STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACQUES PIERRE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-3937
	)	
SECURITY SERVICES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was held in this case on September 25, 2009, by video teleconference at sites in Tallahassee and Miami, Florida, before Eleanor M. Hunter, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Erwin Rosenberg, Esquire
Post Office Box 416433
Miami Beach, Florida 33141

For Respondent: Ronald G. Polly, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice by retaliating against Petitioner for filing a charge of discrimination.

PRELIMINARY STATEMENT

Petitioner, Jacques Pierre (Mr. Pierre), filed a Charge of Discrimination with the Florida Commission on Human Relations (Commission) dated October 3, 2006. Mr. Pierre alleged retaliation for a previous complaint of discrimination based on race (black) and national origin (Haitian).

The Commission investigated the complaint and on July 2, 2008, issued its "Notice of Determination: Cause." Mr. Pierre timely filed a Petition for Relief with the Commission on July 7, 2008. The Petition with attachments was transmitted to the Division of Administrative Hearings in a letter dated August 12, 2008. Based on a Joint Response to Initial Order, the case was set initially for hearing on October 30, 2008. Due to a conflict in Petitioner's counsel's schedule, Petitioner's Motion for Continuance was granted and the case was re-scheduled for December 15, 2008. On December 1, 2008, Respondent's Motion for Summary Final Order (the Motion) was filed with a Memorandum of Law in Support of the Motion. On December 3, 2008, Petitioner's counsel filed a Motion to Withdraw as Attorney for Petitioner, in order to testify on his behalf, and requested a continuance to allow Petitioner to obtain other counsel. The unopposed motion to withdraw was granted and the hearing was rescheduled for March 26, 2009, at 9:00 a.m. No subsequent notice of appearance on Petitioner's behalf was received.

At the time set for the hearing to commence, counsel for Respondent announced his appearance and presented his Motion. In addition to the grounds stated in the written Motion, Respondent's counsel argued that, in effect, a Motion To Dismiss should be granted because Mr. Pierre failed to respond to the Motion, and failed to appear for the hearing. The hearing was postponed for 15 minutes. At the end of that time, Mr. Pierre did not appear, and the Motion was granted.

After the hearing ended, Respondent's counsel telephoned the undersigned's assistant and notified her that, as he was leaving, he saw that Mr. Pierre had arrived. Over objection of Respondent's counsel, the proceedings were reconvened and Respondent's counsel presented his Motion again. In response, Mr. Pierre asserted that a response to the Motion, in fact, had been filed. To support that claim, he presented the testimony of his former attorney, Erwin Rosenberg, but Mr. Rosenberg confirmed that he had not filed a response to the Motion, most likely because the Motion was filed at approximately the same time that he was withdrawing as counsel. After that hearing, Mr. Rosenberg subsequently filed a Notice of Appearance as counsel for Petitioner and a response to the Motion. The Order granting the Motion was vacated on April 1, 2009, based on the provisions of Florida Administrative Code Rule 28-106.204(4) and Subsection 760.11(6), Florida Statutes (2008). The hearing was

rescheduled and held on September 25, 2009. Proposed Recommended Orders were filed on November 6 and 19, 2009. The Transcript, due on October 9, 2009, was apparently timely received by counsel. The Transcript was not received at the Division of Administrative Hearings until December 16, 2009, after the assistant to the undersigned requested if from counsel for the Respondent.

At the final hearing, Petitioner presented the testimony of Kent Jurney and Jacques Pierre. Petitioner's Exhibits A, B, C, D, and E were received in evidence. Respondent's Exhibits 1 and 2, Petitioner's depositions, were received in evidence. Respondent presented no witnesses and made an ore tenus Motion for a Directed Verdict at the close of Petitioner's case, arguing that Petitioner failed to establish the third prong of a prima facie case of retaliation. The Motion was denied. Respondent rested its case.

FINDINGS OF FACT

1. Petitioner, Jacques Pierre (Petitioner or Mr. Pierre) is black and his national origin is Haitian. He has worked in the United States for 24 years. On or about January 25, 2006, Mr. Pierre filed with the Equal Employment Opportunity Commission (EEOC) a charge of discrimination against his employer, Respondent, SSA Security, Inc., a/k/a Security

Services of America, a California Corporation (Respondent or SSA).

2. SSA, under a subcontract with a federal government contractor, Alutiiq-Mele, provided security services for a federal building in Miami. SSA continued to employ Petitioner as a security guard when it took over the contract from his previous employer, Superior Protection. Contractors and managers changed, in the past, but the security guards stayed the same.

3. On August 10, 2006, and August 15, 2006, first Mr. Pierre, then a representative for SSA signed an agreement to settle the EEOC complaint. With a letter dated August 23, 2006, Mr. Pierre received a settlement check in the amount of $1,257.04, and he was advised to report any future unlawful harassment or discrimination charges by use of a "Harassment Hotline and [to] speak with your local area manager, Barry Hirsch [sic]." Captain Barry Hersch was Mr. Pierre's immediate supervisor. The agreement was approved, in principle, by Kent Jurney, Sr., an SSA corporate officer. The language of the agreement is, in relevant part, as follows:

> 1. Removal of all Disciplinary Notices in File. Company agrees to remove all writings related to disciplinary actions taken against Employee from Employee's personnel file maintained by the Company. Employee understands that the removal of said documents does not prevent the Company from

> issuing disciplinary notices and/or taking disciplinary action against Employee as necessary in the future should Employee violate the Company's rules of [sic] policies.
>
> * * *
>
> 4. Confidentiality Clause. The Employee and the Company agree to the following confidentiality and non-disclosure agreement:
> (a) The parties represent and agree that they will keep the terms and amount of this agreement completely confidential. The parties will not hereafter disclose any information concerning this agreement to anyone, including but not limited to, any past, present or prospective employee of the Company or any prospective employer of the Employee.

4. On August 25, 2006, the federal government changed the requirements in the contract. No longer would security guards be allowed to take breaks at the start or end of their shifts, but only during the middle. Mr. Pierre was made aware of the change. In violation of the requirement, on September 1, 2006, Mr. Pierre took his break at the end of his shift.

5. The federal government contract also prohibited security guards from being on the work premises more than 30 minutes before or after their shifts. On August 28, 2006, Mr. Pierre returned to his work site and entered the building more than 30 minutes after his shift to retrieve keys and a telephone charger. Mr. Pierre also got into a loud and profane argument with another worker during his unauthorized return to

the building. Mr. Pierre admitted he had an incident where he got into an argument with and "fired back" at a supervisor in 1995 or 1996.

6. Beginning on or about July 10, 2006, Petitioner began to request, but initially was denied, leave. Mr. Pierre was feeling threatened and harassed by his supervisors and was suffering physically as a result. On a form dated August 25, 2006, Mr. Pierre said he was requesting leave from September 11 to September 25, with a return date of September 27, 2006. Spaces on the form to indicate whether it was approved or disapproved, and by whom are blank. As the reason for the request, Mr. Pierre indicated "stress related: as a result of retaliation." This time, Captain Hersch, approved the request and Mr. Pierre went on vacation in September 2006.

7. On September 5, 2006, as instructed by Mr. Jurney, another Miami supervisor, Bill Graham, issued a memorandum to Mr. Pierre requiring him to attend a mandatory meeting "about several important issues and notifying him of his "temporary removal from the schedule until this meeting has taken place." Copies of the memorandum were sent to Mr. Jurney and Captain Hersch. The evidence is insufficient to determine if other security guards who violated the same rules were subjected to the same consequences, or if discipline was uniformly applied. Mr. Pierre requested, either through his supervisor, Captain

Hersch, or directly to Mr. Graham, that the attorney who handled his EEOC complaint and settlement agreement be allowed to attend the meeting with him. Mr. Jurney denied the request. Because he never attended a meeting, Mr. Pierre remained "off the schedule." For the remainder of 2006 and in early 2007, he was working part-time only at his second job with the State Department of Corrections. Mr. Pierre's income was reduced from $15 an hour ($17 minus $2 for insurance) for 40-hour weeks with SSA, plus $1,000 every two weeks from Corrections to only his Corrections pay. The evidence is insufficient to determine how long Mr. Pierre was, or if he still has, a lower income and what, if any, efforts he has taken to secure alternate employment to mitigate damages. SSA supposedly notified Mr. Pierre, in a memorandum dated September 22, 2006, that he was suspended without pay for two weeks for his rule violations and his failure to attend the mandatory meeting. The authenticity of the memorandum was questioned, and no witnesses testified to sponsor it or to explain why it was necessary, given the fact that Mr. Pierre was already "off the schedule."

8. On October 3, 2006, Mr. Pierre filed a charge of retaliation with the Florida Commission on Human Relations which, on July 2, 2008, found that reasonable cause existed to believe that an unlawful employment practice had occurred.

9. In the fall of 2006, Mr. Pierre applied for a job with the Miami-Dade Corrections and Rehabilitation Department (Miami-Dade). It was his understanding that his background investigation had been successfully completed, but that SSA had not responded to a reference form. Mr. Pierre took the form to SSA. The form, dated October 4, 2006, was completed by Captain Hersch, who responded, in relevant part, as follows:

> 3. Reason for termination (voluntary/fired)? NON APPLICABLE
> 4. Describe the applicant's work performance. GENERALLY ACCEPTABLE
> 5. Describe the applicant's attendance record. GOOD OVERALL
> 6. Was the applicant ever disciplined for any reason? If YES, please explain. YES CONFIDENTIAL."
> 7. Is applicant able to work well with others? YES
> 8. Is applicant trustworthy? YES
> 9. Describe applicant's work habits? KNOWS HIS JOB, AND DOES IT
> 10. Is applicant eligible for re-employment? If NO, please explain why. STILL EMPLOYED

10. There is no explanation why Captain Hersch mentioned the confidential agreement, but not the subsequent disciplinary actions that were the focus of concern to Mr. Jurney and Mr. Graham, which could have been disclosed without violating the agreement. Based on the earlier assurances from Miami-Dade, Mr. Pierre, having put "no" when asked about discipline of his job application, believes the contradictory response from SSA caused him not to get the job. He received a letter informing

him, but without giving specific reasons, that he was not hired by Miami-Dade. He failed to prove the correctness of his belief. Mr. Pierre testified, but presented no supporting evidence, that he could have earned up to $120,000 a year with Miami-Dade.

11. SSA received notice on the second anniversary of its contract, in October 2006, that the federal government contract would not be renewed. Some time in 2007, most likely in February, at Mr. Pierre's request, he met with Mr. Jurney. It was not until that meeting, Mr. Pierre remembered, that Mr. Jurney had someone remove pre-settlement discipline records from his personnel file. By that time, SSA no longer had a contract with the federal government and was transferring its personnel over to work for the next contractor, Alutiiq. Mr. Pierre asked to be transferred and Mr. Jurney testified that he contacted someone at Alutiiq and asked for Mr. Pierre to be interviewed, but the evidence is insufficient to support a finding that SSA attempted to transfer Mr. Pierre to Alutiiq, or what the routine procedures were for transferring security guards. When Mr. Pierre found out that the necessary paperwork was never sent from SSA to Alutiiq, he tried unsuccessfully for two or three weeks to contact SSA. It is reasonable to believe that SSA, while not allowing Mr. Pierre to work, would not help him transfer over to the next contractor. Mr. Pierre was not

transferred and was not employed by Alutiiq. Mr. Jurney testified unconvincingly that he made non-federal contract job offers to Mr. Pierre and Mr. Pierre found the offers acceptable, "but he didn't accept them." It is inconceivable that Mr. Pierre, who has three children to support and a wife who works part-time, would have rejected any legitimate job offer at that time. Mr. Pierre and Mr. Jurney, a former highway patrol trooper and member of an advisory board for the Florida Highway Patrol, discussed Mr. Pierre's desire to be a trooper. Mr. Jurney offered to assist him but that employment never materialized.

12. As a corporate officer, Mr. Jurney was responsible for overseeing hundreds of contracts involving 1,500 employees. He was senior to Mr. Graham and Captain Hersch. Yet, once he authorized the EEOC settlement, he became directly involved in the decision-making concerning discipline and consequences for Mr. Pierre. There is no evidence that Mr. Pierre had ever come to his attention before he approved the settlement.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

14. Petitioner had the burden of proving, at the administrative hearing held in this case, that he was the victim

of the unlawful "retaliation" alleged in his Complaint. See Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue.").

15. The Florida Civil Rights Act of 1992 (Act) is codified in Sections 760.01 through 760.11, Florida Statutes. The Act, as amended, was patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq. The "anti-retaliatory provisions" of the Act are found in Subsection 760.10(7), Florida Statutes, which provides as follows:

> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

The provisions of (Subsection 760.10(7)) are almost identical to the federal counterpart, 42 U.S.C. 2000e—3(a); therefore, Florida Courts follow federal law when examining retaliation claims. Carter v. Health Management Associates, 989 So. 2d 1258 (Fla. 2d DCA 2008).

16. "Courts have commonly referred to [these anti-retaliatory] provisions [of Section 760.10(7), Florida Statutes] as the participation and opposition clauses." Guess v. City of Miramar, 889 So. 2d 840, 846 (Fla. 4th DCA 2004). "Cases (like this one) involving retaliatory acts committed after the employee has filed a charge with the relevant administrative agency usually arise under the participation clause." Carter, 989 So. 2d at 1263.

17. Retaliatory acts prohibited by Section 760.10(7), Florida Statutes, amount to intentional discrimination. See Stubbs v. Department of Transportation, No. 02-1437, 2002 Fla. Div. Adm. Hear. LEXIS 1366 *20 (Fla. DOAH October 3, 2002). The protection against retaliation extends to former employees. Robinson v. Shell Oil Co., 519 U.S. 337, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

18. "Discriminatory [or retaliatory] intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001); see also United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 (1983)("As in any lawsuit, the plaintiff [in a Title VII action] may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves.").

19. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory [or retaliatory] intent without resort to inference or presumption." King v. La Playa-De Varadero Restaurant, No. 02-2502, slip op. at 15 n.9 (Fla. DOAH February 19, 2003)(Recommended Order); see also Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004). "If the [complainant] offers direct evidence and the trier of fact accepts that evidence, then the [complainant] has proven discrimination [or retaliation]." Maynard v. Board of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). In this case, Petitioner has not offered direct evidence of retaliation.

20. Courts have recognized that "direct evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997).

21. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the "shifting burden framework established by the [United States] Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d

207 (1981)" is applied. "Under this framework, the [complainant] has the initial burden of establishing a prima facie case of discrimination. If [the complainant] meets that burden, then an inference arises that the challenged action was motivated by a discriminatory intent. The burden then shifts to the employer to 'articulate' a legitimate, non-discriminatory reason for its action. This burden of rebuttal "is merely one of production, not persuasion, and is exceedingly light." Verna v. Public Health Trust, 539 F. Supp. 2d 1340, 1354 (S.D.Fla. 2008). (citing Mont-Ros, 111 F. Supp. 2d at 1349-1350 (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (U.S. 1981); and Lee v. Russell County Bd. of Educ, 684 F.2d 769, 773 (11th Cir. 1982)). If the employer successfully articulates such a reason, then the burden shifts back to the [complainant] to show that the proffered reason is really pretext for unlawful discrimination." Schoenfeld, 168 F.3d at 1267 (citations omitted); see also Ruby v. Springfield R-12 Public School District, 76 F.3d 909, 911 (8th Cir. 1996)("Ruby's retaliation claims are also analyzed under this shifting burden framework."); and Brewer v. AmSouth Bank, No. 1:04CV247-P-D, 2006 U.S. Dist. LEXIS 35762 *25 (N.D. Miss. May 25, 2006)("Analysis of a retaliation claim proceeds under the same McDonnell Douglas-Burdine shifting burden framework as other claims arising under Title VII.").

22. To establish a prima facie case of retaliation, the Petitioner must show the following: (a) he engaged or participated in a protected activity; (b) he suffered an adverse employment action; and (c) there is some causal link between his protected activity and the adverse employment action. See Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002).

23. Petitioner participated in a protected activity when he complained to the EEOC in January 2006, in a case that was settled in August 2006. He suffered a negative employment action when he was no longer assigned work beginning in September 2006. Respondent conceded that the first two prongs of the test for retaliation have been met.

24. "To meet the causal link requirement, the plaintiff 'merely has to prove that the protected activity and the negative employment action are not completely unrelated.'" See E.E.O.C. v. Reichhold Chemicals, Inc., 988 F.2d 1564, 1571-72 (11th Cir. 1993)). "[T]he causal link requirement . . . must be construed broadly; a plaintiff merely has to prove that the protected activity and the [adverse] employment are not completely unrelated." Carter, 989 at 1263. Cases that demonstrate evidence of a causal link include Hyde v. Storelink Retail Group, Inc., 2007 U.S. Dist. LEXIS 45667, summary judgment denied by Hyde v. StoreLink Retail Group, Inc., 2008

U.S. Dist. LEXIS 108429 (M.D. Fla., Dec. 4, 2008) ("Plaintiff alleges that shortly after October of 2005, she told Human Resources and Storelink owners that she opposed the discriminatory conduct of [her immediate supervisor]. After complaining to Defendant about [him], Plaintiff began to receive disparaging write-ups and by March 28, 2006, [her supervisor] had fired her. In light of Plaintiff's ten years of favorable evaluations, these events occurring after her complaints are sufficient to support a prima facie claim for retaliation under Title VII."); Hinton v. Supervision Int'l, Inc., 942 So. 2d 986 (Fla 5th DCA 2006) ("Hinton met all the requirements to demonstrate a prima facie retaliation case. First, Hinton filed a claim with the Florida Commission of Human Relations. Second, she was terminated from her employment after she filed the claim. Third, Hinton was terminated within one hour after the claim was faxed to [the company], after being previously threatened by [a manager] that she would be fired if she wasted any more of his time with her claim that [a supervisor] had engaged in a pattern of sexual harassment."); Mowery v. Escambia County Utilities Authority, 19 Fla. L. Weekly Fed. D 369 ("The third requirement of the prima facie case of retaliation requires a causal connection between the protected expression and the alleged retaliation. To establish [a] causal connection, a plaintiff need only show 'that the protected

activity and the adverse action were not wholly unrelated."); Clover v. Total Systems, Inc., 176 F.3d 1346, 1354 (11th Cir. 1999) (quoting Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir. 1985)) ("Temporal proximity between the protected activity and the adverse employment action may suffice to show a causal connection if there is any other evidence suggesting that the employer-defendant was aware of the protected expression.) Ashmore v. J. P. Thayer Co., 303 F. Supp. 2d 1359, 1373 (D. Ga. 2004) (citing Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993).”); Wideman v Wal-Mart, 141 F.3d 1453 (M.D. Fla. 1998)(“To establish the causal relation element of her prima facie case of retaliation, Wideman need only show "that the protected activity and the adverse action are not completely unrelated." Meeks v. Computer Associates Intern., 15 F.3d 1013, 1021 (11th Cir.1994) (quoting EEOC v. Reichhold Chem., Inc., 988 F.2d 1564 at 1571-72 (11th Cir.1993)). She has done that by presenting evidence that Wal-Mart knew of her EEOC charge--she testified that she informed her Wal-Mart managers on February 10, 1995, that she had filed an EEOC charge of discrimination the day before--and that the series of adverse employment actions commenced almost immediately after management learned she had filed the charge. See Donnellon v. Fruehauf Corp., 794 F.2d 598, 601 (11th Cir.1986) ("The short period of time [(one month)] between the

filing of the discrimination complaint and the . . . [adverse employment action] belies any assertion by the defendant that the plaintiff failed to prove causation."); and Farley v. Nationwide Mut. Ins. Co., (S.D.Fla. 1999) ("Here, there is no dispute that Farley's two supervisors, Tom Sutterfield and Hugh Glatts, learned of Farley's EEOC charge shortly after its filing. Sutterfield admitted in his deposition that Farley told him about the charge and that he discussed the matter with Glatts. Moreover, a close temporal proximity existed between Farley's termination and his supervisors' knowledge of the complaint. The charge was made May 19, 1995 and Farley was fired seven weeks later on July 10, 1995. We find this timeframe sufficiently proximate to create a causal nexus for purposes of establishing a prima facie case.") Respondent's argument that, as with a claim of discrimination, Petitioner has to demonstrate that, for the third prong, he was treated differently from others is not supported by case law on retaliation.

25. Mr. Jurney's approval of the EEOC settlement that was entered into in August 2006, followed by his personal involvement in Petitioner's discipline beginning in September 2006, intervening over the authority of two intermediate supervisors, establishes a causal link between the protected activity and the adverse employment outcome that is sufficient

to establish a prima facie case of discrimination by retaliation. A prima facie case also exists because of the apparent discrepancy between the relative lack of concern over Petitioner's rule violations by his immediate supervisor, based on his failure to mention the more recent incidents on the reference form, as compared to the consequences faced by Petitioner. If it is possible to infer either that there was or was not discrimination, then the evidence must be rebutted. Jamerson v. Arrow Co., 75 F.3d 1528, 1532 (11th Cir. 1996).

26. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [complainant] remains at all times with the [complainant]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. BT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times."); and Brand v. Florida Power Corp., 633 So. 2d 504, 507 (Fla. 1st DCA 1994)("Whether or not the defendant satisfies its burden of production showing legitimate, nondiscriminatory reasons for the action taken is immaterial insofar as the ultimate burden of persuasion is concerned, which remains with the plaintiff.").

27. Where an administrative law judge does not halt the proceedings "for lack of a prima facie case and the action has been fully tried, it is no longer relevant whether the [complainant] actually established a prima facie case. At that point, the only relevant inquiry is the ultimate, factual issue of intentional discrimination. . . .. [W]hether or not [the complainant] actually established a prima facie case is relevant only in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination." Green v. School Board of Hillsborough County, 25 F.3d 974, 978 (11th Cir. 1994).

28. Although Respondent's motion was denied at the close of Petitioner's case, the instant case was not "fully tried" because Respondent declined to present any evidence other than its two exhibits, Petitioner's depositions, and the testimony elicited on cross-examination of Petitioner's witnesses. Donnellon v. Fruehauf Corp., 794 F.2d 598 (N.D. Ga. 1986). It was at this point in the proceedings, that Respondent had the opportunity to demonstrate that Petitioner was not treated differently from others and that it had a uniform discipline policy. In Texas Department of Community Affairs v. Burdine, however, the Supreme Court observed, that after an employer produced evidence of a legitimate business purpose for its actions and the plaintiff offered no new evidence, "there may be

some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation" and that "this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." Likewise, the cross-examination of Petitioner's witnesses must be considered as possible evidence rebutting the claim of retaliation.

29. Considering the cross-examination elicited in this case, there is insufficient evidence of any uniform application of discipline or that the appropriate discipline for various rule or policy infractions was imposed by Respondent, or that procedures to transfer Petitioner to the next contractor were followed. Assessing the plausibility of Respondent’s position, weighing all the evidence, including the testimony and cross-examination of Petitioner’s witnesses, it is determined that Petitioner established he suffered an adverse employment outcome for filing a discrimination complaint. "Disbelief of the defendant's proffered reasons, together with the prima facie case, is sufficient circumstantial evidence to support a finding of discrimination." Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322 (S.D.Fla. 1999).

30. Consideration of the appropriate remedy is guided by Subsection 760.11(7), Florida Statutes, which provides, in relevant part, as follows:

> (7) If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay. Within 90 days of the date the recommended order is rendered, the commission shall issue a final order by adopting, rejecting, or modifying the recommended order as provided under Sections 120.569 and 120.57. The 90-day period may be extended with the consent of all the parties. In any action or proceeding under this subsection, the commission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action. In the event the final order issued by the commission determines that a violation of the Florida Civil Rights Act of 1992 has occurred, the aggrieved person may bring, within one year of the date of the final order, a civil action under subsection (5) as if there has been a reasonable cause determination or accept the affirmative relief offered by the commission, but not both.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order directing that Respondent cease the

discriminatory employment practice evidenced in this case and awarding Petitioner back pay at the rate of $15.00 an hour for each normal 40-hour work week between September 5, 2006, and the date of the final order, offset by earnings from substitute employment, if any.

DONE AND ENTERED this 27th day of January, 2010, in Tallahassee, Leon County, Florida.

ELEANOR M. HUNTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 27th day of January, 2010.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.