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.

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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III. WHY THE SUPREME COURT HAS JURISDICTION

A. The Jurisdictional Issues – Split Between 3rd DCA & Other Districts:

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 actio*n," 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. 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) 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 seven factual allegations supporting animus[1] are insufficient or whether the Second DCA is correct that "[P]laintiff, at a

[1] Petitioner's principal was incensed by his assisting another employee to draft a sexual harassment charge targeting her and confronted him verbally, immediately afterwards commencing a series of vindictive actions against him by: 1) 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; 2) placing the announcement on the reverse side of the marquee where passers-by could not see it; 3) referring to him as "*the mistake*;" d) attempting to terminate him for job abandonment eight days after signing his medical leave request; 4) 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; 5) humiliating him in front of students and colleagues by having him summarily escorted from the building; 6) inflicting a three day (paid) disciplinary suspension without due process; and 7) 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 – A "Poster Child" for Prima Facie Case

At oral argument, Justice Cope called the prima facie case a *poster child*.

1. Petitioner Assists Employee to Write Civil Rights Charge

On February 21, 2008, a security guard at Southwood Middle School, requested Petitioner, a teacher, to assist her in drafting a charge of harassment on account of sexual orientation against the District and Principal Deborah Leal. The 3rd DCA found Petitioner's assistance protected and retaliation impermissible.

On March 10th at her office, Leal confronted Petitioner about his involvement in drafting the charge in an accusatory and hostile manner.

2. Leal Snubs Petitioner as Rookie Teacher of the Year

About the time Leal confronted Petitioner on March 10, 2008, he was voted by staff to be the school's 2008 *Rookie Teacher of the Year*.

Leal delayed placing the announcement of the Rookie Teacher award on the marquee outside the school until Spring Break when no one would be at the school. She instructed that the announcement be placed on only one side, facing away from traffic, so that passers-by on the one way street could not see it.

3. Leal Falsely Accuses Petitioner of "Job Abandonment"

In August 2008, at the beginning of the 2008-2009 school year, Leal told office staff she had a list of people she wanted to get rid of and that Petitioner was at the top of the list. She referred to him as "*the mistake.*"

Petitioner suffers from Crohn's disease and experienced a flare-up in early September. Leal signed off on an official "Leave of Absence" on September 8th.

Eight days later, she attempted to terminate him for job abandonment while his leave request was still pending at Central Office. Subsequently, his application was approved thwarting her effort to eliminate him.

4. Leal Falsely Accuses Petitioner of Misuse of Computer Password

On September 29th, Leal falsely accused Petitioner of sharing his computer password with a substitute teacher in order to enter students' grades. However, the School Board policy is precatory, ***suggesting*** that employees not share passwords. The policy holds them accountable merely for any misuse. Until Petitioner's case, the Respondent District had never sought to punish any employee for sharing. Now it sought to impose two weeks suspension without pay. Also, the District notified Florida's Education Practices Commission (EPC) in Tallahassee for possible license suspension or revocation, but the EPC dismissed the charge.

During the investigation, one witness was told to "*throw him under the bus*." "*Wake up and see what's happening . . . .. Tell Leal what she wants to hear*."

5. Petitioner is Suspended and Escorted Out of Southwood

Petitioner filed Charge 011 with PERC on February 6, 2009. Twenty-eight days later, on March 6th, District Regional Administrative Directors informed Petitioner - without explanation - that he was being sent home immediately, ordering him to remain silent while he was escorted from the building.

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.

Petitioner was suspended for three days (with pay) without just cause, without due process, or, indeed, without any explanation. Although Petitioner requested something in writing to document the event, the administration declined.

Petitioner was afterwards involuntarily transferred to another school many miles distant. A Regional Superintendent alleged that Petitioner was being transferred, "*in the best interest of the school system*," but she refused to say why - "*I'm not at liberty to discuss that*." However, she ruled out every plausibly legitimate reason. It had nothing to do his teaching, his personality, or even the investigation of the computer password charge.

As a consequence of the transfer, Petitioner's daily commute has increased by more than 48 miles. The additional gasoline and oil, wear and tear on his vehicle, and turnpike tolls exceed two hundred fifty dollars ($250.00) each month.

6. **Petitioner is Given Further Discipline**

The Board's vote on the ten-day disciplinary suspension was scheduled for the meeting of May 20, 2009. However, at the last minute, the item was withdrawn from the agenda and Petitioner was issued a written reprimand.

IV. ARGUMENT WITH REGARD TO JURISDICTION

A. The Above Facts Constitute a Prima Facie Case for Retaliation

Florida case law establishes the elements for proving a prima facie case of retaliation: 1) protected activity; 2) adverse employment action; and 3) a causal link. 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) *superseded by statute on other grounds*,); *Pasco County School Bd. v. Florida Public Employees Relations Commission*, 353 So.2d 108 (Fla. 1st DCA 1977). *See also*, Coral Gables v. Stathers Memorial Lodge 7, 976 So.2d 57, 63-64 (Fla. 3d DCA 2008); School Bd. of Lee County v. Lee County School Bd. Employees, 512 So.2d 238, 239 (Fla. 3rd DCA 1987).

Both the Third DCA and PERC have acknowledged that Petitioner's assistance with the gender harassment charge was protected activity. Koren v. School District of Miami-Dade, Slip Op. 3D09-1931 at 3 (Fla. 3d DCA 2010).

B. Petitioner Sufficiently Pled Adverse Employment Action

With respect to the second element, the Third DCA insinuated, without expressly finding, that Petitioner did not suffer an adverse employment action because he "*has not claimed that he has suffered a loss of wages or benefits, demotion or similar a*ction," and because there has been "*no threatening or coercive decision or a decision against the employee's interest*." Id. at 4 n.3 and 6.

However, in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 71 (2006) the Supreme Court said: "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." Ironically, in Burlington, as in the present case, the adverse employment action was an involuntary transfer and disciplinary suspension. Those satisfied the Supreme Court and should have satisfied the Third DCA. See also Gibbons v. State Public Employee Relations Commission, 702 So.2d 536, 536 (Fla. 2d DCA 1997) (involuntary transfer).

For a contrary proposition, the Third DCA majority opinion relied upon Graham v. Florida Dept. of Corrections, 1 F.Supp.2d 1445, 1449 (M.D. Fla. 1998) where the court granted summary judgment on the retaliation claim because Graham *wanted* to leave the North Florida Reception Center. Id. at 1450. Obviously, this does not support the majority because the transfer was not against Graham's will; the reliance of the majority opinion upon Graham is misplaced.

Additionally, in the present case, Petitioner has alleged a) attempted termination under the pretext of job abandonment when Leal had already signed off on a medical leave, and b) attempted two week disciplinary layoff without pay for allegedly sharing a computer password to facilitate grade entry when no one had ever been disciplined for that offense. Under Burlington, the question is whether these types of actions are ones which "*well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination*.'" 548 U.S. at 68. Clearly the answer is yes, either prospect would appear daunting to a reasonable worker. See Koren, Slip Op. 3D09-1931 at 20-21, Cope J. dissenting.

Two Florida district courts of appeal have followed Burlington. Gates v. Gadsden County Sch. Bd. Slip Op. 1D09-3636 at 3-4 (Fla. 1st DCA 2010); Donovan v. Broward County Bd. of Commissioners, 974 So.2d 458, 459 (Fla. 4th DCA 2008). In this case, the Third DCA has not.

C. Petitioner Sufficiently Pled Causal Connection

As the Gibbons court explained, establishing a causal link only requires that the employer was aware of the protected expression when it took the action.

> [W]e 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***.

Gibbons v. State Public Employees Relations Com'n, 702 So.2d 536, 536-37 (Fla. 2d DCA 1997) (emphasis added). In the present case, the employer was aware.

In Gibbons, PERC had dismissed the ULP charge because of a failure to provide affidavits from witnesses who heard supervisors *state* their intention to retaliate. But the Second District rejected that idea. The court concluded that Gibbons' own sworn statement was sufficient to establish "a prima facie charge and that affidavits offering direct evidence were not necessary." Id. at 537.

Retaliatory intent may be inferred from circumstantial evidence:

> A discharge of an employee, followed closely on 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). In this case, events followed closely.

In this case circumstantial evidence of animus and retaliatory intent consists of a chain of events: Leal was incensed by Petitioner's assistance to another employee drafting a sexual harassment complaint targeting her. She confronted him and afterwards immediately began to engage in a series of unreasonable and vindictive actions against him, some of which involved 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; placing the announcement on the reverse side of the marquee where passers-by could not see

it; referring to him as "the mistake;" attempting to terminate him for job abandonment after signing a medical leave request; attempting to discipline or discharge him for sharing his computer password, even though the board policy was merely precatory; humiliating him in front of students and colleagues by having him escorted from the building; inflicting a three day suspension with pay, but without due process; and involuntarily transferring him to another distant school. Further, Petitioner has alleged that the pending discipline or discharge for violation of a Board policy against sharing a computer password was pretextual because the policy is merely precatory, not mandatory. Additionally, he was disparately treated in that no one else similarly situated was ever disciplined.

As the minority dissent pointed out:

> The majority opinion also affirms the dismissal order because "there is just not sufficient objective evidence of animus or relation of adverse events to Koren's participation in a protected activity, necessary to sustain the allegations of unfair labor practices as set forth by statute and case law." Majority opinion at 7. Respectfully, this passage seems to say that plaintiff must produce affidavits of witnesses who may have overheard Ms. Leal say that she was retaliating against Mr. Koren. However, the Gibbons decision states that such affidavits are not required. 702 So.2d at 536. The Gibbons decision correctly holds that the plaintiff's own sworn statement is sufficient support. Here, too, it appears that the majority ruling is in conflict with Gibbons.

See Koren, Slip Op. 3D09-1931 at 24, Cope J. dissenting.

VI. CONCLUSION

For the above reasons, this Court should take discretionary jurisdiction.

Respectfully submitted,

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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 28th day of December 2010, to Stephen A. Meck, Esq., and Sharon E. Cromar, Esq., Public Employee Relations Commission,4050 Esplanade Way, Tallahassee, Florida 32399-0950 and Luis Garcia, Esq., School Board Attorney's Office, School Board Administration Building, 1450 N.E. 2nd Ave, Suite 430, Miami, Florida 33132.

Thomas E. Elfers, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Microsoft Word, New Times Roman 14 pt. font in accordance with the requirements set forth in Fla. R. App. P. 9.210 (a) (2).

Thomas E. Elfers, Esq.