 585 (Fla. 1st DCA 2011); See also Fla.R.Civ. P.

In Browning v. Brody, 796 So. 2d 1191, 1193 (Fla. 5th DCA 2001), the court summarized PERC's jurisdiction under § 447.501, Fla.Stat. (2010) in the following manner:

> Labor union activities involving public employees are comprehensively regulated by Chapter 447, Part II of the Florida Statutes; commonly known as the Public Employees Relations Act (the Act). Under the Act, the Legislature created PERC, and empowered that administrative agency "to settle disputes regarding alleged unfair labor practices." § 447.503, Fla. Stat. . . The activities prohibited as being "unfair labor practices" are defined in section 447.501 of the Florida Statutes. . . with subsection (1) applying to employer activities and subsection (2) applying to union activities. Case law interpreting the jurisdictional scope of the Act has broadly included, as falling within PERC's exclusive jurisdiction, those activities which "arguably" constitute unfair labor practices as defined by section 447.501 "or the type of labor matter or dispute within the contemplation of Part II, Chapter 447." Maxwell v. School Bd. of Broward County, 330 So. 2d 177, 180 (Fla. 4th DCA 1976); accord Local Union No. 2135, Int'l Ass'n of Firefighters v. City of Ocala, 371 So. 2d 583, 585 (Fla. 1st DCA 1979).

After assuming that PERC had jurisdiction over § 447.501 claims, PERC's General Counsel summarily dismissed Petitioner's charges based upon his determination that the allegations even if true, were insufficient to support a ULP charge (R. 41-50). General Counsel also determined that it lacked subject matter jurisdiction over the alleged Florida Whistle-blower Act claims, which may be filed in circuit court (R. 41-42). In truth, although PERC had jurisdiction over ULP charges brought under § 447.501, it did not have jurisdiction over the charges filed

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1.140(h)(2) ("The defense of subject matter jurisdiction may be raised at any time.").

by Petitioner as they did not fall properly within the parameters of § 447.501, Fla.Stat. (2010).

As previously discussed, § 447.501 of the Florida Statutes, prohibits public employers from: " (a) Interfering with, restraining, or coercing public employees in the *exercise of any rights guaranteed them under this part*. . . (d) Discharging or discriminating against a public employee because *he or she has filed charges or given testimony under this part* (emphasis added). The original charge filed by Petitioner with PERC on February 21, 2008 involved his alleged assistance to a co-worker in the filing of an internal civil rights complaint, it did not involve conduct under subsection (a), nor did it involve alleged retaliation for the filing of a complaint with PERC, since the adverse employment action allegedly resulted from the filing of internal complaint with the Respondent. As such the February 21, 2008 charges were not properly filed with PERC, and did not constitute a ULP as set forth under 447.501. For these reasons, PERC lacked subject matter jurisdiction of these claims.[2]

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2 In reality, Petitioner's claims of discriminatory treatment by his school principal are better suited for adjudication by a circuit court rather than treated as a ULP charge before PERC. Petitioner may concur with this assessment, as he also has a pending case in circuit court against his school principal and Respondent known as *Koren v. School Board of Miami-Dade County and Deborah Leal*, Miami-Dade County Circuit Court Case No. 09-40760 CA-02. While Petitioner may argue that there should be concurrent jurisdiction for these types of claims, a more persuasive argument is that PERC's jurisdiction should not be so expansive that any claim, including traditional employment discrimination claims are

B. PERC'S DISMISSAL OF PETITIONER'S ULP CHARGES WAS APPROPRIATE BECAUSE PETITIONER FAILED TO ESTABLISH A PRIMA FACIE CASE OF RETALIATION UNDER § 447.501 DUE TO PETITIONER'S INABILITY TO DEMONSTRATE THAT HE SUFFERED AN ADVERSE EMPLOYMENT ACTION.

Although PERC summarily dismissed Petitioner's ULP charges because he had failed to establish a prima facie case of retaliation as set forth in § 447.501, Fla.Stat. (2010), Petitioner nonetheless alleged that there was evidence of retaliatory conduct after he filed an amended ULP charge with PERC on February 6, 2009, almost a year after he filed his original charge with PERC. *Petitioner's Initial Brief* at pp. 33-37. Contrary to Petitioner's contention, his amended ULP charges did not contain sufficient allegations to demonstrate retaliation in violation of § 447.501.

It is undisputed that in order to establish a prima facie claim of retaliation under Title VII, plaintiff must demonstrate that: (1) he engaged in statutorily protected activity, (2) he suffered an adverse employment action, and (3) that there is a causal relation between the two events. Guess v. City of Miramar, 889 So. 2d 840, 846 (Fla. 4th DCA 2004) (citing Harper v. Blockbuster Entertainment Corp., 139 F. 3d 1385, 1388 (11th Cir.1998); Donovan v. Broward County Board of Commissioners, 974 So. 2d 458 (Fla. 4th DCA 2008). Petitioner argues that this standard has been modified by the Supreme Court and that in order to satisfy the

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routinely filed with PERC.

"adverse employment action" prong Petitioner now ". . .(M)ust show that a reasonable employee would have found the challenged action materially adverse." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006). *Petitioner's Initial Brief* at pp. 21-22.

While in Title VII cases, the standard advanced by Petitioner may be appropriate, it is not fitting for a ULP case presented before PERC. As discussed, *infra*, even assuming that PERC should have applied "the materially adverse action" standard, Petitioner would have still failed to establish a prima facie charge of retaliation under § 447.501.

In PERC's order affirming the General Counsel's summary dismissal of Petitioner's ULP charges, it identified three (3) adverse employment actions: 1) unsuccessful attempts by his principal to have him dismissed from his position for job abandonment; 2) unsuccessful attempts by his school principal to discipline Petitioner for having allowed a student access to the electronic gradebook and sharing his computer password with another staff member; and 3) Petitioner's removal and involuntary transfer from his school site (R. 125-134). See also Attachment VI of Appendix to *Petitioner's Initial Brief.* None of the previously enumerated "adverse employment actions" actually meet the "materially adverse action" standard preferred by Petitioner and employed in Title VII actions in federal court. In his Initial Brief, Petitioner provides a litany of examples of alleged

adverse actions that courts have routinely rejected as constituting materially adverse actions. Only two of the cases cited found the alleged acts to be deemed as materially adverse and in one instance the court did not even find termination of a three month employee as materially adverse. *See Petitioner's Initial Brief* at fn. 5, pp. 20-21.

To treat the alleged adverse actions submitted by Petitioner as constituting retaliation would make almost any act deemed objectionable by an employee as retaliation. A complainant's unhappiness with or dislike or disagreement with a job action does not render the action adverse. MacLean v. City of St. Petersburg, 194 F. Supp. 2d 1290, 1298 (M.D. Fla. 2002); see also Graham v. State of Florida Department of Corrections, 1 F. Supp. 2d 1445, 1450 (M.D. Fla. 1998)(holding that reassignment after employee filed complained of sexual harassment was not adverse). In his brief, Petitioner focuses on the involuntary transfer and asserts that it should be held to constitute adverse employment action using a "post-Burlington" standard. *Petitioner's Initial Brief* at pp. 25-26.

However, in his argument Petitioner concedes that a transfer in and of itself does not constitute adverse employment action. Petitioner thus suggests that the transfer be viewed in light of Petitioner's involvement with his coworker's complaint of harassment in order to demonstrate an adverse or materially adverse employment action. Where Petitioner's argument fails is in the lack of a causal

connection between his assisting his coworker to file a complaint of harassment and the alleged adverse employment action, the involuntary transfer, which was filed over a year before the transfer took effect. *Petitioner's Initial Brief* at pp. 33-34. Undeniably, a time lapse of over a year cannot be viewed as being sufficiently close in time to constitute a causal connection between the filing of the complaint and the alleged retaliatory action.

Contrary to Petitioner's contention, the alleged adverse action did not "follow closely on the heels" of Petitioner having assisted his coworker in filing a discrimination complaint. See e.g., Leatherwood v. Anna's Linens Co., 384 F. App'x. 853, 859 (11th Cir. 2010) (negative evaluation three-and-a-half months after filing EEOC charge did not, alone, establish causation); Richmond v. Oneok, Inc., 120 F. 3d 205, 209 (10th Cir. 1997) (three-month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174–75 (7th Cir. 1992) (four-month period insufficient). As the Supreme Court has expressed: "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.'" Clark County School District v. Breeden, 532 U.S. 268, 273, 121 S.Ct. 1508, 1511, 149 L.Ed.2d 509 (2001)(a three to four month disparity between the statutorily protected expression and the adverse employment action was insufficient to establish

temporal proximity). The alleged actions against the Petitioner occurring over a year after Plaintiff's first ULP charge were too remote to establish causation based on close temporal proximity. See Thomas v. Cooper Lighting, Inc., 506 F. 3d 1361, 1364 (11th Cir. 2007). In the absence of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law. See Higdon v. Jackson, 393 F. 3d 1211, 1220 (11th Cir. 2004) (citing Wascura v. City of South Miami, 257 F. 3d 1238, 1248 (11th Cir. 2001)).

C. THE THIRD DISTRICT COURT OF APPEALS CORRECTLY RELIED ON THE *LEE COUNTY* AND *PASCO COUNTY* CASES IN RENDERING ITS OPINION.

In its decision in Koren, the Third District applied the two pronged burden shifting test employed by the First District Court in Pasco County School Board v. PERC, 353 So. 2d 108, 117 (Fla. 1st DCA 1977). "This two-pronged burden shifting test is almost as old as the Florida Public Employees Relations Act itself, and encompasses all types of activity protected by the Act." School Board of Lee County v. Lee County School Board Employees, Local 780, AFCSME, 512 So. 2d 238, 241 (Fla. 1st DCA 1987). "As with any cause of action, the employee's failure to prove this essential element constitutes a failure to establish a prima facie case." City of Coral Gables v. Coral Gables Walter F. Stathers Memorial Lodge 7, Fraternal Order of Police, 976 So. 2d 57, 64 (Fla. 3d DCA 2008). In the City of

Coral Gables case, the Third District, in reversing an order from PERC, clarified that PERC had misapplied the correct standard and had failed to adhere to the Lee County case's pronouncement that an asserted violation of Section 447.501(1)(a) required "a showing that the employer was motivated by protected conduct." City of Coral Gables, 976 So. 2d at 65.

As indicated in the Koren opinion, a critical element to a ULP charge, is the complainant's ability to demonstrate that the " . . .(P)rotected activity was a substantial or motivating factor in the employer's decision or action which constituted the alleged violation." Lee County, 512 So. 2d at 239. Even if it assumed that Petitioner had shown retaliatory conduct on the part of the Respondent, the Third District, upon a review of the complete record, concluded that PERC was correct in determining that Petitioner had failed to establish that School Board was motivated by the Petitioner's filing of grievances with PERC. Koren, 46 So. 3d at 1093.

D. THE THIRD DISTRICT COURT OF APPEALS' OPINION IN *KOREN* DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH OTHER DISTRICT COURT OPINIONS ON THE SAME LEGAL QUESTION AND AS SUCH THIS COURT SHOULD DISCHARGE ITS GRANT OF JURISDICTION AS IMPROVIDENTLY GRANTED.

In its Brief on Jurisdiction, Petitioner appears to have misinterpreted the Third District Court of Appeals' opinion as said ruling does not expressly or

directly conflict with the opinion of another District Court of Appeal on the same issue. Moreover, none of the opinions relied upon by the Third District are in conflict with the decisions cited by Petitioner in his brief. The Third District's ruling that: "(A) successful claim under this provision (section 447.501) requires proof that the exercise of statutorily protected conduct motivated the employer to make a threatening or coercive decision or a decision against the employee's interest," is not contrary to the cases cited by Petitioner in his brief. *See* Koren, 46 So. 3d at 1093.

In his Jurisdiction Brief, Petitioner asserted that the opinion in Koren creates a conflict with other District Courts of Appeal in the State with regard to the requirements for a complainant to establish a prima facie case of ULP before PERC. Petitioner also asserts that the opinion rendered by the Third District in this matter also creates a conflict with respect to the necessary causal connection that a Petitioner must set forth in a ULP case field with PERC. Neither of these asserted reasons for establishing conflict jurisdiction are evident in the decision rendered by the court in the Koren opinion. Initially, Petitioner argued that the Court failed to employ the "reasonable person" test articulated in Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 126 S.Ct. 2405 in determining that there was no adverse employment action. In reality, in its decision in Koren, the Third District did not make a specific finding as to whether the alleged retaliatory conduct

constituted an adverse employment action, but instead found that, based on the facts of the case, there was insufficient "objective evidence" to show that the alleged "adverse events" were related to Petitioner having filed grievances with PERC (the protected activity under section 447.501). Koren, 46 So. 3d at 1093.

Overall, none of the cases referenced by the Petitioner reflect a conflict with the Koren decision as to the requisite evidence necessary to find the existence of retaliatory conduct or adverse employment action. In fact, only one of the cases cited by Petitioner, the Gibbons opinion deals with a complaint filed with PERC and even in that case, Petitioner fails to articulate a definitive conflict between Gibbons and the Koren opinions. See Gibbons v. State Public Employees Relations Commission, 702 So. 2d 536 (Fla. 2d DCA 1997). The Gibbons opinion also predates the Burlington opinion.

It is actually the dissent's opinion in Koren that asserts that the majority opinion conflicts with Gibbons and Burlington "to the extent that the majority argues that a transfer cannot be a basis for a retaliation claim". Koren, 46 So. 3d at 1100. However, the majority opinion did not articulate such a proposition; instead the majority found that a review of the complete record did not establish that the Respondent's actions were motivated by the Petitioner's filing of grievances with PERC. As discussed *supra*, the majority opinion did not render an opinion as to

whether the involuntary transfer constituted an adverse or "materially adverse action."

Accordingly, this Court, upon further review, should decline to exercise its discretionary jurisdiction as the Koren opinion does not expressly and directly conflict with the cases cited by Petitioner on the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(iv). In order for this Court to exercise its discretionary jurisdiction, conflict between decisions must be express and direct. See Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Overall, Respondent respectfully requests that this Court discharge its grant of jurisdiction in this case as improvidently granted and dismiss this review proceeding. See e.g., Florida Unemployment Appeals Commission v. Porter, 39 So. 3d 1195 (Fla. 2010); Ramirez v. McCravy, 37 So. 3d 240 (Fla. 2010); Health Care and Retirement Corp. of America, Inc. v. Bradley, 997 So. 2d 400 (Fla. 2008).

V. CONCLUSION

Accordingly, this Court should affirm the Third District Court of Appeals' opinion because Petitioner is unable to establish a prima facie case of unfair labor practice in a proceeding before the Public Employees Relations Commission. Moreover, PERC also lacked subject matter jurisdiction to entertain Petitioner's ULP charges because Petitioner's allegations were not of the type covered by

section 447.501 of the Florida statutes. In addition, this court, upon further review, should discharge its grant of jurisdiction as improvidently granted since there is no express and direct conflict between the Third District's decision in Koren with other district courts of appeal on the same question of law. Rather, the Third District's opinion merely held that based upon the record before it, Petitioner's allegations were insufficient to support a charge of unfair labor practice under § 447.501 of the Florida statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was transmitted by U.S. Mail this 5th day of July, 2011 to THOMAS E. ELFERS, ESQUIRE, 14036

Southwest 148 Lane, Miami, Florida 33186 and COLIN M. ROOPNARINE, ESQUIRE, Public Employees Relations Commission, 4050 Esplanade Way Tallahasseee, Florida 32399-0950.

Luis M. Garcia, Esquire

CERTIFICATE OF COMPLIANCE WITH FONT TYPE AND SIZE

The undersigned hereby certifies that Response to Petitioners Brief on Jurisdiction complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Luis M. Garcia, Esquire