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.

REPLY BRIEF

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A. Subject Matter Jurisdiction

Respondent School Board raises an issue on appeal which was not addressed below. It contends that this Court does not have subject matter jurisdiction because "[t]he 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 traditionally 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."

Petitioner disagrees. Aiding another employee to protest a violation of *e.g.* the collective bargaining agreement does indeed fall under Chapter 447.

That protected right, in the first instance, is codified in Fla. Stat. § 447.301 (3): "Public employees shall have the right to engage in concerted activities not prohibited by law, for the purpose of . . . other *mutual aid or protection* (emphasis added)." In the present case Petitioner assisted a security guard (same omnibus bargaining unit) to write a charge of sexual-orientation discrimination against the school principal to be filed with the District's Office of Civil Rights Compliance. The two employees worked in concert; protection was the objective.

The subject of sexual-orientation had been negotiated at the bargaining table and was specifically prohibited by the collective bargaining agreement even though grievances were channeled into forums other than the grievance procedure:

> The Board agrees to continue its policy of not discriminating against any employee on the basis of . . . sexual orientation . . . . Complaints regarding sexual orientation . . . are not subject to the grievance/arbitration process. Such complaints may be addressed through the appropriate School Board Rule . . . .

Contract between Miami-Dade County Public Schools and the United Teachers of Dade, Article I, Section 11 B, page 5, July 1, 2006 – June 30, 2009.

To satisfy the statute, it is not necessary for a negotiated contractual right to be implicated, or for a grievance to be written (even though that is what happened in the present action). For example, in another earlier case, employees complained about unsanitary working conditions and safety violations (presumably governed by OSHA), resulting in one employee being told to keep her mouth shut.

> The evidence established that several food service workers in the school cafeteria voiced numerous concerns and complaints over several months in the fall of 1985. Particularly, they had complaints of health violations and unsanitary food management practices. The employees also complained to their supervisor about safety problems including electrical cords lying across floors and water collecting in work areas. The employees voiced complaints about their treatment by the cafeteria manager, Marie McDuffie, and about McDuffie's scheduling of work assignments. The employees brought their concerns to the attention of McDuffie and the school principal, Steven Cook. When these efforts proved unsuccessful, the employees took their complaints to the superintendent's personnel staff. A second meeting with Cook and McDuffie was arranged on December 6, 1985, a meeting that ended when Cook

> and McDuffie abruptly walked out. On December 10, 1986, the incident most relevant to this case occurred. Cook called one of the cafeteria employees, Carol MacDonald, into his office because he had observed her earlier that day tell a coworker she did not have to perform a task McDuffie had just told the coworker to do. McDonald testified that Cook told her to "keep her mouth shut" about problems in the cafeteria and the rest of the school. He told her that she was not the "straw boss." He said he was tired of her causing trouble and with her being a troublemaker. Cook told her not to discuss problems in the cafeteria with her coworkers.

School Board of Lee County v. Lee County School Bd. Employees, Local 780, AFSCME, 512 So.2d 238, 239-240 (Fla. App. 1 Dist., 1987). The above facts satisfied the requirements of § 447.301 (3).

In the second instance, a related right is to be found in Fla. Stat. § 447.301 (4): "Nothing in this part shall be construed to prevent any public employee from presenting at any time, his or her own grievances, in person or by legal counsel, to his or her public employer . . . ."

Respondent perchance may argue that a charge of sexual-orientation discrimination is not really a grievance because enforcement was specifically excluded from the contractual grievance procedure. However, to parse wording so finely goes beyond existing case law and common sense. The word *grievance* has several dictionary nuances. The legislature could easily have restricted the meaning of the term to the contractual grievance procedure had it chosen to do so, but it did not.

Respondent may argue that the security guard filed the claim, not Petitioner; however, *concerted* and *mutual aid* are the key. Petitioner, to assure protection afforded by *e.g.* the collective bargaining agreement, aided and acted in concert with another employee. He helped someone else; it wasn't personal to him.

Case law does address the protection provided those who assist. First-person filing of a written grievance was not required where "[t]he charge, which was sworn to by Gibbons, stated that during the summer of 1995 Gibbons criticized the management staff in his office on several occasions and that he counseled colleagues regarding their union rights." Gibbons v. State Public Employees Relations Com'n, 702 So.2d 536, 537 (Fla. 2d DCA 1997). Notwithstanding that no grievance had been written, the court found that a prima facie case had been presented under *both* 447.301(3) and (4): "In the present case, Gibbons alleged that he was engaged in protected *activity pursuant to section 447.301(3),(4*), which provides that public employees have the right to engage in concerted activities not prohibited by law for the purpose of collective bargaining or other mutual aid or protection and that they have the right to present grievances to their employer." Gibbons, 702 So.2d at 537 (emphasis added).

B. Adverse Employment Action

1. A Chain Reaction

Respondent says: "Where Appellee'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." *Answer* at 13-14. It is predictable that if one removes and focuses upon two tiles from the mosaic, the rest of the picture will be overlooked. In this case Respondent dispensed with a majority of the facts. There were several discrete protected activities as well as several discrete acts of retaliation. Common sense would suggest that if causality is to be reckoned by temporal proximity, one should link the retaliation to the most recent protected activity. At best, Respondent is taking a monocular view of a three dimensional problem.

What Burlington presents, and what this case presents, is a series of events. There were several threatening and/or adverse employment actions at different times, just as there were separate protected activities. Once Petitioner's principal learned he had assisted a security guard to draft a sexual harassment charge against her — which was the first protected activity — she commenced a series of vindictive actions against him by:

a) Hostilely (threateningly) confronting him — 17 days after his assistance to the security guard. Fearful of the confrontation, Petitioner wrote a grievance (a second protected activity).

b) Declining to write a strong endorsement of Petitioner for Rookie Teacher of the Year Award — 1 day after he filed his grievance; 27 days after his assistance to the security guard.

c) 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 — 1 week after he filed his grievance; 5 weeks after his assistance to the security guard.

d) Placing the announcement on the reverse side of the marquee where passers-by could not see it — 1 week after he filed his grievance; 5 weeks after his assistance to the security guard. Two weeks after that event, Petitioner was summoned by the District to cooperate in the investigation of the charge made by the security guard (a third protected activity).

e) Referring to him as "*the mistake,*" telling others she would get rid of him — two months from his cooperation in the investigation, provided summer recess tolls the elapsed time.

f) Attempting to terminate him for job abandonment eight days after she had signed his medical leave request — three months from his cooperation in the investigation, presuming summer recess tolls the elapsed time.

g) Filing disciplinary charges against him for sharing his computer password even though board policy was merely precatory and no one else had ever been disciplined — the charges were brought three months after his cooperation in the investigation, presuming summer recess tolls the elapsed time. Afterwards Petitioner filed his first unfair labor practice (a fourth protected activity).

h) Humiliating him in front of students and colleagues by having him summarily escorted from the building; inflicting a three day (paid) disciplinary suspension without due process; and involuntarily transferring him to distant school — 28 days after he filed his ULP. Two months later Petitioner was elected union steward (a fifth protected activity).

i) Pressing for 2 weeks disciplinary layoff or discharge — 18 days after he was elected union steward.

Petitioner's argument for causal connection has been two-fold: 1) that there were threatening remarks (that he had helped the security guard, that he was a *mistake*, that she would get rid of him) and that there were threatening actions (attempted termination for job abandonment while on approved leave

and attempted termination relating to password sharing for which no one had ever been disciplined), and 2) close proximity in time to various protected activities. It wasn't merely the involuntary transfer.

2. The Involuntary Transfer

Respondent says: "[I]n his argument Petitioners concedes that a transfer in and of itself does not constitute adverse employment action." *Answer Brief* at 13.

Not exactly. What Petitioner said was:

> Prior to Burlington, the 11th Circuit required that transfers must involve loss of position, title, salary, duties or prestige to qualify as adverse . . . . 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 . . . . Stone & Webster Engineering Corp. v. Herman, 115 F.3d 1568, 1574 (11th Cir. 1997).
>
> 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 . . . .
>
> 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 . . . .
>
> 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 . . . . Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 58 (2006).

Initial Brief at 25-26.

In the past, retaliatory transfer *has* served as an adverse employment action.

> Further, Gibbons alleged that he was thereafter subjected to an adverse employment action, because he was transferred to an office more than fifty miles away from his current office.

Gibbons v. State Public Employees Relations Com'n, 702 So.2d 536, 537 (Fla. 2d DCA 1997) (Gibbons was found to have alleged a prima facie case).

Similarly in this case, 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.

C. **The Burlington Standard**

Respondent says: "While in Title VII cases the standard advanced by Petitioner may be appropriate, it is not fitting for a ULP case presented before PERC."[1] *Answer* at 12. Curiously (because the central issue sub judice is Burlington), neither case law nor argument has been offered to support this naked assertion, and two Florida appellate courts have already disagreed.

The two appellate decisions citing to the Burlington case for support are: Gates v. Gadsden County School Board, 45 So.3d 39, 41 n. 1 (Fla. 1st DCA 2010) *reh'g denied* Sept. 30, 2010 ("anything more than the most petty and trivial actions against an employee should be considered 'materially adverse'"); and Donovan v. Broward County Bd. of Commissioners, 974 So.2d 458, 459 (Fla. 4th DCA 2008) ("foreclosing otherwise available internal remedies because the employee has filed a charge of discrimination with the Florida Commission on Human Relations" was an adverse employment action pursuant to Burlington).

Respondent could have argued, and may yet argue, that a clear bright line is preferable. If an involuntary transfer results in demotion or loss of pay, then it is quantifiable and therefore retaliatory. If otherwise, then it is not. Respondent could have argued that Burlington will just muddy the waters.

[1] Retaliation case law is shared whether the underlying facts implicate race, religion, ethnicity, gender, sexual harassment, age or disability — three laws minimally. What would make that line of case law unfit for PERA is not clear. Two Florida appellate courts have found otherwise.

But no one who is gainfully employed wants to be summarily moved to a remote location for having piqued the boss over the exercise of a legal right. Demotion or no, surrendering six and a half hours of personal time each week and $250.00 of otherwise disposable income each month would be sufficiently important for most of us to make us pause and think twice. If the test for retaliation is whether the action(s) will serve to deter others, it would be hard to argue that none inhere(s) in these facts.

The Supreme Court has said: "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, 68, 126 S. Ct. 2405 (2006). It rejected the idea "that violations [must] involve 'tangible employment action' such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington, 548 U.S. at 64.

A trend is evident. At the moment of this writing, Burlington has been cited 633 times in all jurisdictions. It has been cited favorably or as support by the state courts of **Colorado**, Churchill v. The Univ. Of Colo. At Boulder, No. 09CA1713, slip op. at 47(Colo. Ct. App. 2010); **Delaware**, Conley v. State, No. 08C-09-026 (RBY), slip op. at 17 (Del. Super., 2011); **Florida**, *e.g.* Gates v. Gadsden County

School Board, 45 So.3d 39, 41 n. 1 (Fla. 1st DCA 2010) *reh'g denied* Sept. 30, 2010; **Massachusetts**, King v. City of Boston, 883 N.E.2d 316, 327 n. 11 (Mass. App. Ct. 2008); **New Jersey**, *e.g.* Montalvo v. State Of N.J. No. A-2363-09T3, slip op. at 14 (N.J. Super. 2011); **Ohio**, *e.g.* Wallace v. Mantych Metalworking, 937 N.E.2d 177, 186 (Ohio 2nd DCA 2010); **Tennessee**, *e.g.* Allen v. McPhee, 240 S.W.3d 803, 812 (Tenn. 2007); **Texas**, *e.g.* Texas Youth Commission Evins Regional Juvenile Center v. Garza, No. 13-08-00527-CV (Tex. 13th DCA 2009); and **Washington**, *e.g.* Pedersen v. Snohomish County Center for Battered Women, No. 60275-6-I (Wash. 1st DCA 2008). Undersigned counsel, after diligent search, cannot find any state jurisdiction rejecting Burlington.

The remaining question is whether the Third DCA on the one hand, or the First and Fourth DCA on the other, has the better approach to effectuate the intent of the legislation.

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). 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).

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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 25th day of July 2011, to:

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APPENDIX

TABLE OF ATTACHMENTS

1. *Contract between Miami-Dade County Public Schools and the United Teachers of Dade*, Article I, Section 11 B, page 5, July 1, 2006 – June 30, 2009.