STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GERMAINE ROGERS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-2803
	)	
CALDER RACE COURSE, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was held in this case on July 28, 2010, by video teleconference at sites in Tallahassee and Miami, Florida, and was concluded by telephone on September 13, 2010, before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Andrew Obeidy, Esquire
Daymon Brody, Esquire
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For Respondent: Eric Isicoff, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice by discriminating against Petitioner and retaliating against him because he complained of racial discrimination.

PRELIMINARY STATEMENT

Petitioner, Germaine Rogers (Rogers), filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) on a form dated December 18, 2009. The EEOC transferred the matter to the Florida Commission on Human Relations (FCHR). Rogers claimed discrimination based on his race (black), and alleged retaliation (demotion and change to the night shift) for his complaints of inequities in overtime work assignments and pay based on race. He alleged that the discrimination occurred from March 1, 2009, through December 15, 2009, but did not indicate that it was continuing.

The FCHR investigated the complaint and, on May 10, 2010, issued its "Notice of Determination: No Cause." Rogers filed a Petition for Relief with the FCHR on May 15, 2010. In the Petition, Rogers requested that the FCHR re-open his case alleging that, in fact, he had been fired from his job on December 15, 2009. The FCHR forwarded the Petition with a narrative attached to the Division of Administrative Hearings (DOAH) on May 24, 2010.

As requested in a Joint Response to Initial Order, the case was set for hearing on July 28, 2010. When the hearing was not completed on July 28, 2010, it was scheduled to continue and was completed on September 13, 2010.

At the final hearing, Petitioner testified on his own behalf. Petitioner's Exhibits 1 (Respondent's Exhibit 13), 2 (Respondent's Exhibit 18), and 3 (Respondent's Exhibit 20) were received in evidence. Respondent presented the testimony of Peggy Kaminski, Richard Sukhu, and Anthony (Tony) Otero. Respondent's remaining Exhibits 1 through 62 were received in evidence. The Transcript of the hearing was filed September 15, 2010. Proposed Recommended Orders were filed on October 28, 2010.

FINDINGS OF FACT

1. Petitioner Germaine Rogers (Petitioner or Rogers) is African-American man.

2. Rogers was hired as a security guard for Respondent Calder Race Course, Inc. (Respondent or Calder) in 1998, He was hired by the Director of Security, Tony Otero, on the recommendation of Assistant Director of Security, Barbara Leurtzing, who interviewed him.

3. At first, Rogers was a seasonal employee who only worked during the part of the year when Calder was open for racing.

Rogers' Complaint

4. By 2009, Rogers was one of five Calder employees with the title of security shift manager. The other four, who are not African Americans, were Leurtzing, Chase Randolph, Uri Ammari, and Tom Cargile.

5. Rogers complained to Otero in person and in emails written in July 2009 and September 2009, as will be explained later in more detail, that he was receiving lower pay and working more than the other four shift managers.

6. In December 2009, Rogers was first moved to more night shift work, then demoted to security guard. After that, his employment was terminated. Circumstances surrounding these events and the exact dates will be discussed in greater detail below, but this is, in essence, the chronology that serves as the basis for Rogers' complaint of discrimination.

Background

7. Rogers began employment at Calder, on April 25, 1998. As a seasonal security guard, he was paid by the hour and earned higher overtime pay when he exceeded forty hours of work.

8. After about two years, Otero promoted Rogers to lieutenant. In 2003, Otero again promoted Rogers, this time to captain.

9. Rogers was an hourly employee until 2005, when both he, Leurtzing, and all supervisors in the security department became

salaried employees. As a salaried employee, Rogers was eligible for annual raises and bonuses but not overtime. Effective April 25, 2005, Rogers' rate of pay, $12.36 an hour, became a weekly rate of $605, and was intended to compensate him as if he were working six days a week because he would no longer earn overtime. Rogers began complaining, nevertheless, about not getting paid overtime.

10. Sometime during 2006, Rogers was required to cover for a vacationing security guard without getting extra pay. Yet, when he missed a day of work, his pay was docked by Leurtzing. She considered him a "no show, no call" for missing the day during the Thanksgiving holiday. Rogers complained to Ken Dunn who was then president of Calder, and he ultimately, received pay for the day he had missed. That year, Rogers also did not receive a bonus. He regularly complained to Otero about perceived pay inequities and unfair treatment.

11. In 2007, Rogers became a security captain/detective and began receiving health insurance. His duties included managing 35 security officers, supervising six officers in the poker surveillance room, and responding to calls from the stables.

12. As security captain/detective, Rogers continued to report directly to Leurtzing who supervised six detectives. Rogers believed, based on the number of people they each

supervised, that he had significantly greater responsibilities than Leurtzing. But she also prepared the payroll for the entire security department. In addition, Leurtzing was Calder's liaison who reported any incidents to their insurance companies. That year, Leurtzing made approximately $40,774, and Rogers made approximately $32,570.

13. In 2008, Leurtzing continued to be the assistant director of security, ranking higher on the organizational chart than Rogers, who was still a security captain. Chase Randolph began work as a security guard, a lower rank than Rogers' with no supervisory responsibilities. Randolph started at $15.70 an hour and, after a raise, ended the year making $16.25 an hour. Because he earned overtime, Randolph made more take-home pay than Rogers approximately ten weeks during the year in 2008. Rogers' total compensation for the year was $34,903, and Randolph's was $33,203.09.

14. Randolph earned overtime until he too became a salaried employee on May 11, 2009. From January through April 2009, Rogers continued to question the fairness of having Randolph receive overtime pay when he did not. Rogers estimates he put in overtime from 13 to 16 hours each week during that same period of time. Randolph made more than Rogers two weeks during 2009, and was paid less for the entire year, in part,

because he resigned from employment with Calder before the end of the year.

15. In addition to issues concerning his pay, Rogers also did not receive the recognition that he thought he deserved. He expected to be recognized more as the employee of the week, especially after he foiled an attempted break-in.

16. On the evening of July 21, 2009, Rogers sent the following e-mail (reproduced as written) to Otero:

> Dear Tony
> I would like to bring to your attention some Concerns of mine. Within the last couple of months I've receive more responsibility but i never ask for a pay raise nor did i receive one. Chase R makes more money than I gary.s receive the same salary as i. With all the new responsibility i did not received or ask for a pay raise. I've advised you over two years ago to put me on a six day salary. It's not faire that i work six days or over fourth hours every week and never getting compensated for it. When you advise me to change my shift to 3 the 11 i thought was no longer responsible for the employee that work the 11 to 7 shift. This e-mail is not in regard to me receiving anymore compensation than i do now it in preference to respect and responsibility as a supervisor and a friend. I'am aware of many security employees that makes equal or grater salaries that does not have the responsibility that I do. Without being out place and out of line I just wanted to informed you of those concerns of mine.
> Sincerely
> Germaine Rogers

17. The next day, in response, Otero wrote the following email:

> Germaine,
> Thank you for expressing your concerns. I was just discussing this very matter with [President of Calder race Course] Tom [O'Donnell] on Monday. Please stop in to see me when you come to work today and we'll talk further.
> Tony

18. When they met, Otero told Rogers that he would have to wait until October to get a pay raise. Otero had already discussed the need for raises for the security staff with O'Donnell in anticipation of their having greater responsibilities when Calder opened a casino in January 2010.

19. In anticipation of the casino opening, Calder hired Tom Cargile and Uri Ammari, both of whom had worked at another casino. They also held the required casino licenses, as did Leurtzing. They were given the same title as Rogers and, as a part of the restructuring, Leurtzing now also held the title of security shift manager, rather than assistant director of security.

20. The four security shift managers now appeared on the organization chart as if they were equal and below Otero's new number two person, Chuck Lang, who was hired in September 2009, because of his casino experience and whose title was security manager. Technically, it appeared that the shift managers

reported to Lang, although, in reality, Rogers apparently continued to report to Otero with whom he had worked for eleven years.

21. In support of his charge of discrimination, Rogers showed that, in 2009, Ammari made approximately $42,500, Leurtzing made $43,000, and Cargile made $55,000, while he (Rogers) made $33,700.

22. Leurtzing had approximately four years' seniority over Rogers at Calder and continued to handle payroll for the security department, and insurance issues. Although relatively new hires with the same title, Ammari and Cargile were establishing procedures for casino, and hiring and training additional security staff for significantly different casino security duties. Rogers had applied for a casino license but had not yet received it. He had no prior casino experience, having only supervised poker room surveillance at Calder. The four security shift managers were not similarly situated based on the different levels of experience and responsibilities.

23. In addition to the desire to earn overtime, Rogers gave other indications that he did not want management responsibilities. On September 1, 2009, Rogers notified Otero and others on the staff that he was "downsizing" his cell phone service and that, as of September 3, 2009, he should be contacted only by Calder e-mail.

24. Otero wrote back, asking "Germaine, How are we supposed to contact you when you're not at the track? Thanks, Tony." Considering it essential to be able to contact supervisors in the security department, Otero helped Rogers to synchronize his phone so that he could use it to receive Calder e-mails.

25. Otero criticized Rogers and Randolph when doors were found unlocked, but Rogers testified that was not his responsibility. Following another occasion when Otero required him to cover for a vacationing security guard, Rogers got upset when Otero offered to have him make up the day by taking off a Wednesday rather than a day of his choice. On September 24, 2009, he sent an e-mail to Otero and Richard Sukhu, the director of surveillance at Calder, who is an African-American. The subject line of the email read "welcome to my world" and the e-mail (reproduced as written) continued as follows:

> Life is so unfair when you're black
> I work more hours than chase [Randolph], but no one in my department have put me up for employee of the week, I ask for a raise I was told wait until October for a raise on a job I have been doing for months, now I am being told wait for a makeup day on a 8 shift I work on 9-22-2009, I am a hard worker And I know my job, it is so sad when you do everything right you get pass over due to race, I am a team player my hours show it, do not reply back, the last time I got stuck working I had to call out sick to get my hours back, if I was paid for the 6 day like I ask 4 years ago I would not feel

> race play apart in this department it is all well in good to ask to work more hours but w[h]ere is the money, most White employee work only 40 hours I have been doing 45 plus for years.

26. Otero forwarded the e-mail to Calder President, Tom O'Donnell, Peggy Kaminski in human resources, and to his deputy, the new security manager, Lang. Kaminski advised Otero not to respond and that she would meet with Rogers. Lang emailed Otero as follows:

> This potential issue will have to be addressed immediately. Not only Peggy, but Tom should be made aware of this letter. I have never seen this type of attitude from a salaried, management employee. This type of attitude could quickly poison a department. It is the exact opposite of what type of culture and experience we are trying to grow here. An option may be to return Germaine back to his hourly status as he suggests. I strongly believe we can not move forward with him as a shift manager in the casino.

27. Lang's e-mail to Otero was also forwarded to O'Donnell and Kaminski. The next day, Kaminski met with Rogers, with Sukhu present. They reviewed Rogers' complaints and offered to move him back to an hourly position, but Rogers declined to agree because it would have been a base pay reduction. According to Kaminski, Rogers said it was about "fairness" not race, so she then addressed performance issues with Rogers. Kaminski told Rogers that his job was in jeopardy and that writing the email did not help his situation. At a follow-up

meeting between Kaminski, Otero, and O'Donnell, the decision was made to have Rogers begin reporting directly to Lang, because he seemed most upset with Otero.

28. Kaminski had a second meeting with Rogers on September 30, 2009, with Otero and Lang present. At that time, Rogers signed a document drafted by Kaminski that provided, in relevant part, he "admitted [at the September 25th meeting] that I was angry with my manager and did not feel that I had been discriminated against for racial reasons. However, I stated that I felt that I have been treated unfairly in the areas of pay and recognition." Rogers further acknowledged that he would be reporting directly to Lang, apparently without knowing the views Lang had expressed about his complaint.

29. Rogers went on vacation from November 24, 2009, until December 1, 2009. After that, he was assigned to five night shifts, which Otero believed he preferred, although Rogers said he had previously been assigned to only three or four night shifts. A guard on his shift was accused of sleeping, but rather than reprimand the guard as directed by Lang, Rogers decided that the guard was not asleep. Rogers worked the night shift, until December 15, 2009, when he claimed Lang terminated his employment.

30. Calder's staff's version of events is supported by the EEOC form Rogers filed and by a document dated December 15,

2009, and signed by Rogers, Lang and Suhku, as a witness entitled a "corrective counseling form." It gave Roger's notice that his position as a security shift manager was being rescinded and that he was being demoted to security officer, consistent with what Lang had previously indicated should be an option. The reasons given were lack of supervision during your shifts, officers not being held accountable on your shift, poor report writing, and inability to counsel team members on your shift.

31. Rogers said he was handed the corrective counseling form at a meeting in Otero's office. Despite what the form said and what he put on his EEOC complaint form, Rogers said Lang told him he was terminated not demoted, and that he was not to return to Calder property without permission from someone at Calder. According to Rogers, Lang also said he should call Kaminski or Otero the following day if he was interested in future employment at Calder.

32. Calder's payroll records tend to support Rogers' claim that he was fired on December 15, 2009, but the explanation that payroll records would only show the last day worked is more reasonable. It is also reasonable that Rogers would have been required to surrender keys and badges that gave him access as a supervisor on December 15, 2009, but that would not necessarily indicate that he was fired rather than demoted.

33. The next day, Rogers called and left a voice-mail message for Kaminski, but Lang returned his call. Lang told him to come for a security officer uniform fitting on December 17, 2009. It is not credible to believe that Lang fired Rogers one day and the next day rehired him.

34. While he was in the uniform room, on December 17, 2009, Rogers saw Sukhu and Otero, who both testified that, when Otero spoke to him, Rogers gave them "the [extended middle] finger." Otero, who had been most supportive of Rogers for eleven years despite his frequent complaints about work pay inequities, kept walking. Sukhu tried to talk to Rogers who indicated that the gesture was aimed at Otero with whom he was extremely angry because Otero did not tell him he was being demoted. On hearing about the obscene gesture, Kaminski called and demanded that Rogers meet with her.

35. According to Rogers, he did not make an obscene gesture. He agreed that, if he had, it would constitute insubordination and is disrespectful behavior that is prohibited in the Calder employee handbook. He acknowledges that Kaminski called him. Because he was already home, Rogers said he "refused to come back to the property" and "advised her I would see her Monday morning when I start my new shift." After that, Otero called Rogers and terminated his employment.

36. Otero's account of the events is the most credible because he had hired Rogers, promoted him over the eleven years they worked together, and is no longer employed by Calder.

ULTIMATE FINDINGS OF FACT

37. Rogers' claim of racial discrimination in treatment is not supported by the evidence. His claim of a disparity in pay is supported by the fact that the three other shift managers who are not African-Americans earned more than he. In response, however, Calder showed legitimate differences in the qualifications and responsibilities of the shift managers, and that higher compensation for the other three was justified.

38. Circumstantial evidence from which one could draw an inference of retaliatory intent consists of Lang's email and Kaminski's statement that his job was in jeopardy and the email did not help. But Lang's email also addressed legitimate business concerns. In the end, it was his unwillingness to act as a supervisor that caused Rogers to be demoted. (He was fired for insubordination on December 17, 2009, by Otero, the same person who had hired and promoted him.)

CONCLUSIONS OF LAW

39. 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).[1]

40. Petitioner has the burden of proving, at the administrative hearing held in this case, that he was the victim of the unlawful discrimination and retaliation alleged in his Complaint.[2] 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.")

41. The Florida Civil Rights Act of 1992 (FCRA) 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. Therefore, Florida Courts follow federal law when examining discrimination and retaliation claims. Carter v. Health Management Associates, 989 So. 2d 1258 (Fla. 2d DCA 2008). Section 760.10(1)(a) is as follows:

> It is an unlawful employment practice for an employer:
>
> To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

42. To establish a prima facie case of racial discrimination based on disparate treatment, Petitioner must

show the following: (a) he belongs to a racial minority; (b) he was subjected to an adverse employment action; (c) he was qualified for his position; and (d) the employer treated similarly situated employees outside the protected class more favorably. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

43. In this case, Petitioner clearly met the first two prongs of the test. He is an African-American and he was demoted. Petitioner showed that, at least temporarily, it appeared that Respondent found him qualified for promotion to shift manager and paid him less than other employees with the same title who were outside his protected minority group. However, Respondent showed, in rebutting that evidence, that the other managers were, in fact, more qualified. Petitioner was neither qualified nor willing to accept the responsibilities of the position. In that regard, any presumption of discrimination was overcome. See Ford v. Minteq Shapes and Services, Inc., 587 F.3d 845, 878 (7th Cir. 2009); and Knight v. Baptist Hospital of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003).

44. The "anti-retaliatory provisions" of the Act are found in subsection 760.10(7), Florida Statutes, which provides that:

> 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.

45. 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).

46. Petitioner engaged in a protected activity when he claimed racial discrimination. He suffered an adverse employment action when he was demoted, and the threat of a demotion and of his job being "in jeopardy" immediately followed his claim of racial discrimination. The issues are, therefore, whether Petitioner's charge of racial discrimination was made with sufficient detail to invoke the protection of the FCRA, and whether a causal link between the charge and his demotion is established.

47. "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).

48. In this case, the opposition clause applies because Petitioner is an employee who "'has opposed any practice made an unlawful employment practice by [Title VII or the FCRA].'" EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000). The nature of his grievance is the very specific allegation that he has worked more for less pay and less recognition than most white employees for four years. See Guess, supra at 847.

49. "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).

50. "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, Case No. 02-2502, 2003 Fla. Div. Adm. Hear. LEXIS 244 (Recommended Order February 19, 2003; 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.

51. 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).

52. "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."); 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.")

53. In this case, an inference could be drawn from Lang's email and from Kaminiski's warning that, because of his complaint of racial discrimination, they intended to demote him, as Lang did less than two months later.

54. 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)).

55. In this case, Respondent demonstrated a legitimate business reason for demoting Petitioner, his inability and unwillingness to perform the duties of the position. See Weaver v. Leon County School Board, Case No. 02-2295, 2002 Fla. Div. Adm. Hear. LEXIS 1440 (Recommended Order August 23, 2001.)

56. 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.").

57. 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."); 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.").

58. Petitioner has failed to discredit Respondent's explanation or to show that it was pretextual.

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 dismissing the charge of discrimination filed by Petitioner in this case.

DONE AND ENTERED this 23rd day of December, 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
Division of Administrative Hearings
this 23rd day of December, 2010.

ENDNOTES

[1]/ References to Florida Statutes are to the 2010 version, unless otherwise indicated.

[2]/ Petitioner did not allege unlawful termination and all findings regarding his termination are included solely to address the claim that he was not demoted but was terminated on December 15, 2009.

COPIES FURNISHED:

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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.