

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
PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees/Respondents.

**SCHOOL BOARD'S RESPONSE TO PETITIONER'S
BRIEF ON JURISDICTION**

On Review from the District Court
of Appeal, Third District
State of Florida

LUIS M. GARCIA, ESQ.

Florida Bar No. 969869

SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA

Attorney for Appellee/Respondent School Board

1450 Northeast Second Avenue, Suite 400

Miami, Florida 33132

Tel: 305-995-1304

Fax: 305-995-141

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
SUMMARY OF THE ARGUMENT	1
STATEMENT OF THE CASE AND OF THE FACTS	2
ARGUMENT	4
CONCLUSION	6
CERTIFICATE OF SERVICE	7
CERTIFICATE OF FONT SIZE COMPLIANCE	7

TABLE OF CITATIONS

<u>Cases</u>	<u>Pages</u>
<u>Burlington Northern and Santa Fe Ry. Co. v. White</u> , 548 U.S. 53, 126 S.Ct. 2405 U.S.,(2006).....	4
<u>Cagle v. St. Johns County School District</u> , 939 So. 2d 1085, 1089 (Fla. 5th DCA 2006)	3
<u>City of Coral Gables v. Coral Gables Walter F. Stathers Memorial Lodge 7, Fraternal Order of Police</u> , 976 So.2d 57 (Fla. 3d DCA 2008).....	4-5
<u>Gibbons v. State Public Employees Relations Commission</u> , 702 So.2d 536 (Fla. 2d DCA 1997).....	5
<u>Koren v. School District of Miami-Dade County, Florida & Public Employees Relations Commission</u> , 46 So.3d 1090, (Fla. 3d DCA 2010)	<i>passim</i>
<u>Pasco County School Board v. PERC</u> , 353 So. 2d 108(Fla. 1st DCA 1977).....	4
<u>Reaves v. State</u> , 485 So.2d 829, 830 (Fla. 1986).	2
<u>School Bd. of Lee County v. Lee County School Bd. Employees, Local, 780, AFCSME</u> , 512 So.2d 238 (Fla. 1st DCA 1987)	4,5

Statutes

Fla. Stat. § 447.501 et seq...... *passim*

Other Authorities

Fla. R. App. P. 9.030(a)(2)(A)(iv)2

I. SUMMARY OF THE ARGUMENT

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) and concluded that the record reveals no basis for finding a prima facie violation of that statute. Koren, 46 So.3d at 1093.

In its Brief on Jurisdiction, Petitioner has apparently 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.

Accordingly, this Court 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 and “must appear within the four corners of the majority opinion.” Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

II. STATEMENT OF THE CASE AND FACTS

Petitioner (Appellant below) Justin Koren filed several Unfair Labor Practice (“ULP”) charges with the Respondent/Appellee, Public Employee’s Relations Commission (“PERC”) pursuant to § 447.501(1)(a) and (d), Fla.Stat. (2010). The charges were based on Petitioner’s allegation that he had been subjected to retaliation by his employer, Respondent/Appellee, School Board of Miami-Dade County, Florida 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.

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 grievances filed by Plaintiff 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.

III. ARGUMENT

In his Brief, Petitioner asserts 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 two asserted basis for establishing conflict jurisdiction are evident in the decision rendered by the court in the Koren opinion. Initially, Petitioner argues 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.

In its Koren decision, 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 previously indicated, 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 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. 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).

IV. CONCLUSION

Accordingly, this Court should refuse to grant jurisdiction as there is no express and direct conflict between the Third District's decision in Koren, holding that the Petitioner's allegations were insufficient to support a charge of unfair labor practice under § 447.501 of the Florida statutes.

Respectfully submitted,

Walter J. Harvey
School Board Attorney
The School Board of Miami-Dade County, Florida
1450 NE 2nd Avenue, Room 430
Miami, FL 33132

By: _____

LUIS M. GARCIA, ESQUIRE
Deputy Assistant School Board Attorney
Florida Bar No. 969869
Telephone: (305) 995-1304
Facsimile: (305) 995-1412

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was transmitted by U.S. Mail this 21st day of January, 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 Tallahassee, 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

