THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC10-2366

Petition from the Third District Court of Appeal
Case No. 3D09-1932, CONSOLIDATED 3D09-1897

(Lower Tribunal Numbers PERC 09-011, 09-030, 09-036)

JUSTIN KOREN,

Petitioner,

v.

SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA

Respondent.

INITIAL BRIEF

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A. The Issue on Appeal

1. With respect to sufficiency of a prima facie case for an unfair labor practice (ULP), whether the Third DCA is correct that adverse employment action must consist of "*loss of wages or benefits, demotion or similar action,"* or a "*threatening or coercive decision,*" − or whether the *reasonable person* test cited by the Supreme Court in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 71 (2006) and relied upon in Gates v. Gadsden County Sch. Bd. No. 1D09-3636 at 3-4 (Fla. 1st DCA 2010) and Donovan v. Broward County Bd. of Commissioners, 974 So.2d 458, 459 (Fla. 4th DCA 2008) is to be the law.

2. With respect to *causal connection* for a ULP prima facie case, whether the Third DCA is correct that Petitioner's nine factual allegations supporting animus[1] are insufficient or whether the Second DCA is correct that "[P]laintiff, at a

[1] Petitioner's principal learned he had assisted a security guard to draft a sexual harassment charge targeting her and commenced a series of vindictive actions against him by" 1) hostilely confronting him shortly afterwards 2) delaying installation of the announcement on the school's marquee to congratulate him as *Rookie Teacher of the Year* until spring break when no one would be present; 3) placing the announcement on the reverse side of the marquee where passers-by could not see it; 3) referring to him as "*the mistake*;" 4) telling others she would get rid of him, 5) attempting to terminate him for job abandonment eight days after signing his medical leave request; 6) attempting to discipline or discharge him for sharing his computer password even though board policy was merely precatory and no one else had been disciplined; 7) humiliating him in front of students and colleagues by having him summarily escorted from the building; 8) inflicting a three day (paid) disciplinary suspension without due process; and 9) involuntarily transferring him to distant school.

minimum, must establish that the employer was aware of the protected expression when it took the adverse employment action," Gibbons v. State Public Employees Relations Com'n, 702 So.2d 536, 536-37 (Fla. 2d DCA 1997).

B. Statement of Relevant Facts

Petitioner and Charging Party, Justin Koren ("Petitioner") has been employed by the School Board of Miami-Dade County ("Board" or "District") as a language arts teacher, and has been cited by his peers and superiors for exceptional performance. During the 2008-2009 school year, and up through March 6, 2009, he was assigned to Southwood Middle School ("Southwood"). During that time, Deborah Leal ("Leal" or "Principal Leal") was the principal of Southwood. *Unfair Labor Practice Charge Against Employer, Charge 011, Attachment 1 at ¶ 4.*[2]

1. Petitioner Assists in the Morris Civil Rights Charge

On February 21, 2008, Security Guard Kimberly Morris requested Petitioner to assist her in drafting a charge of harassment on account of sexual orientation against the District and Principal Leal ("Morris Charge"). School Board Rule 6Gx13-4a-1.32 prohibits discrimination on account of *e.g*. sexual orientation. It also forbids retaliation for assisting someone to file a charge of discrimination, or for participating in an investigation.

[2] Hereafter all references are to Attachment 1 unless otherwise noted in the text.

Notwithstanding, on March 10, 2008, Principal Leal confronted Petitioner about his involvement in drafting the Morris Charge, and, in an accusatory and hostile manner, informed Petitioner that she knew he had authored it. *Charge 011 at ¶ 9.* She demanded that he confess. By her tone and manner, Leal let Petitioner know that she considered Petitioner's assistance of Ms. Morris a wrongful act.

This confrontation took place in the presence of a regional union representative, Mr. John Roques. *Charge 011 at ¶ 9.* Leal told Petitioner that her allegation was based upon an "anonymous source." *Charge 011 at ¶ 9.* She made it clear that she took Petitioner's actions personally, and that she would make him pay for it.

On March 19, 2008, Petitioner notified the union, United Teachers of Dade ("UTD" or "Union"), of Leal's action, and filed a grievance against her, alleging that she had violated Article XXI, Section 7, C-1 of the contract:

> Employees shall be free from unnecessary, spiteful, or negative criticism or complaints by administrators or other persons. Under no condition shall management representatives express such complaints or criticism concerning an employee in the presence of other employees, students, or parents, nor shall anonymous complaints be processed.

Charge 011 at ¶ 10.

On or about March 24, 2008, Morris filed the charge that Petitioner had assisted her in drafting - Charge #N85317 Civil Rights Compliance - against Principal Leal for harassment related to sexual orientation. *Charge 011 at ¶ 7.*

The investigation of Charge #N85317 ("Morris Charge") was conducted by the Civil Rights Compliance Office ("CRC") of the Miami-Dade County School District, which is authorized by the Board to examine civil rights complaints. *Charge 011 at ¶ 13.* On April 10, 2008, in connection with the Morris Charge, the CRC sent a witness notification letter to Petitioner, which requested his cooperation in the investigation of the Charge. *Charge 011 at ¶ 14.*

On April 14, 2008 Petitioner met with Ms. Jonaura Wisdom, CRC Investigator, in Petitioner's classroom at Southwood. *Charge 011 at ¶ 15.* He signed a written statement for Wisdom: "I feel that Ms. Leal is retaliating against me ever since I declined to discuss the Ms. Morris matter with her, and she accused me of writing the letter for Ms. Morris." *Charge 011 at ¶ 16.*

2. Leal Snubs Petitioner as Rookie Teacher of the Year

At or about the time Leal confronted Petitioner on March 10, 2008, Petitioner was voted by Southwood's faculty and staff to be the school's 2008 Rookie Teacher of the Year. *Charge 011 at ¶ 11.*

In response to Petitioner's election, Leal put forward a lukewarm letter of recommendation, dated March 17, 2008. *Charge 011 at ¶ 11.* Dissatisfied with this letter, some members of the school's nominating committee urged Leal to write a more supportive endorsement. Leal refused. *Charge 011 at ¶ 11.* In an email to Committee Chairperson Andrea Floyd, dated March 20, 2008, Leal wrote

that she did "not feel comfortable" writing a stronger endorsement of Petitioner, thereby evincing continuing animus against Petitioner, stemming from her confrontation with him ten days earlier. *Charge 011 at ¶ 11.*

Further demonstrating her animus against Petitioner, Leal instructed school personnel to delay placing the announcement that Petitioner was Southwood's Rookie Teacher of the Year on the marquee outside the school until the beginning of Spring Break 2008, because during the break no one would be coming to the school. *Charge 011 at ¶ 12.* Pursuant to Leal's instructions, the announcement was placed on only one side, facing away from traffic, so that passers-by on the one way street in front of the school could not see it. *Charge 011 at ¶ 12.*

At the regional level, Petitioner's candidacy for Rookie Teacher of the Year was squelched.

3. Leal Falsely Accuses Petitioner of "Job Abandonment"

In August 2008, at the beginning of the 2008-2009 school year, Leal said she had a list of people she wanted to get rid of and that Petitioner was at the top of the list, and that the hiring of Petitioner had been a mistake. She even went so far as to refer to him as "*the mistake*" to other employees. Leal blamed the previous principal and her secretary for making this mistake; according to Leal, if it had been up to her, it would never have happened. She was looking for a way to get rid of him.

Notwithstanding Leal's posture, Petitioner's evaluations had all been good. The District's evaluation form, PACES, offers only two categories: "Meets Standards" and "Does Not Meet Standards." Without exception, Petitioner met standards. He had never been reprimanded or disciplined.

Petitioner suffers from Crohn's disease, a painful, chronic disorder of the digestive system. Petitioner's condition is aggravated by stress. In early September, 2008, after the summer break and three weeks into the new school year, Petitioner's Crohn's disease flared up, causing him to become physically ill, and requiring that he take time off from his job. *Charge 011 at ¶ 17.* Petitioner worked through Friday, September 5, 2008, but could not come to work the following week. He requested a medical leave of absence from Leal. *Charge 011 at ¶ 17.* In connection with seeking medical leave, Petitioner explained his condition to Leal, including the fact that his condition is aggravated by stress.

In response to Petitioner's request for medical leave, Leal signed and dated an official "Leave of Absence" form for Petitioner on September 8, 2008 and checked the "I Recommend Approval" box on the form. *Charge 011 at ¶ 18*.

Notwithstanding that Leal had recommended approval of medical leave for Petitioner, she attempted to terminate him for job abandonment. *Charge 011 at ¶ 19*. While Petitioner's request for leave was still pending at the Leave Office, Petitioner received a delivery notice for a certified letter via the United States

Postal Service, and a copy of the same letter via first-class mail, on September 22, 2008. *Charge 011 at ¶ 19.* The letter was dated September 16, 2008, and signed by Leal. It falsely accused Petitioner of job abandonment and evinces Leal's continuing animus against Petitioner. *Charge 011 at ¶ 19.*

> Attendance and punctuality are essential functions of your job position. Please be advised that you have been absent from the worksite and/or you have failed to comply with the worksite procedures regarding attendance on the following days: 9/11/08, 9/12/08, 9/15/08, and 9/16/08… These absences are unauthorized absences which warrant dismissal on the grounds of job abandonment… Your absences will be considered unauthorized until you communicate directly with this administrator. Failure to respond as directed will result in termination due to job abandonment.

The letter also informed Petitioner that he had "three days" from the date of the letter to respond – an impossibility because that date had already passed by the time he received the letter. *Charge 011 at ¶ 20, 21.* Yet, the letter warned: "Failure to respond as directed will result in termination due to abandonment." The letter was courtesy copied to the Regional Director of Personnel and the District Director of the Office of Professional Standards. *Charge 011 at ¶ 20.*

Petitioner's leave application was approved by the Leave Office on September 23, 2008, retroactive to September 8, 2008, thereby mooting Leal's attempt to dismiss him for job abandonment. *Charge 011 at ¶ 24.* However, for several days, he did not know whether or not he had lost his job.

4. Leal Falsely Accuses Petitioner of Misuse of Computer Password

When the first attempt at termination failed, another was quickly initiated. Six days later, on September 29, 2008, Petitioner received a certified letter from Leal, advising him that he had been named as the subject of a formal investigation. *Charge 011 at ¶ 25.*

The allegations were purportedly made by his department chair, Nicholas Cameron, but they were co-signed by Leal. The complaint alleges: "Mr. Koren gave his username and password to a substitute teacher and paraprofessional in order to enter students' grades into the grade book. It is further alleged that within two weeks into the school year, Petitioner allowed a student aide to grade student assignments and enter their grades into the grade book." *Charge 011 at ¶ 26.*

Petitioner denies these allegations. He admits leaving his password for Department Chair Nicholas Cameron, for purposes of having Cameron, at his discretion, facilitate entry of student grades while Petitioner was absent on medical leave. *Charge 011 at ¶ 27.* No misuse of Petitioner's account occurred, as only legitimate student grades were entered.

The accusations against Petitioner were subsequently forwarded to the Miami-Dade County Public Schools' Civilian Investigative Unit ("CIU") and assigned to Investigator Terri A. Chester. *Charge 011 at ¶ 28.* In a letter to Petitioner dated September 30, 2008, informing him of the investigation, Ms.

Chester identified Leal as the complainant: "Ms. Deborah Leal, Principal, Southwood Middle School, alleges that acts similar to those detailed in the allegation narrative occurred on or about September 7, 2008." *Charge 011 at ¶ 29.*

School Board policy suggests that employees should not share passwords, but does not prohibit it. Instead, it holds them accountable for any misuse associated with their accounts. The language is precatory:

> Users of the network *will be* held responsible for all activity associated with the user's account. Users *should not* share their passwords with anyone, engage in activities that would reveal anyone's password or allow anyone to use a computer to which they are logged on.

MDCPS Acceptable Use Policy, Section VI: Security, §E (emphasis added). *Charge 011 at ¶ 33.*

Consistent with the foregoing, Board policy actually creates a procedure for one employee to lend his or her password to another. It requires that the borrower of the password obtain written permission from the owner of the password before using it, on pain of disciplinary action *against the borrower*. The iteration of disciplinary action for failure to obtain written permission stands in contrast to the mere admonition in MDCPS policy that users generally *should not* share their passwords with other employees. Borrowing passwords *must not* be done without written permission.

> Users *must not* use another individual's account without written permission from that individual. Attempts to log into the system as

> any other user *will* result in disciplinary action as described in Section X, Disciplinary Action for Improper Use, contained herein.

Acceptable Use Policy for the Network, School Board Rule 6 Gx13 – 6A-1.112 (emphasis added).

Up until Petitioner's case, the District had never sought to punish any employee for sharing a computer password with a colleague for purposes of keeping student grades up-to-date. On a few occasions, MDCPS had disciplined employees for sharing passwords when it resulted in downloading of pornography. Charge *011 at ¶ 34.* But no such misuse occurred in Petitioner's case; only grades had been entered. *Charge 011 at ¶ 35.*

Although Leal initiated an investigation against Petitioner for allegedly giving out his password, she did not investigate either the substitute teacher or the paraprofessional who allegedly used Petitioner password - without his written permission - to enter student grades. The paraprofessional was neither reprimanded nor disciplined, and the substitute teacher was rehired (recalled or brought back to work) the next day.

During the process of the investigation, the District's Office of Professional Standards ("OPS") informed Petitioner that the ethics issue had been forwarded to Florida's Education Practices Commission ("EPC") in Tallahassee. The charge was dismissed.

During the process of the investigation, one potential witness was told to "throw him under the bus." "Wake up and see what's happening. If you cooperate, you'll be fine. Tell Leal what she wants to hear." *Charge 011 at ¶ 31.*

5. Petitioner is Suspended and Escorted Out of Southwood

Petitioner filed Charge 011 on February 6, 2009. *Charge 011, Attachment 1 at ¶ 2.* On February 23, 2009, he returned to work from medical leave. Twenty-seven days after filing the charge, and thirteen days after returning to school, on March 5, 2009, while Petitioner was teaching students, he was interrupted by a telephone call, directing him to turn over his class to a substitute teacher and to report to the main office. Leal, with a smile on her face, handed him a notice that he was being involuntarily transferred. Petitioner returned to his classroom – FCAT testing was only two days away.

The following day, March 6, 2009, as Petitioner reported to work, a clerical worker told him confidentially that she was sorry to hear that they were getting rid of him. Thereafter, teachers and students accosted him to ask about the transfer; Petitioner did not initiate any conversations himself. In regard to queries, Petitioner had not been given a reason for the transfer, so he declined to speculate.

Later that day Petitioner was recalled to the office. There MDCPS Regional Administrative Directors Ms. Kristal Hickmon and Dr. Alexis Martinez informed Petitioner - without explanation - that he was being sent home immediately.

Charge of Unfair Labor Practice Against Employer for the Purpose of Adding a Claim of Retaliation for Filing Said Charge, Charge 030, Attachment 2 at ¶ 2 (hereinafter Charge 030,Attachment 2 at ¶).

Ms. Hickmon and Dr. Martinez ordered Petitioner to remain silent while he was being escorted from the building. Dr. Martinez then personally escorted Petitioner back to his classroom where, in front of his students, Petitioner silently gathered his personal effects. Dr. Martinez conducted Petitioner through the school building, the main office, through the front door and into the parking lot, as if he were removing a dangerous person from the premises. Many teachers and students witnessed this event; several asked what was happening. Petitioner was forbidden to answer.

As a result, unrebutted false rumors circulated throughout Southwood and the community at large that Petitioner had been removed from the school for sexually molesting students. Many believed he had been arrested.

Although Petitioner and Union Steward Connor-Miller requested something in writing to document the event, the regional administrator declined. Petitioner received only the verbal order to remain home.

Petitioner was suspended for the remainder of Friday, March 6, Monday, March 9, and Tuesday, March 10, 2009, and was thereafter never allowed to return to Southwood. Instead, he was involuntarily transferred to another school many

miles distant. Petitioner timely protested this additional retaliation. Amendment to Charge 030, Attachment 2 at ¶ 4.

The three day suspension of Petitioner is nowhere authorized by District policy or by the collective bargaining agreement. It was done without notice and a hearing, and it was designed to inflict maximum internal notoriety and maximum humiliation, embarrassment and pain on Petitioner.

6. **Petitioner is Involuntarily Transferred**

Following the suspension, beginning March 11, 2009, the District transferred Petitioner to another school, without due process, just cause, or, indeed, any explanation whatsoever. *Charge 030, Attachment 2 at ¶ 5.*

The collective bargaining agreement governing the terms and conditions of Petitioner's employment provides for involuntary transfer, as follows:

> The Superintendent or his/her designee may, *when deemed in the best interest of the school system*, involuntarily transfer unit members. . . .

Contract between the Miami-Dade County Public Schools and the United Teacher of Dade, Article XII, Section 8, *Involuntary Transfer* (emphasis added).

At a conference on March 10, 2009, MDCPS Regional Superintendent Janet Hupp ("Hupp") invoked the above contractual provision, stating that Petitioner was being transferred, "in the best interest of the school system." *Charge 030, Attachment 2 at ¶ 5.* However, when Petitioner and his union representative asked

how this transfer was in the best interest of the school system, Hupp refused to say. *Charge 030, Attachment 2 at ¶ 5.* Union Steward Connor-Miller asked several times why Petitioner was being transferred. Each time, Hupp replied, "I'm not at liberty to discuss that."

Although she refused to cite a single reason why his transfer was in the best interest of the school system, Hupp ruled out every plausibly legitimate reason. It had nothing to do with his students, his teaching, his personality, or even the investigation of the computer password charge. *Charge 030, Attachment 2 at ¶ 5.*

As a consequence of the transfer, Petitioner's commute has increased by more than 48 miles. This adds an extra one hour and twenty minutes a day to Petitioner's drive, or an extra 26 hours per month. The additional gasoline and oil, wear and tear on Petitioner's vehicle, and Florida Turnpike tolls exceed two hundred fifty dollars ($250.00) each month. *Charge 030, Attachment 2 at ¶ 7.*

7. Petitioner is Passed Over for Assistant Principalship

On April 17, 2009 Petitioner applied to the District's Assistant Principal Preparatory Program to be considered for future openings as an assistant principal.

On April 20, 2009, Petitioner was elected to Union office, UTD Building Steward. On April 28th, eight days later, Petitioner was notified by Employer through Ms. Sherri Daniels, Legal Services Coordinator, that the District would seek a five day disciplinary layoff without pay in connection with the computer

password. *Amended Unfair Labor Practice Charge, Charge 036, Attachment 3 at ¶ 42-43 (hereinafter Charge 036, Attachment 3 at ¶).*

Nine days later on May 7, 2009, Petitioner was interviewed by the District's committee making recommendations regarding those employees who would be selected to advance to career development as assistant principals. Despite having outstanding credentials, being fully qualified for advancement, and having done exceptionally well in his interviews, Petitioner was not selected for advancement. The District rejected Petitioner in favor of other, less-qualified candidates.

8. **Petitioner is Given Further Discipline**

As noted supra, on April 28, 2009, Petitioner was notified by MDCPS that MDCPS administrative staff would recommend that the Board impose on Petitioner a five-day disciplinary suspension without pay, conditional upon waiver of his due process hearing, as punishment for sharing his computer password. *Charge 036, Attachment 3 at ¶ 43.* When Petitioner refused to acquiesce in this punishment, the recommendation escalated to a ten-day suspension without pay.

The Board's vote on the ten-day disciplinary suspension was scheduled for the meeting of May 20, 2009. The disciplinary nature of the action was advertised to the pubic on the District's web site. On the afternoon of the meeting, a few hours before the event, the item was withdrawn from the Board agenda. A memorandum signed by the Superintendent of Schools appeared on the District's

web site reading: "Withdrawal of Agenda Item D-66, ***Dismissal*** *of Employee – Justin A. Koren,*" (emphasis added). Consequently, coworkers thought that Petitioner had been about to be fired, or might yet be fired. Petitioner received e-mails and telephone calls from other employees at his work location and other work locations inquiring as to what he had done to warrant discharge. As a consequence Petitioner suffered further humiliation.

Immediately following receiving the notification of this error, Petitioner left work early and drove 40 miles to the District's Employee Assistance Program, whereupon he was referred to a clinical psychologist.

All charges were summarily dismissed by PERC. The consolidated charges were timely appealed to the 3rd DCA where their dismissal was affirmed, October 27, 2010. Koren v. Sch. Dist. Of Miami-Dade County, No. 3D09-1932 (Fla. 3rd DCA 2010) (Attachment 4).

IV. SUMMARY OF ARGUMENT

1. With respect to sufficiency of a prima facie case for an unfair labor practice (ULP), the Third DCA is incorrect that adverse employment action must consist of "*loss of wages or benefits, demotion or similar actio*n," or a "*threatening or coercive decision.*" The *reasonable person* test cited by the Supreme Court in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 71 (2006) and relied upon in Gates v. Gadsden County Sch. Bd. No. 1D09-3636 at 3-4

(Fla. 1st DCA 2010) and Donovan v. Broward County Bd. of Commissioners, 974 So.2d 458, 459 (Fla. 4th DCA 2008) should be the law of Florida.

2. With respect to *causal connection* for a ULP prima facie case, the Third DCA is incorrect that Petitioner's nine factual allegations supporting animus are insufficient. The Second DCA is correct that "[P]laintiff, at a minimum, must establish that the employer was aware of the protected expression when it took the adverse employment action," Gibbons v. State Public Employees Relations Com'n, 702 So.2d 536, 536-37 (Fla. 2d DCA 1997). Principal Leal's accusatory confrontation with Petitioner followed hard on the heels of the protected activity and constitutes direct evidence of animus.

V. ARGUMENT WITH REGARD TO EACH ISSUE

A. Under Burlington, Petitioner Suffered Materially Adverse Actions

1. The Applicable Standard

The standards for summary dismissal are well known:

> The second preliminary error the district court committed was misapplication of the standard of appellate review of a motion to dismiss for failure to state a cause of action. In this posture appellate *courts must assume for the purposes of review that all well-pleaded allegations of the complaint are true*.

Everton v. Willard, 468 So.2d 936, 941 (Fla., 1985) (emphasis added).

2. Direct Evidence is Uncommon, but Present in This Case

Direct evidence of retaliatory animus is not very common, although it is present in this case.

> Courts have recognized that in discrimination cases, an employer's true motivations are particularly difficult to ascertain, see United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (acknowledging that discrimination cases present difficult issues for the trier of fact, as "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"). . . .

Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (Cir. 11 1993).[3] There is direct evidence that Leal accosted Petitioner in an accusatory manner, witnessed by Petitioner's union representative, regarding his involvement in helping to prepare the Morris charge. She told other employees that she had a list of persons she wanted to get rid of and that Petitioner was at the top of the list.

3. **Elements of the Circumstantial Prima Facie Case**

With respect to the Public Employee Relations Act, "the General Counsel's sole role is to determine whether the ULP charge and

[3] Accordingly, Florida case law does not require that an employer actually articulate or admit to animus or retaliation. *See* Laborer's International Union of North America, Local 678 v. Orange County Florida, 18 FPER 2314 (1992). Animus and retaliation can be shown using circumstantial evidence. Pasco, 353 So.2d at 119 (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); Singer Company v. NLRB, 429 F.2d 172 (8th Cir. 1970); Ridgely Manufacturing Co. v. NLRB, 166 U.S.App.D.C. 232, 510 F.2d 185 (1975).

accompanying documents establish "a prima facie violation of the applicable unfair labor practice provision." Koren v. Sch. Dist. Of Miami-Dade County, No. 3D09-1932, 17 (Fla. 3rd DCA 2010) (Cope, J. dissenting) (citing to § 447.503(1) (Attachment 4).

The prima facie elements for retaliation track federal case law: 1) the plaintiff was engaged in a protected activity; 2) the plaintiff was thereafter subjected by his employer to an adverse employment action; and 3) there is a causal link between the protected activity and the adverse employment action. Gibbons v. State Public Employees Relations Com'n, 702 So.2d 536, 536-37 (Fla. 2d DCA 1997) (citing Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913 (11th Cir.1993); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515 (11th Cir.1991).[4]

4. Adverse Employment Action Modified by Supreme Court in Burlington

With respect to retaliation, Florida courts also follow federal case law. Carter v. Health Management Associates, 989 So.2d 1258, 1262 (Fla. 2nd DCA 2008). Five years ago the federal standard for the adverse action element was

[4] *See also*, Stewart v. Happy Herman's Cheshire Bridge, Inc., 96-8689 (11th cir. 1997); Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993) (retaliation; race); Bigge v. Albertson's Inc., 894 F.2d 1497, 1501 (11th Cir. 1990); Donnellon v. Fruehauf Corp., 794 F.2d 598, 600-601 (11th Cir. 1986); Simmons v. Camden County Board of Education, 757 F.2d 1187 (11th Cir. 1985); Doyal v. Marsh, 777 F.2d 1526 (11th Cir. 1985).

substantially altered by the Supreme Court in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006).

> The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the antiretaliation provision as forbidding the same conduct prohibited by the antidiscrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions." . . .
>
> The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm . . . . *In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse*, "which in this context means it well might have `dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68, 126 S. Ct. 2405, 2415 (2006) (emphasis added). As of this writing, many decisions in the 11th Circuit have cited to Burlington,[5] two of which read in part:

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[5] *See e.g.*, Jiles v. United Parcel Service, Inc., No. 09-13625. Non-Argument Calendar 8 (11th Cir., 2010) (less favorable schedule not materially adverse); Reeves v. Dsi Sec. Serv. Inc., No. 09-14514, 5 (11th Cir., 2010) (left hanging on the telephone when he became ill at work and called for help; recipient of racial innuendos made by employees asking him to check on a driver named "Coon," and denial of overtime opportunities not materially adverse); Saunders v. Emory Healthcare, Inc., No. 09-10283, 10 (11th Cir. 2010) (decrease in her assignment to charge nurse and in-service, and changes to her holiday and vacation schedules resulting in no decrease in pay or loss of certification not materially adverse); Foshee v. Ascension Health-IS. Inc., No. 09-16499, 3 (11th Cir., 2010) (employer's insistence upon counseling sessions and a written behavioral agreement, and refusal to meet with her over requested accommodations not materially adverse); Hopkins v. Saint Lucie County Sch. Bd., No. 10-11252, 7 (11th Cir., 2010) (required to teach in a classroom while another teacher was

> To satisfy the adverse employment action requirement, the "plaintiff must show that a *reasonable employee would have found the challenged action materially adv*erse." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006). A materially adverse action is one that "*well might have dissuaded*

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present; not immediately issued a laptop computer carrying bag "with emblazoned school insignia;" required to use an objectional assigned textbook; refused shared space on bulletin board by fellow teacher; occasionally rude and disruptive students not materially adverse); Williams v. Apalachee Center, Inc., No. 08-13430, 4 (11th Cir. 2009) (no recitation of facts); Gresham v. City of Florence, No. 08-14625, 18 (11th Cir. 2009) (receipt of memorandum outlining procedures to use when requesting leave and request to mow grass in a high-visibility area not materially adverse); Brown v. Northside Hospital, No. 08-13051, 15 (11th Cir. 2009) (having been given three months to effectuate a transfer on account of inability to get along with present boss, and having subsequently filed an EEOC charge, plaintiff's termination at the end of three months was not retaliation for the protected activity); Luna v. Walgreen Company, No. 08-15600, 5 (11th Cir. 2009) (employer's removal of the chairs from the pharmacy not materially adverse); Shannon v. Postmaster General of United States Postal Service, No. 08-16827, 10 (11th Cir. 2009) (lateral assignment to travel position; requiring medical documentation of fitness and a signed modified job offer were not materially adverse); Hester v. North Alabama Center for Educational Excellence, No. 08-17037, 4 (11th Cir. 2009) (employer continued to pay under the same classification scheme through the time she filed her EEOC charge so no retaliatory action was taken); Snowden v. Daphne, No. 07-15023. 3 (11th Cir. 2008) (summary judgment case: plaintiff demoted after complaining about racial slur at work was unable to show pretext regarding allegations of poor performance); Burgos v. Chertoff, No. 07-12954, 6 (11th Cir. 2008) (remanded for consideration under Burlington; the court did not examine whether she met the materially-adverse and causal-relationship prongs); Woodruff v. School Board of Seminole County, No. 08-11798, 5 (11th Cir. 2008) (requiring storage of wheelchair outside classroom and write ups for misconduct were not materially adverse); Crawford v. Carroll, 529 F.3d 961, 973 (11th Cir.2008) (unfavorable performance review affecting eligibility for a merit pay increase after complaining of racial discrimination was materially adverse); Butler v. Alabama Dept. of Transp., 536 F.3d 1209 (11th Cir., 2008) (two racial epithets were not materially adverse).

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> *a reasonable worker from making or supporting a charge of discrimination*." Id.

Jones v. Alabama Power Company, No. 07-15818, 9-10 (11th Cir. 6/23/2008) (11th Cir. 2008) (emphasis added).

> The district court applied this court's pre-Burlington standard to Hester's's retaliation claim and required her to show that she suffered "an adverse employment action" that had a "tangible, negative effect on her employment." . . . In Burlington, the Supreme Court broadened the type of employer conduct considered actionable under Title VII's retaliation provision and held that a plaintiff need only show that the employer's actions were "*harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination*." Burlington, 548 U.S. at 57, 126 S. Ct. at 2409. Accord Crawford v. Carroll, 529 F.3d 961, 974 (11th Cir. 2008). This court has recognized that the standard for proving a prima facie case of retaliation under Title VII is now "decidedly more relaxed" than the standard applied by the district court. Crawford, 529 F.3d at 973.

Hester v. North Alabama Center for Educational Excellence, No. 08-17037, 4 (11th Cir. 2009);

In Florida both the 1st and 2nd DCA have adopted the Burlington *reasonable employee* standard: Gates v. Gadsden County Sch. Bd. Slip Op. 1D09-3636 at 3-4 (Fla. 1st DCA 2010) and Donovan v. Broward County Bd. of Commissioners, 974 So.2d 458, 459 (Fla. 4th DCA 2008). *See also*, the dissenting opinion in this case: Koren v. Sch. Dist. Of Miami-Dade County, No. 3D09-1932 (Fla. 3rd DCA 2010) (Cope J. dissenting) (Attachment 4).

However, the 3rd DCA has not followed Burlington, and instead requires "a threatening or coercive decision or a decision against the employee's interest." Koren v. Sch. Dist. of Miami Dade County and Public Employee Relations Commission, 3 D09-1931, 6 (Fla. 3rd DCA 2010) (Attachment 4). In so doing, the 3rd Circuit relied upon its own precedent in City of Coral Gables v. Coral Gables Walter F. Stathers Mem'l Lodge 7, Fraternal Order of Police, 976 So. 2d 57, 63 (Fla. 3d DCA 2008) and upon the pre-Burlington federal case of MacLean v. City of St. Petersburg, 194 F. Supp. 2d 1290, 1298 (M.D. Fla. 2002).

As a threshold matter, even under the *pre-Burlington objective standard*, the 3rd DCA did not discuss why an attempted termination and an attempted two weeks disciplinary layoff would fail to rise to the level of threatening. At least with respect to the first action, both federal and state case law have held that discharge may constitute adverse action. National Cement Co. v. Federal Mine Safety and Health Review Com'n, 27 F.3d 526, 534 (11th Cir. 1994); Bruner v. GC-GW, Inc., 880 So.2d 1244, 1246 (Fla. 1st DCA 2004); Webb v. Florida Health Care Management Corp., 804 So.2d 422, 424 (Fla. 4th DCA 2001); Lindamood v. Office of State Attorney, 731, 832 So.2d 829 (Fla. 5th DCA 1999). The decision below raises a question – if pending discharge is not threatening, then what would be?

Transfers have been a separate matter. Prior to Burlington, the 11th Circuit required that transfers must involve loss of position, title, salary, duties or prestige

to qualify as adverse. Pre-Burlington, lateral transfers generally failed to qualify. Doe v. Dekalb County School Dist., 145 F.3d 1441, 1449-50 (11th Cir. 1998).

But even using the pre-Burlington objective standard, a lateral transfer could be found retaliatory if there were direct evidence of animus. In Stone & Webster Engineering Corp. v. Herman, 115 F.3d 1568, 1574 (11th Cir. 1997), the position into which the plaintiff was being transferred was objectively equivalent; however, there was direct evidence of animus – the employee was viewed as a troublemaker:

> Here Harrison can build his case on direct evidence of S&W's animus. . . . *[W]e think Ehele saw Harrison as a "troublemaker," in Ehele's own words. The Secretary did not err in viewing retaliation as a probable contributing factor to Harrison's transfer* out of sight and out of the drywell.
>
> Against Harrison's evidence S&W offers little in rejoinder. Ehele mentions that Harrison had earlier requested a transfer to an outside crew. This is a plausible contention, as Harrison, now working as a journeyman, might prefer not to work alongside people he had just recently supervised. But S&W falls short of convincing us, as he failed to convince the ALJ or the Secretary, that S&W would have transferred Harrison had he never provoked trouble for S&W at the ironworkers' meeting. Substantial evidence upholds the Secretary's finding of retaliation.

Stone & Webster Engineering Corp. v. Herman, 115 F.3d 1568, 1574 (11th Cir. 1997) (emphasis added).

In the present case, it is clear that Leal regarded Petitioner as a troublemaker. Accordingly, were this Court to find Burlington inapropos, then Petitioner would argue that, pursuant to Stone, there is direct evidence of animus following closely

upon his protected activity, and afterwards followed by an extended series of retaliatory actions including attempted discharge. The principal viewed Petitioner as a troublemaker who had affronted her personally; she was getting even. Therefore, even under the pre-Burlington objective standard modified by the Stone exception, this element of the prima facie case has been met.

Notwithstanding what might have been found under a proper application of the pre-Burlington objective standard, Petitioner urges this Court to adopt the Burlington reasonable person objective standard as applied to lateral transfers.

> Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and `should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 71 (2006).

Factually in Burlington, as in the present case, there was a lateral transfer and a sequence of actions and reactions spanning several months, all of which the Burlington Court took into account: The plaintiff in Burlington complained about sexual harassment from her boss, who had made insulting remarks about her in front of co-workers. Although her boss was disciplined, a higher supervisor from the company simultaneously transferred the plaintiff from forklift operator to a manual laborer. Both the former and subsequent duties fell within the same job description so there was no loss of pay, meaning that under the pre-Burlington objective standard, the transfer would not have amounted to an adverse

employment action. Following her transfer, Plaintiff filed an EEOC charge for retaliation. Thereafter, she was disciplined for insubordination, which caused her to file another retaliation charge. Subsequently, the employer found that she had not been insubordinate, reinstated her, and awarded her backpay for the 37 days she had been suspended. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 58 (2006).

Under the pre-Burlington objective standard, her transfer arguably might not have been an adverse action because she retained the same classification and pay; her disciplinary suspension might not have been an adverse action because she had been reinstated and repaid; however, under the Burlington reasonable person objective standard, these actions were sufficient to satisfy the second element of the prima facie case.

In the present case, much like in Burlington, Petitioner became involved with a protest based upon sexual harassment. As in Burlington, improper oral remarks were made by his boss in the presence of other employees; Principal Leal referred to him as "the mistake," and indicated that she would like to get rid of him. Afterwards, paralleling Burlington, his retaliatory transfer was facially a lateral transfer, his attempted termination relating to sick leave was aborted, and his threatened two week disciplinary suspension was reduced to a written reprimand. As in Burlington, the transfer was initiated not by the immediate boss,

but by a higher administrator. Under the pre-Burlington objective standard, none of these actions produced a loss of pay or title or status. Presumably (although not stated) the court below made its decision using that standard. However, in Burlington, terms, any reasonable employee would conclude this to be a siege of attrition and to be materially adverse.

As a consequence of the transfer, Petitioner's commute increased by more than 48 miles, which added an extra one hour and twenty minutes a day to his drive, or an extra 26 hours driving time per month. The additional gasoline and oil, wear and tear on his vehicle, and Florida Turnpike tolls exceed two hundred fifty dollars ($250.00) each month. Although the 3rd DCA did not comment on these tangible consequences for the Petitioner, it seems likely that these inconveniences were considered by the court below to be irrelevant as happening outside the workplace. Under Burlington, however, retaliation is "not limited to discriminatory actions that affect the terms and conditions of employment." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006).

Locally, Petitioner's case has some degree of notoriety. In light of that, any reasonable employee, knowing what happened to Petitioner, will now think twice before helping anyone else to file a charge of harassment in the future. Burlington addressed this issue of discouragement:

> This Court agrees with the Seventh and District of Columbia Circuits that the proper formulation requires a

> retaliation plaintiff to show that the challenged action "well might have `dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Rochon v. Gonzales, 438 F. 3d 1211, 1219.

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006).

In this case, the principal's initial reactions, her belligerent confrontation with Petitioner, her refusal to write a more supportive letter of recommendation, her delayed installation of the announcement on the school's marquee until spring break when no one would be present; her placement of the announcement on the reverse side of the marquee where passers-by could not see it, her attempt to terminate Petitioner while on medical leave, the transfer to a remote location, and the rejection of his bid to become assistant principal should collectively be considered materially adverse.

That decision will impact on the third element of retaliation, the causal relationship.

B. The Employer Was Aware & Adverse Action Was Not Wholly Unrelated

1. **Two Elements: Employer Awareness − Actions Not Wholly Unrelated.**

In Florida the Second DCA, relying upon federal case law, has held that a plaintiff's burden is to show, for purposes of a prima facie case, that the protected activity and the adverse action are not *wholly unrelated*. As part of the relatedness,

he must show that the *employer was aware* of the protected expression when it took the action.

> [T]he causal link in the [retaliatory discharge formula [is not] the sort of logical connection that would justify a prescription that the protected participation in fact prompted the adverse action. Such a connection would rise to the level of direct evidence of discrimination, shifting the burden of persuasion to the defendant. *Rather, we construe the 'causal link' element to require merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated*. Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir.1985). *The plaintiff, at a minimum, must establish that the employer was aware of the protected expression when it took the adverse employment action*. *Hairston*, 9 F.3d at 920 (quoting Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir.1993).

Gibbons v. State Public Employees Relations Com'n, 702 So.2d 536, 536-37 (Fla. 2d DCA 1997) (emphasis added). For federal case law incorporating employer awareness with "*not wholly unrelated*," see Gupta v. Florida Board of Regents, 212 F.3d 571, 590 (11th Cir. 2000); Hairston, 9 F.3d at 920; Goldsmith, 996 F.2d at 1163; Weaver, 922 F.2d at 1525; Bigge, 894 F.2d at 1501; Simmons, 757 F.2d at 1189.[6]

[6] For additional 11th Circuit case law requiring the employer to have knowledge of the protected activity, see Bass v. Board of County, 97-00308-CIV-ORL-18 (11th Cir. 2001); Brungart v. Bellsouth Telecommunications, Inc., 231 F.3d 791, 799 (11 Cir. 2000); Farley v. Nationwide Mutual Insurance Company, 197 F.3d 1332, 1337 (11th Cir. 1999); Raney v. Vinson Guard Service, Inc., 120 F.3d 1192 1197 (11th Cir. 1997).

2. Relatedness Can Be Shown Through Temporal Proximity

In the absence of direct evidence, the nexus can be shown through timing, although not timing alone: "The mere presence of a temporal sequence which shows the discharge following the filing of the discrimination claim is, in and of itself, not sufficient to substantiate the requisite causal connection." Thurman v. Robertshaw Control Company, 869 F. Supp. 934, 940 (N.D. Ga. 1994). There still must be evidence that employer knew of employee's protected activities, combined with a proximity in time between protected action and the allegedly retaliatory action in order to establish prima facie case of retaliation. Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir.1987).[7]

In Florida, the First DCA has acknowledged the efficacy of proving unfair labor practice retaliation through temporal proximity:

> The timing of the decision by the employer in connection with the employee's union activity is a proper consideration to a determination whether an unfair labor practice was committed. A discharge of an employee, followed closely on

[7] *See also* 11th Circuit case law subscribing to proximity in time: Cooper v. Southern Co., 390 F.3d 695, 740 (11th Cir. 2004) ("Harris established a prima facie case of retaliation because the delay between the filing of the lawsuit and her firing was so brief"); Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000) ("[C]lose temporal proximity" may be sufficient to establish causal relation in retaliation cases); Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 745 (11th Cir. 1996) ("Where termination closely follows protected activity, it is usually reasonable to infer that the activity was the cause of the adverse employment decision"); Doyal, 777 F.2d at 1534 ("[T]iming of its actions was such as to allow an inference of retaliation to arise").

> the heels of an employer's display of anti-union animus, supports a finding of an unfair labor practice.

Pasco County School Bd. v. Florida Public Employees Relations Commission, 353 So.2d 108, 119 (Fla. 1st DCA 1977).

Historically, the question has been − how much time? In federal case law there was a causal link where the adverse employment actions followed only days after notification to management of the charges of sexual harassment. Sowers v. Kemira, Inc., 701 F. Supp. 809, 825 (S.D. Ga. 1988). However, the time element does not have to be that tight. In Donnellon, 794 F.2d at 600-01, the fact that plaintiff was discharged only one month after filing complaint with the EEOC negated "any assertion by the defendant that the plaintiff failed to prove causation." The Weaver court found causation where the protest occurred on July 18 and the first negative performance evaluation occurred "shortly afterward," on September 4th. 922 F.2d at 1524. Seven weeks was sufficient for a nexus in Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1337 (11th Cir. 1999).

Going to the other extreme, a three year time lapse discounted the causal connection between the two events. Samuelson v. Durkee/French/Airwick, 976 F.2d 1111, 1115 (7th Cir. 1992). Similarly, a thirty-three month time lapse prevented an inference of retaliation. Oliver v. Digital Equipment Corporation, 846 F.2d 103, 110-11 (1st Cir. 1988). Also, a two year time lapse failed to establish a causal connection. Jennings v. Uniroyal Plastics Company, 1989 WL

125601 *8 (N.D. Ind. 1989). Nine months did not suffice in another case, although an intervening act of insubordination undermined the nexus. Mesnick v. General Electric, 950 F.2d 816, 828 (1st Cir. 1991), *cert. denied*, 504 U.S. 985 (1992). Seven months was sufficient separation to support a district court's grant of summary judgment for the employer. West F. Fred Wright Construction Co., 756 F.2d 31, 34 (6th Cir. 1985). In one case, the district court granted summary judgment for the employer when there was a six month gap between the protested sexual harassment and the discharge. Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 321 (7th Cir. 1992).

In the present millennium, five 11th Circuit decisions have held that a three to four month disparity between the statutorily protected expression and the adverse employment action is not enough to establish a causal connection. Burgos-stefanelli v. Sec'y, No. 0:09-cv-60118-DTKH, 8 (11th Cir., 2011); Revere v. McHugh, No. 09-13386, Non-Argument Calendar, 8 (11th Cir. 2010); Shannon v. Postmaster General of United States Postal Service, No. 08-16827, 10 (11th Cir. 2009); Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007); Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004) (citing Clark Cnty. Sch. Dist. v. Breedon, 532 U.S. 268, 273-74 (2001)); Wascura v. City of South Miami, 257 F.3d 1238, 1248 (11th Cir. 2001) (finding that a three and one-half month

temporal proximity between a protected activity and an adverse employment action "is insufficient to create a jury issue on causation").

Mechanistically, therefore, seven weeks or less may serve to show temporal proximity and the animus required for retaliation, but three to four months may not.

This approach lent itself more to a situation involving a single protected activity and a single retaliatory event. When there are multiples, as there were in the Burlington case and as there are in the present case, the holistic approach of the reasonable employee objective standard is more functional.

> Additionally, close temporal proximity is not the only means by which a plaintiff can establish a causal connection. A plaintiff may establish a causal relation element under a prima facie case of retaliation based on evidence that an employer knew of a protected activity, and a *series of adverse employment actions commenced* almost immediately thereafter.

Jiles v. United Parcel Service, Inc., No. 09-13625. Non-Argument Calendar, 8 (11th Cir., 2010) (Emphasis added).

A Series of Adverse Employment Actions in This Case		
Action	Reaction	Temporal Proximity
February 21, 2008, Petitioner helps Security Guard with sexual harassment complaint.	March 10, 2008, Leal confronted Petitioner & accuses him of writing the charge.	17 days from the date Petitioner assisted; less from the time Leal learned of the charge.
March 19, 2008, Petitioner files a	March 20, 2008, Leal says that she does not	27 days from the date Petitioner assisted; 1

grievance over the confrontation April 14, 2008, Petitioner cooperates with investigation of the Morris charge & says: "I feel that Ms. Leal is retaliating against me."	feel comfortable writing a stronger letter of endorsement for Petitioner. Late March 2008, Leal orders announcement on marquee delayed until beginning of spring break when no one is present. She also orders the announcement place on the side facing away from traffic so that no one can read it.	day after he filed his grievance. 5 weeks from the date Petitioner assisted; c. 1 week after he filed his grievance.
Summer Recess – School Not In Session[8]		
	August 2008, Leal refers to Petitioner as "the mistake." She says that she has a list of those she wants to get rid of, and he is at the top of the list.	c. 2 months from the investigation – if summer recess tolls elapsed time
	September 16, 2008, Leal attempts to fire Petitioner for job abandonment, eight	c. 3 months from the investigation – if summer recess tolls elapsed time.

[8] During two months of summer break, schools are not in session from mid-June to mid-August, and teachers are not present on site. In this case, immediately upon return of the teachers, Leal made it clear she had not forgotten; she told other employees that Koren was a "mistake" and she would like to get rid of him. This communication constitutes the second piece of direct evidence.

	days after approving his medical leave. September 29, 2008, Leal charges Petitioner with giving out computer password (for which no one has ever been disciplined).	 c. 3 months from the investigation – if summer recess tolls elapsed time.
February 6, 2009, Petitioner files an unfair labor practice charge for retaliation. February 23, 2009, Petitioner returns from medical leave.	March 6, 2009, Employer sends two administrators to physically escort Petitioner from the building. He is given a 3 day suspension without notice of a hearing. He is transferred to a location adding an hour and 20 minutes to his commute.	28 days from filing unfair labor practice charge. 13 days after his return to work.
April 20, 2009, Petitioner is elected union steward.	April 28, 2009, Petitioner is notified that District will seek 5 day unpaid disciplinary layoff for password, provided he waives due process. He declines; district seeks 10 days. May 20, 2009, superintendent withdraws board agenda item – Dismissal of Employee Justin A. Koren.	18 days after being elected union steward. 10 weeks from filing unfair labor practice charge. 40 days after being elected union steward.

The 3rd DCA did not address any of the above temporal juxtapositions. They said merely: "There is just not sufficient objective evidence of animus, or relation of adverse events to Koren's participation in a protected action." Koren v. Sch. Dist. Of Miami-Dade County, No. 3D09-1932, 7 (Fla. 3rd DCA 2010) (Attachment 4).

3. Temporal Proximity is Not the Only Test for Relatedness

Leal's accusatory confrontation with Petitioner, which took place 17 days from the time he assisted in the preparation of the charge (probably a shorter time from when she learned of the charge), is evidence of animus. But even if there were an absence of time relatedness, other evidence, meaning direct evidence in this case, can be used to show causation. This was true even before Burlington expanded the analysis to the objective reasonable employee standard.

> "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 Dist. v. Breeden, 532 U.S. 268, 273 (2001). *Thus, 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. Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007).

Shannon v. Postmaster General of United States Postal Service, No. 08-16827, 10 (11th Cir. 2009) (emphasis added).

In the Stone case, discussed earlier, there was other evidence to show causation:

> Here Harrison can build his case on direct evidence of S&W's animus. . . . [W]e think Ehele saw Harrison as a "troublemaker."

Stone & Webster Engineering Corp. v. Herman, 115 F.3d 1568, 1574 (11th Cir. 1997). In the present case, there is evidence that Leal saw Petitioner as a troublemaker – she confronted and accused him of helping Morris draft the charge; she referred to him as the mistake and said she wanted to get rid of him.

Two decades before Burlington, the 1st DCA said that even though the action constituting the unfair labor practice had to occur within statutory six months for filing; nevertheless, a charging party might bring into play evidence occurring prior to those six months. That presages Burlington. Although the adverse actions back in the pre-Burlington objective standard days of 1983 were primarily discipline, discharge and demotion, Da Costa held that the charge could be proven by other events occurring earlier.

> The Commission and the hearing officer erred in their interpretation of the six-month limitation period of Section 447.503(6)(b) as applied to an unfair labor practice based on a continuing course of conduct. *The employee has the burden to prove that an unfair labor practice occurred within six months of the filing of his complaint. However, he may, as in this case, seek to prove that charge by evidence of events occurring prior to the six-month period*.

Da Costa v. Public Employees Relations Commission, 443 So.2d 1036, 1040 (Fla. 1st DCA 1983) (emphasis added).

What was suggested in Da Costa has been clarified by Burlington. Even without discipline, discharge or demotion resulting in loss of pay, relatedness can attach to other materially adverse events.

VI. CONCLUSION

"Clearly Mr. Koren has stated a prima facie case of retaliation." Koren v. Sch. Dist. Of Miami-Dade County, No. 3D09-1932, 17 (Fla. 3rd DCA 2010) (Cope, J. dissenting) (Attachment 4). For the above reasons, and because a prima facie case has been amply stated, the decision of the 3rd DCA should be overturned and a hearing should be ordered.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in accordance with the font requirements set forth in Fla. R. App. P. 9.210 (a) (2).

/s/ Thomas E. Elfers
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was sent via U.S. Mail this 12th day of May 2011, to:

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APPENDIX

TABLE OF ATTACHMENTS

1. *Charge Against Employer* (February 5, 2009).

2. *Amendment to Charge* . . . . (March 31, 2009).

3. *Amended Unfair Labor Practice Charge* (May 2, 2009).

4. *Koren v. Sch. Dist. Of Miami-Dade County*, No. 3D09-1932, 17 (Fla. 3rd DCA 2010) (Cope, J. dissenting).