STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALAN MOLLICK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-0093
	)	
UNITECH,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on March 17, 2009, by telephone conference call.

APPEARANCES

For Petitioner: Alan Mollick, pro se
204 Salem Drive
Pennsville, New Jersey 08070

For Respondent: Andrew J. Marchese, Esquire
Marshall Dennehey Warner Coleman
and Googin, P.C.
One East Broward Boulevard, Suite 500
Fort Lauderdale, Florida 33130

STATEMENT OF THE ISSUE

Whether Respondent committed the unlawful employment practice alleged in the employment discrimination complaint

Petitioner filed with the Florida Commission on Human Relations (FCHR) and, if so, what relief should Petitioner be granted.

PRELIMINARY STATEMENT

On June 23, 2008, Petitioner filed a employment discrimination complaint (Complaint) with the FCHR, alleging that Respondent had unlawfully retaliated against him. His Complaint contained the following "Discrimination Statement":

> I believe Unitech did not hire me due to malicious information provided by my previous employer ITT. In January 2008, I went on an interview at Unitech for the position of Software Engineer. I was interviewed by Manager Ed Kaprocki. The interview went exceptionally well and I anticipated being hired. I called Ed Kaprocki, and asked why I was not hired, after finding out I did not get the position. I was told that it was because of my background investigation. He said that there were things that I had "said" which were very bad. I asked him if this was something on the Internet and he said that it was. I then asked him if it was something to do with ITT (itt.com) and his answer was "yes." After that, Mr. Kaprocki became very evasive and I could not gather any more information. It was apparent that Unitech had contacted my previous employer, ITT, without my consent. My resume clearly stated that ITT was not to be contacted for any reason. It is an invasion of privacy to do any background investigation without me signing a consent form, which I was never asked to do. In addition, the reason I did not want ITT to be contacted was that I had known for over a year that I was being blacklisted by the company in retaliation for a previous EEOC complaint filed after my

> termination. The reason for not contacting ITT was explained to Mr. Kaprocki during my interview.

On December 3, 2008, the FCHR, following the completion of its investigation of the Complaint, issued a Notice of Determination: No Cause. Petitioner, on January 5, 2009, filed with the FCHR a Petition for Relief (Petition), in which he alleged that "Respondent ha[d] violated the Florida Civil Rights Act of 1992, [a]s [a]mended, in the manner specifically described below":

> Denied employment in retaliation for me filing an EEOC complaint against a previous employer, or other discrimination. Invasion of privacy in an attempt to find excuses not to hire me (Google search).

He further stated in the Petition the following:

> THE DISPUTED ISSUES OF MATERIAL FACT, IF ANY, ARE AS LISTED BELOW:
>
> Respondent's statements indicate that I do not communicate well, am not a team player, and somehow, that I am a bad person, all of which is not true. Therefore, I was not hired due to retaliation or discrimination due to a disability but NOT for the reasons given by respondent.
>
> THE ULTIMATE FACTS ALLEGED & ENTITLEMENT TO RELIEF ARE AS LISTED BELOW:
>
> I was the victim of blacklisting prior to interviewing at Unitech. Unitech was made aware that I had filed an EEOC complaint against my former employer. Unitech perpetuated the blacklisting, then came up with other excuses for not hiring me. Seek relief=$100K or job.

On January 8, 2009, the FCHR referred the matter to DOAH for the assignment of a DOAH administrative law judge to "conduct all necessary proceedings required under the law and submit recommended findings to the [FCHR]." The undersigned was thereafter assigned the case, and he scheduled a final hearing for March 17, 2009. On March 5, 2009, Respondent filed a Motion for Summary Final Order, arguing that "no genuine issue of material fact exists in this case, and the record evidence clearly shows that UNITECH is entitled to judgment as a matter of law."

On March 6, 2009, the undersigned issued an Order Denying Motion for Summary Final Order, which provided, in pertinent part, as follows:

> A motion for summary final order may be granted only in those cases where the administrative law judge has final order authority. § 120.57(1)(h)("Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact."). Because he does not have final order authority in the instant case, the undersigned cannot grant the relief Respondent has requested. Moreover, the undersigned is unable to state with confidence from a review of the record, as it now exists, that "no genuine issue of material fact exists in this case." (There is case law supporting the proposition that the refusal to hire a prospective employee "because that person pursued a

discrimination charge against another employer . . . constitute[s] unlawful retaliation." See Jones v. GES Exposition Services, No. 02 C 6243, 2004 U.S. Dist. LEXIS 6665 *15-16 (N.D. Ill. April 15, 2004) and the cases cited therein.) Accordingly, neither may the undersigned relinquish jurisdiction of the instant matter to the FCHR pursuant Section 120.57(1)(i), Florida Statutes, which provides as follows:

> "When, in any proceeding conducted pursuant to this subsection, a dispute of material fact no longer exists, any party may move the administrative law judge to relinquish jurisdiction to the agency. An order relinquishing jurisdiction shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists. If the administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge. An order entered by an administrative law judge relinquishing jurisdiction to the agency based upon a determination that no genuine dispute of material fact exists, need not contain findings of fact, conclusions of law, or a recommended disposition or penalty."

In view of the foregoing, Respondent's Motion for Summary Final Order is hereby DENIED.

As noted above, the final hearing in this case was held on March 17, 2009. Two witnesses, Petitioner and Edward Kaprocki,

testified at the hearing. In addition, nine exhibits (Petitioner's Exhibits 1 through 4, and Respondent's Exhibits 1 through 5) were offered and received into evidence.

At the close of the evidentiary portion of the hearing, the undersigned, on the record, set the deadline for filing proposed recommended orders at 30 days from the date of the filing of the hearing transcript with DOAH.

The Transcript of the final hearing (consisting of one volume) was filed with DOAH on April 9, 2009. Accordingly, proposed recommended orders had to be filed no later than Monday, May 11, 2009.

Respondent filed its Proposed Recommended Order on May 7, 2009. To date, Petitioner has not filed any post-hearing submittal.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Petitioner is a software engineer with almost 30 years of experience in the industry.

2. From 2001 until August of 2006, Petitioner was employed by ITT Industries (ITT).

3. Petitioner's employment with ITT came to an end when he was involuntarily terminated.

4. Following his termination, Petitioner filed an employment discrimination complaint with the federal Equal Employment Opportunity Commission (EEOC) alleging that ITT had discriminated against him because he suffered from Tourette's syndrome (which caused him to have vocal tics and to stutter).

5. Petitioner did not take any action to pursue these allegations of employment discrimination beyond filing this complaint against ITT with the EEOC.

6. Petitioner has been unable to obtain a "permanent job" as a software engineer since his termination by ITT.

7. Respondent is a defense contractor that "make[s] [military] simulation and training equipment."

8. In early 2008, Respondent was looking to fill a temporary software engineer position.

9. Edge Dynamics was one of the outside employment agencies that Respondent used to assist it in the hiring process.

10. On January 9, 2008, Edge Dynamics provided Petitioner's resume to Edward Kaprocki, a senior principal software engineer with Respondent. Mr. Kaprocki was responsible for interviewing applicants for the position and making hiring/rejection recommendations.

11. After reviewing Petitioner's resume, Mr. Kaprocki "thought [it] looked interesting enough where it would worth

talking to [Petitioner]," and he so advised Sandra Asavedo, his "point of contact" at Edge Dynamics.

12. Ms. Asavedo made the necessary arrangements to set up a face-to-face interview between Mr. Kaprocki and Petitioner.

13. The interview took place in Mr. Kaprocki's office on January 14, 2008. It lasted about 45 minutes to an hour.

14. Petitioner seemed to Mr. Kaprocki to be "a little bit nervous," but Petitioner did not do or say anything to cause Mr. Kaprocki to believe that Petitioner suffered from any disability.

15. During the course of the interview, Petitioner showed Mr. Kaprocki his personal website, which contained information about and pictures of "some of the projects that [Petitioner] had worked on."

16. Based on the interview, Mr. Kaprocki determined that Petitioner did not have the skill-set that was needed for the position Respondent was seeking to fill.

17. Immediately following the interview, Mr. Kaprocki went to his supervisor, Steve Preston, whose office was "right down the hall," and recommended that Petitioner not be hired to fill the position.

18. Mr. Kaprocki then telephoned Ms. Asavedo to let her know that Petitioner was not going to be hired so that she could inform Petitioner.

19. Mr. Kaprocki's decision to recommend against hiring Petitioner had nothing to do with Petitioner's suffering from Tourette's syndrome or his having filed an EEOC complaint against ITT. Indeed, at the time he made his decision, Mr. Kaprocki did not even know that Petitioner had Tourette's syndrome or had filed an EEOC complaint against ITT. Mr. Kaprocki first learned of these matters only after Petitioner had filed his Complaint in the instant case.

20. After being told that he would not be hired for the position, Petitioner telephoned Mr. Kaprocki several times, pleading with Mr. Kaprocki to "reconsider hiring him." Mr. Kaprocki told Petitioner "that the decision had been made" and would not be reconsidered.

21. Mr. Kaprocki felt that Petitioner, by making these telephone calls, was "badgering and harassing him."

22. To satisfy his own personal curiosity (and for no other reason), Mr. Kaprocki looked online to find out more about the person who was subjecting him to this "badgering and harass[ment]."[2]

23. Mr. Kaprocki did not discover, as a result of his online search, that Petitioner had Tourette's syndrome or that Petitioner had filed an EEOC complaint against ITT.

24. His search, however, did reveal certain comments Petitioner had made in an online forum that Mr. Kaprocki

considered to be "extremely unprofessional." After reading these comments, Mr. Kaprocki was even more confident than he had been before he began his search that he had made the right decision in not recommending Petitioner for employment.

25. Petitioner was never offered a position with Respondent.

CONCLUSIONS OF LAW

26. The Florida Civil Rights Act of 1992 (Act) is codified in Sections 760.01 through 760.11, Florida Statutes, and Section 509.092, Florida Statutes. "The Act, as amended, was [generally] patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Federal case law interpreting [provisions of] Title VII and the ADEA is [therefore] applicable to cases [involving counterpart provisions of] the Florida Act." Florida State University v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); see also Carter v. Health Management Associates, 989 So. 2d 1258, 1262 (Fla. 2d DCA 2008)("Because this provision of the FCRA [Section 760.10(7), Florida Statutes] is almost identical to its federal counterpart, 42 U.S.C. § 2000e-3(a), Florida courts follow federal case law when examining FCRA retaliation claims.").

27. Among other things, the Act makes certain acts "unlawful employment practices" and gives the FCHR the

authority, if it finds following an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, that such an "unlawful employment practice" has occurred, to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay."[3] §§ 760.10 and 760.11(6), Fla. Stat.

28. To obtain such relief from the FCHR, a person who claims to have been the victim of an "unlawful employment practice" must, "within 365 days of the alleged violation," file a complaint ("contain[ing] a short and plain statement of the facts describing the violation and the relief sought") with the FCHR, the EEOC, or "any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80." § 760.11(1), Fla. Stat. This 365-day period within which a complaint must be filed is a "limitations period" that can be "be equitably tolled, but . . . only [based on the] acts or circumstances . . . enumerated in section 95.051," Florida Statutes. Greene v. Seminole Electric Co-op., Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997).

29. "[T]o prevent circumvention of the [FCHR's] investigatory and conciliatory role, only those claims that are fairly encompassed within a [timely-filed complaint] can be the subject of [an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes]" and any

subsequent FCHR award of relief to the complainant. Chambers v. American Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994).

30. In the instant case, Petitioner alleged in the employment discrimination complaint that he filed with the FCHR on June 23, 2008, that Respondent's failure to have hired him for the temporary software position for which he interviewed earlier that year constituted unlawful "retaliation."

31. The "anti-retaliatory provisions" of the Act are found in Section 760.10(7), Florida Statutes, which provides as follows:

> 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.

"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). "The FCRA's opposition clause protects employees who have opposed unlawful employment practices. . . . The FCRA's participation clause protects an employee from retaliation if he or she made a charge, testified, assisted, or participated in any manner in an

investigation, proceeding, or hearing under the FCRA." Carter, 989 So. 2d at 1263 (internal quotation marks omitted). "Cases involving retaliatory acts committed after the employee has filed a charge with the relevant administrative agency usually arise under the participation clause." Id.

32. 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.'"); and Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974)("[T]he burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'").

33. Retaliation prohibited by Section 760.10(7), Florida Statutes, amounts 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)(Recommended Order)("The retaliation claim fails because Mr. Stubbs did not establish that he engaged in any statutorily protected activity nor that there was any discriminatory animus."); cf. Jackson v.

Birmingham Board of Education, 544 U.S. 167, 178 (2005)("[T]he text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional 'discrimination' 'on the basis of sex.' We reach this result based on the statute's text. In step with Sandoval, we hold that Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.").

34. "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.").

35. "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)("Direct

evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.'"). "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).

36. "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate [or retaliate]' on the basis of some impermissible factor. . . . If an alleged statement at best merely suggests a discriminatory [or retaliatory] motive, then it is by definition only circumstantial evidence." Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Likewise, a statement "that is subject to more than one interpretation . . . does not constitute direct evidence." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997).

37. "[D]irect 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).

38. 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.[4] 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.").

39. "To establish a prima facie [case of] retaliation under [Section 760.10(7), Florida Statutes] a [complainant] must

demonstrate: 1) he engaged in statutorily protected activity; 2) he suffered an adverse employment action; and 3) there is a causal relation between the two events." Guess, 889 So. 2d at 846.

40. "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.").

41. Where the 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)(citation omitted); see also Aikens, 460 U.S. at 713-715 ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non. . . . [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection [as a candidate for promotion], the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.' After Aikens presented his evidence to the District Court in this case, the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience. The District Court was then in a position to decide the ultimate factual issue in the case. . . .

Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'")(citation omitted); Beaver v. Rayonier, Inc., 200 F.3d 723, 727 (11th Cir. 1999)("As an initial matter, Rayonier argues it is entitled to judgment as a matter of law because Beaver failed to establish a prima facie case. That argument, however, comes too late. Because Rayonier failed to persuade the district court to dismiss the action for lack of a prima facie case and proceeded to put on evidence of a non-discriminatory reason--i.e., an economically induced RIF--for terminating Beaver, Rayonier's attempt to persuade us to revisit whether Beaver established a prima facie case is foreclosed by binding precedent."); and Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1129 (11th Cir. 1984)("The plaintiff has framed his attack on the trial court's findings largely in terms of whether the plaintiff made out a prima facie case of discrimination. We are mindful, however, of the Supreme Court's admonition that when a disparate treatment case is fully tried, as this one was, both the trial and the appellate courts should proceed directly to the 'ultimate question' in the case:

'whether the defendant intentionally discriminated against the plaintiff.'").

42. The instant case was "fully tried," with Petitioner and Respondent having both presented evidence.

43. A review of the evidentiary record reveals no proof of prohibited intentional discrimination in the form of retaliation on Respondent's part.[5] Indeed, although not required to do so, Respondent affirmatively established through its evidentiary presentation that, in not hiring Petitioner, it was motivated by legitimate business considerations, not by a desire to retaliate against Petitioner for having filed an EEOC employment discrimination complaint against his previous employer, ITT.[6]

44. In light of the foregoing, Respondent's employment discrimination complaint must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the FCHR issue a final order finding Respondent not guilty of any unlawful employment practice alleged by Petitioner and dismissing Petitioner's employment discrimination complaint.

DONE AND ENTERED this 14th day of May, 2009, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of May, 2009.

ENDNOTES

[1] All references to Florida Statutes in this Recommended Order are to Florida Statutes (2008).

[2] Mr. Kaprocki did not need any more information about Petitioner to make a hiring/rejection recommendation. He had already decided that Petitioner would not be a "good fit for the position" and, based on this determination, had recommended against hiring Petitioner.

[3] The FCHR, however, has no authority to award monetary relief for non-quantifiable damages. See City of Miami v. Wellman, 976 So. 2d 22, 27 (Fla. 3d DCA 2008)("[N]on-quantifiable damages . . . are uniquely within the jurisdiction of the courts."); and Simmons v. Inverness Inn, No. 93-2349, 1993 Fla. Div. Adm. Hear. LEXIS 5716 *4-5 (Fla. DOAH October 27, 1993)(Recommended Order)("In this case, petitioner does not claim that she suffered quantifiable damages, that is, damages arising from being terminated from employment, or from being denied a promotion or higher compensation because of her race. Rather, through argument of counsel she contends that she suffered pain, embarrassment, humiliation, and the like (non-quantifiable damages) because of racial slurs and epit[he]ts

made by respondents. Assuming such conduct occurred, however, it is well-settled in Florida law that an administrative agency (as opposed to a court) has no authority to award money damages. See, e. g., Southern Bell Telephone & Telegraph Co. v. Mobile America Corporation, Inc., 291 So. 2d 199 (Fla. 1974); State, Dept. of General Services v. Biltmore Construction Co., 413 So. 2d 803 (Fla. 1st DCA 1982); Laborers International Union of N.A., Local 478 v. Burroughs, 541 So. 2d 1160 (Fla. 1989). This being so, it is concluded that the Commission cannot grant the requested relief, compensatory damages.").

[4] "To 'articulate' does not mean 'to express in argument.'" Rodriguez v. General Motors Corporation, 904 F.2d 531, 533 (9th Cir. 1990). "It means to produce evidence." Id.; see also Mont-Ros v. City of West Miami, 111 F. Supp. 2d 1338, 1349 (S.D. Fla. 2000)("This burden is merely one of production, not persuasion, and is exceedingly light.").

[5] Petitioner's mere subjective belief that he was unlawfully retaliated against by Respondent, however sincere that belief may be, does not constitute proof that there actually was such retaliation. See Adair v. Charter County of Wayne, 452 F.3d 482, 491 (6th Cir. 2006)("Subjective beliefs, without affirmative evidence, are insufficient to establish a claim of retaliation."); Little v. Republic Refining Co., Ltd., 924 F.2d 93, 96 (5th Cir. 1991)("Little points to his own subjective belief that age motivated Boyd. An age discrimination plaintiff's own good faith belief that his age motivated his employer's action is of little value."); Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983)("We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief."); and Bowers v. City of Galveston, No. G-06-409, 2009 U.S. Dist. LEXIS 15439 *22 (S.D. Tex. Feb. 26, 2009)("Although Bowers believes this action was taken in retaliation for allegedly speaking out on issues of compliance with Department of Transportation laws, she offers no facts to support her conclusory allegations. Bowers subjective belief that she was a victim of retaliation is insufficient to support the claim.").

[6] Section 760.10, Florida Statutes (specifically, Subsection (1)(a) thereof) also "makes it an unlawful employment practice for 'an employer' to discriminate . . . against an individual because of such individual's handicap . . . ." Klonis v. Department of Revenue, 766 So. 2d 1186, 1190 (Fla. 1st DCA 2000). Petitioner did not allege in his June 23, 2008,

Complaint that he was a victim of such discrimination at the hands of Respondent, but he did make such an allegation in the Petition for Relief he subsequently filed with the FCHR. Even assuming that this belated allegation of handicap discrimination made in Petitioner's Petition (but not in his Complaint) could be considered in this proceeding, there is no evidentiary basis upon which to find that Respondent committed such an unlawful employment practice. See, e.g., Porter v. Department of Agriculture and Consumer Services, No. 07-1334, 2007 Fla. Div. Adm. Hear. LEXIS 509 *26-27 (Fla. DOAH September 13, 2007)(Recommended Order)("A prospective employee cannot be discriminated against on the basis of his or her disability unless the prospective employer knows of the disability. As stated in Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928, 932 (7th Cir. 1995), 'At the most basic level, it is intuitively clear when viewing the [Act's] language in a straight forward manner that an employer cannot [take adverse action against] an employee because of a handicap unless it knows of the [handicap]. If it does not know of the [handicap], the employer is [taking adverse action against] the employee because of some other reason.' . . . Absent that knowledge, Respondent's decision not to hire Petitioner must have been 'because of some other reason,' not because of a disability of Petitioner.").

COPIES FURNISHED:

Alan Mollick
204 Salem Drive
Pennsville, New Jersey 08070

Andrew J. Marchese, Esquire
Marshall Dennehey Warner Coleman
and Googin, P.C.
One East Broward Boulevard, Suite 500
Fort Lauderdale, Florida 33130

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.