STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VICTORIA MENZ, Petitioner, vs. DR. EMANUEL KONTOS DMD, P.A., Respondent.	)	Case No. 10-9752

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings (DOAH), by its duly-designated Administrative Law Judge (ALJ) Thomas P. Crapps, held a formal hearing in the above-styled case on January 10 and 11, 2011, in St. Petersburg, Florida.

APPEARANCES

For Petitioner: Matthew K. Fenton, Esquire
Wenzel, Fenton, and Cabassa, P.A.
1110 North Florida Avenue, Suite 300
Tampa, Florida 33602

For Respondent: Jeremy W. Rodgers, Esquire
Spector Gadon and Rosen, LLP
390 Central Avenue, Suite 1550
St. Petersburg, Florida 33701

STATEMENT OF THE ISSUES

Whether Respondent violated section 70-54, Pinellas County Code, which prohibits retaliation against a person who has

opposed a discriminatory employment practice, by terminating the Petitioner's employment, and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On August 31, 2009, Petitioner, Victoria Menz (Ms. Menz), filed a Charge of Discrimination against Respondent, Dr. Emanuel Kontos D.M.D., P.A., with the Pinellas County Office of Human Rights. Ms. Menz alleged in the Charge of Discrimination that Respondent had subjected her to "retaliation, sexual harassment and disparate treatment due of my sex (female)."

On September 21, 2010, the Pinellas County Office of Human Rights informed Ms. Menz and Respondent that "there is reasonable cause to believe discrimination has occurred." The determination by the Pinellas County Office of Human Rights informed Ms. Menz and Respondent that, under the county ordinance, the parties had a "final opportunity to engage in conciliation in order to resolve the matter."

On October 13, 2010, the Pinellas County Office of Human Rights informed the parties that, because attempts to conciliate the matter failed, the case would be forwarded to DOAH under sections 70-77 and 70-78, Pinellas County Code.

On October 18, 2010, the Pinellas County Office of Human Rights requested assignment of an ALJ in accordance with section 70-77(e) through (h), Pinellas County Code, and the contract for ALJ services between Pinellas County and DOAH.

On November 12, 2010, ALJ Thomas P. Crapps was assigned to hear the case. On November 15, 2010, a Notice of Hearing was entered, scheduling the administrative hearing for January 10 and 11, 2011, in St. Petersburg, Florida.

At the hearing, Ms. Menz presented the testimony of herself; Valerie Sholtes (Ms. Sholtes); Emanuel Kontos, D.D.S. (Dr. Kontos); Kristen Chase (Ms. Chase); and Randall Weisel, D.D.S. (Dr. Weisel), and introduced Exhibits numbered 3, 4, and 5 into evidence.

Respondent presented the testimony of Cindy O'Leary (Ms. O'Leary), Brenda Little (Ms. Little), Dr. Kontos, and Melissa Marchese (Ms. Marchese) and introduced Exhibits numbered 1 through 13, 16, 18, 19, 21, 23 through 27, 29 through 31, 34 through 36, 39, 41, 42, and 44 into evidence.

A Transcript of the hearing was ordered and filed with DOAH on February 22, 2011. Respondent filed its Proposed Recommended Order on March 11, 2011, and Ms. Menz filed her Proposed Recommended Order on March 14, 2011.

The undersigned issued a Recommended Order on May 12, 2011. Neither party filed any exceptions to the Findings of Fact or Conclusions of Law in the Recommended Order. May 23, 2011, was the deadline for filing exceptions to the Findings of Fact and Conclusions of Law in the Recommended Order. The Findings of

Fact and Conclusions of Law in the Recommended Order are adopted in this Final Order.

FINDINGS OF FACT

1. Ms. Menz was hired by Dr. Weisel as a receptionist for his dental office located in Tarpon Springs, Pinellas County, Florida, on October 6, 2007. Ms. Menz's job responsibilities included answering the phone, checking patients in and out of the office, collecting co-payments, and entering treatment plans in the record. According to Dr. Weisel, Ms. Menz was a good employee because she was eager to learn, and she was very people orientated.

2. Respondent is a professional association located in Tarpon Springs, Pinellas County, Florida. Respondent employees less than 15 employees and is in the business of providing dentistry services. Respondent is subject to the Pinellas County Code concerning human relations.

3. In June 2008, Dr. Weisel sold his Tarpon Springs dental practice to Dr. Kontos. Dr. Kontos had graduated from dental school in May 2007 and had worked for another dentist office. By January 2008, Dr. Kontos wanted to purchase a dental practice in his hometown, Tarpon Springs. When Dr. Kontos purchased the practice from Dr. Weisel, Dr. Kontos had no experience in owning a business or managing employees.

4. According to Dr. Kontos, he decided to keep all of Dr. Weisel's employees for continuity. Dr. Kontos described Ms. Menz's job duties as opening the practice in the morning, "in-putting insurance," collecting co-payments, and "doing treatment plans."

5. By July 2008, Dr. Kontos had promoted one of the dental assistants, Daniel Mauzerolle (Mr. Mauzerolle), to office manager. During the time that Mr. Mauzerolle worked for Dr. Kontos, they became friends and would socialize together.

6. Ms. Menz testified that she had complained to Dr. Kontos in the past about Mr. Mauzerolle about issues from work.

7. Ms. Sholtes, a former dental hygienist for Dr. Kontos, also testified on Ms. Menz's behalf. She testified that Ms. Menz was a good employee and courteous to patients.

8. By November 2008, Dr. Kontos hired Ms. Marchese to collect aging insurance claims and account receivables, as well as review his office procedures. According to Dr. Kontos, the dental practice had a "phenomenal" amount of outstanding insurance claims, in excess of $20,000.00, which had been denied.

9. Ms. Marchese had worked in the dental field since 1991 and was familiar with software systems used to run dental

offices. Further, she was familiar with the submission of insurance forms for dental reimbursement.

10. On May 11, 2009, Ms. Menz opened the office at 7:00 a.m. As she turned on her computer, Ms. Menz noticed the internet web history showed that someone had used her computer the night before. Ms. Menz found that one site had been visited 28 times. Upon visiting the site, Ms. Menz found that the website contained pornographic images. Further, because Mr. Mauzerolle was the only person that worked in the evening in the office, Ms. Menz assumed that Mr. Mauzerolle was the person who had accessed the pornographic site.

11. Ms. Menz credibly testified that she informed Dr. Kontos and told him that Mr. Mauzerolle's actions were unacceptable to her. Ms. Menz credibly testified that she told Dr. Kontos that she could not work under the conditions that she considered to be a hostile workplace environment. Dr. Kontos informed Ms. Menz that he would "take care of it."

12. Dr. Kontos credibly testified that Mr. Mauzerolle, in addition to being the office manager, was his friend and that he was not happy with Ms. Menz reporting the issues concerning the pornography in his office.

13. Two days later, on May 13, 2009, Dr. Kontos terminated Ms. Menz's employment. Ms. Menz credibly testified that at the time of her termination, Dr. Kontos did not provide her a reason

for her termination, only stating "nothing personal, but I'm going to have to let you go."

14. Dr. Kontos testified that he had already decided to terminate Ms. Menz's employment before May 11, 2009, when Ms. Menz complained about the pornography. According to Dr. Kontos, Ms. Marchese had informed him since the end of 2008 about errors that Ms. Menz had been making at work that cost the dental practice money. Dr. Kontos indicated that Ms. Menz made errors such as failing to collect co-payments or collecting improper co-payments and failing to fill out the insurance forms correctly. The result was that insurance claims would be denied and the dental office would lose money.

15. According to Dr. Kontos and Ms. Marchese, on or before April 8, 2009, Ms. Menz made an error that almost cost the dental practice $2,000.00. The alleged error involved putting the wrong information concerning an insurance plan for a patient. Based on this error, Dr. Kontos testified that he made a decision with Mr. Mauzerolle and Ms. Marchese to place an advertisement for a receptionist with Craigslist to replace Ms. Menz. Later that day, Mr. Mauzerolle placed the advertisement with Craigslist.

16. On April 9, 2009, potential job applicants began calling Dr. Kontos' office about the receptionist position.

Ms. Menz took the phone messages from the applicants, including Ms. Kristen Chase.

17. Ms. Menz credibly testified that based on phone calls that she asked Dr. Kontos about the job advertisement and whether or not she was doing a good job. Ms. Menz credibly testified that Dr. Kontos stated that she was doing a good job and not to worry about the advertisement. Further, Ms. Menz credibly testified that she asked Ms. Marchese about the advertisement. Ms. Menz testified that Ms. Marchese stated that Dr. Kontos was seeking to replace Christina Benzel (Ms. Benzel), a co-worker who worked the front desk with Ms. Menz. Ms. Menz believed Ms. Marchese because Ms. Menz had observed that Ms. Benzel's job responsibilities had been reduced.

18. According to Dr. Kontos, sometime at the beginning of May 2009, he and Mr. Mauzerolle interviewed Ms. Chase for the receptionist job. According to Dr. Kontos, he offered Ms. Chase the job after the interview, and he had decided to replace Ms. Menz. Dr. Kontos's testimony on the point that he offered Ms. Chase the job in early May and had decided to replace Ms. Menz is not credible.

19. Ms. Chase credibly testified that she did not receive the job offer from Dr. Kontos at the interview in early May. Further, Ms. Chase credibly testified that, because she did not hear anything from Dr. Kontos, she had assumed that she had not

gotten the job. Further, Ms. Chase credibly testified that she was offered the job on May 14, 2009.

20. Dr. Kontos testified that he had decided to terminate Ms. Menz on April 8, 2009, but that he did not tell her before May 13, 2009, because he "had to build up the nerve to do it." He testified that he felt bad having to terminate her and that he let her go because she made too many mistakes.

21. For support concerning the number of errors made by Ms. Menz, Respondent offered the testimony of Ms. Marchese and numerous exhibits.

22. Ms. Marchese testified that because of the number of errors occurring in the office that she moved her work space to be next to Ms. Menz. According to Ms. Marchese, she was monitoring Ms. Menz and providing "one-on-one training." Further, Ms. Marchese offered testimony that each day she would conduct an "audit trail" of the office and bring errors to Dr. Kontos's attention daily. Ms. Marchese testified that Ms. Menz failed to collect co-payments; entered insurance information incorrectly, resulting in insurance reimbursements being denied; failed to provide adequate information to support insurance billings; and gave patients incorrect estimates on the amount that the patient would owe for different treatments based on the patient's insurance plan. Ms. Marchese testified that she estimated that Ms. Menz had cost the dental office

approximately $100,000.00 in lost revenue and made 90 percent of the office errors.

23. Ms. Marchese identified a number of exhibits that supported Respondent's claim that Ms. Menz was terminated for numerous errors.

24. Ms. Marchese further testified that in March 2009 that she told Dr. Kontos and Mr. Mauzerolle that Ms. Menz was "untrainable" and that she should be terminated. According to Ms. Marchese, in April 2009, she discussed with Dr. Kontos and Mr. Mauzerolle the error that nearly cost the practice $2,000.00 and the decision to advertise for the new receptionist.

25. After the advertisement was taken out in Craigslist for the new receptionist, Ms. Marchese remembered being asked by Ms. Menz about the advertisement and about whether or not Dr. Kontos was seeking to replace her. Ms. Marchese testified that she told Ms. Menz that she did not know if Dr. Kontos was seeking to replace her. Ms. Marchese denied telling Ms. Menz that Dr. Kontos was seeking to replace Ms. Benzel. Ms. Marchese, however, admitted that Dr. Kontos had been unhappy with Ms. Benzel based on her internet usage at the office.

26. Ms. Marchese testified that she informed Dr. Kontos about each of these errors daily and testified about a group of exhibits. A review of the exhibits identified by Ms. Marchese, Exhibits 25, 27, 29, 30, 31, 34, 35, 36, 41, and 44 shows that

the documents are dated December 18 and 21, 2009. When questioned about the dates on the exhibits, Ms. Marchese testified that these exhibits were documentation from the "daily sheets" and that she had "minimized the amount of discovery." Also, she explained that the documents were "printed to condense the information into one page instead of, for instance, on exhibit 25, it would have been over 30 pages." Further, she testified that she had added the notes explaining Ms. Menz's errors to the sheets on or after December 18, 2009. The "daily sheets" were not admitted into evidence. At best, the offered exhibits may be considered summaries. Even considering the documents, the record shows that the offered exhibits show that the documents were compiled to support Ms. Menz's termination after May 13, 2009, and in response to the investigation by Pinellas County. Thus, the exhibits carry little weight in the consideration.

27. Similarly, Exhibits 10, 11, 18, 23, and 24 are all dated after Ms. Menz's termination date of May 13, 2009. A review of Exhibit 10 shows a "Single Patient Ledger" printed up on September 8, 2009. Based on Ms. Marchese's testimony, the document shows that on April 8, 2009, the patient received two dental procedures that cost $1,050.00. According to Ms. Marchese, the patient was told to pay $215.00 for two treatments. Presumably, the balance of the dental bill would be

paid by insurance. However, Ms. Marchese testified that the patient did not have dental coverage for the two procedures. Consequently, the dental office lost money on the two procedures because the patient refused to pay, and there was no insurance to bill. Although the testimony shows this event occurred before the termination, the "Single Payer Ledger" is dated after the termination. Further, a hand-written notation from the patient's chart, which is part of Exhibit 10, stating that "Valerie dropped the ball on the correct fee twice" is dated May 14, 2009, the day after her termination. Similarly, a review of Exhibits 23 and 24 shows that they are insurance claims that were denied before May 13, 2009. Ms. Marchese testified that Dr. Kontos was aware of these errors. However, Exhibits 23 and 24 only show that insurance claims were re-submitted after the date of Ms. Menz's termination. The exhibits do not support the finding that the claims were denied because of Ms. Menz or that these errors were considered before terminating her employment. These exhibits were prepared after the termination as a justification for the action as opposed to contemporaneous proof of Ms. Menz's performance.

28. In contrast to the above listed exhibits, Exhibits 6, 7, 8, and 9 are examples of errors and notes that were documented before Ms. Menz's termination. A review of these exhibits shows that the complained of errors occurred on

January 22, 2009; February 3, 2009; March 2, 2009; and April 27, 2009.

29. Respondent also offered the testimony of other employees from the dental office. Ms. Little, a dental hygienist, testified that she was aware that Ms. Menz made errors in entering codes for different treatment plans. She had spoken to Ms. Menz about the error, and Ms. Menz indicated that she would try to correct the problem. According to Ms. Little, the errors continued, but were not as bad. Finally, Ms. Little testified that Ms. Marchese was responsible for insurance claims with the office. Similarly, Ms. O'Leary, a dental hygienist, testified that she knew that Ms. Menz had some issues with insurance, but that she had a good working relationship with Ms. Menz.

30. Ms. Menz candidly admitted that she made mistakes at her work and credibly testified that she was never told of the many errors that Respondent was claiming she had made or that she had cost Respondent money.

31. Dr. Kontos admitted that that he did not individually counsel Ms. Menz about her errors. Rather than counsel individual employees, Dr. Kontos testified that it was his practice to speak to his employees as a group about errors because he wanted to avoid similar errors.

32. Ms. Menz testified that she earned $10.75 an hour and that she had been out of work for 87 weeks. Ms. Menz agreed with her counsel's question that her calculated damages were $37,410.00. The record also shows that Ms. Menz filed for unemployment compensation, but was unclear about whether or not she received any compensation.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction to hear the instant case pursuant to section 120.65(7), Florida Statutes (2010), and section 70-77(e) through (h), Pinellas County Code.

34. Section 70-52, Pinellas County Code, sets out the purpose and intent of the code concerning human relations and addressing discrimination. Specifically, section 70-52, Pinellas County Code, reads as follows:

> (a) The general purposes of this division are to:
>
> (1) Provide for execution within the county of the policies embodied in the Federal Civil Rights Act of 1964, as amended.
>
> (2) Secure for all individuals within the county the freedom from discrimination because of race, color, religion, national origin, sex, sexual orientation, age, marital status, or disability in connection with employment, and thereby to promote the interests, rights and privileges of individuals within the county.

> (b) This division shall be liberally construed to preserve the public safety, health and general welfare, and to further the general purposes stated herein.
>
> (c) The enforcement of this division may be delegated by interlocal agreement to other units of local government or to nonprofit corporations.

35. Section 70-53, Pinellas County Code, defines the unlawful discriminatory employment practices. Section 70-53, Pinellas County Code, provides, in pertinent part:

> (a) Unlawful discrimination in employment practices.
>
> (1) Employers. It is a discriminatory practice for an employer to:
>
> a. Fail or refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, religion, national origin, sex, sexual orientation, age, marital status, or disability; or
>
> b. Limit, segregate, or classify an employee in a way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee because of race, color, religion, national origin, sex, sexual orientation, age, marital status, or disability.
>
> c. The above described prohibited discrimination on the basis of sex includes sexual harassment, including same-sex sexual harassment, and pregnancy discrimination.

36. Next, section 70-54, Pinellas County Code, prohibits retaliation against a person who has opposed a discriminatory

practice. Specifically, section 70-54, Pinellas County Code, provides that it is an unlawful discriminatory practice for a person to:

> (1) Retaliate or discriminate against a person because he or she has opposed a discriminatory practice, or because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this division;
>
> (2) Aid, abet, incite, or coerce a person to engage in an unlawful discriminatory practice;
>
> (3) Willfully interfere with the performance of a duty or the exercise of a power by the commission or one of its staff members or representatives; or
>
> (4) Willfully obstruct or prevent a person from complying with the provisions of this division or an order issued thereunder.

37. Because section 70-52, Pinellas County Code, identifies that the purpose of these ordinances is to implement the Federal Civil Rights Act of 1964, federal law is instructive applying the ordinances to the facts.

38. Title VII prohibits an employer from discriminating against a person based on the person's race, color, religion, sex, or national origin, or from retaliating against an employee for reporting discrimination. 42 U.S.C. §§ 2000e-2(a)(1) & 3(a). The plaintiff bears the ultimate burden of proving retaliatory treatment by a preponderance of the evidence.

Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990)(discrimination case).

39. Where direct evidence of retaliation is lacking, a plaintiff may present circumstantial evidence sufficient to create a jury question. See E.E.O.C. v. Joe's Stone Crab, Inc., 296 F.3d 1265, 1272 (11th Cir. 2002)(discrimination case). A retaliation claim based on circumstantial evidence is analyzed according to the burden-shifting framework established by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Goldsmith v. City of Atmore, 996 F.2d 1155, 1162-63 (11th Cir. 1993). Accordingly, if a plaintiff establishes a prima facie case of retaliation, and the employer proffers a legitimate, nondiscriminatory reason for its employment action, the plaintiff must then show that the reason is a pretext for retaliation. Id. at 1163.

40. A party may establish a prima facie case of retaliation by showing that (1) he or she engaged in statutorily protected expression; (2) he or she suffered an adverse employment action; and (3) there is some causal relationship between the two events. Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997).

41. As to the second prong, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse." Burlington N. & Sante Fe Ry. Co. v. White,

548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). In Burlington Northern, the Supreme Court stated that "[t]he antiretaliation provision [of Title VII] protects an individual not from all retaliation, but from retaliation that produces an injury or harm." Id. at 67. The acts must be material and significant and not trivial. Id. at 68; see also Crawford v. Carroll, 529 F.3d 961, 973 n.13 (11th Cir. 2008).

42. As for the third element of causal-relationship, the courts construe the element broadly, so that a plaintiff simply has to demonstrate that the protected activity and adverse action are not completely unrelated. Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004). A "close temporal proximity" between the employee's protected activity and adverse actions may be sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection. Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000). However, "[i]f there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law." Higdon, 393 F.3d at 1220-21 (holding that, by itself, three months was insufficient to prove causation).

43. After establishing a prima facie case, the burden shifts to the employer to provide a legitimate, non-

discriminatory reason for the employment action. Goldsmith, 996 F.2d at 1162-63.

44. If the employer provides a legitimate, non-discriminatory reason for the employment action, then the burden shifts back to the plaintiff to show that the employer's offered reason is a pretext. Id. Pretext means that the reason given by the employer was not the real reason for the adverse employment decision. Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997). "[A] reason cannot . . . be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (emphasis omitted). In this respect, conclusory allegations or unsupported assertions, without more, "are not sufficient to raise an inference of pretext[.]" Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1376 (11th Cir. 1996) (quotation omitted). Instead, the plaintiff must "present significant probative evidence" of pretext. Id. (quotation omitted). The plaintiff must meet the proffered reason "head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc). The trier of fact should consider "whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies,

incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Jackson v. Ala. State Tenure Comm'n, 405 F.3d 1276, 1289 (11th Cir. 2005) (quotation omitted). The "identification of inconsistencies in the defendant's testimony is evidence of pretext," but the "mere denial of credibility" has no evidentiary value. Howard v. BP Oil Co., 32 F.3d 520, 523, 526 (11th Cir. 1994).

45. Applying the rules of law to the facts in this case, the record shows that Ms. Menz established that Respondent violated section 70-54, Pinellas County Code, by retaliating against her for complaining about the office manager accessing pornography from Ms. Menz's work computer.

46. The record clearly shows that Ms. Menz met her initial burden of showing a prima facie case. It is undisputed that Ms. Menz's complaint to Dr. Kontos that the office manager had accessed pornographic websites on Ms. Menz's computer was protected activity. Further, the facts here show that Ms. Menz had an adverse employment action when she was terminated. Finally, Ms. Menz established the causation element based on the temporal proximity of her termination to her complaint. It was not disputed that Respondent terminated Ms. Menz within two days of her complaint. Based on this proximity, Ms. Menz brought forward evidence of causation.

47. Next, the record clearly shows that Respondent met its burden of providing a legitimate non-discriminatory reason for terminating Ms. Menz's employment. Respondent brought forward evidence showing that it terminated Ms. Menz for performance issues. Respondent brought forward evidence showing that Ms. Menz had made costly errors during her employment and that on April 8, 2009, Dr. Kontos had decided to advertise for Ms. Menz's position. Further, Dr. Kontos testified that he had hired another individual to replace Ms. Menz by the first week of May 2009, over a week before Ms. Menz's termination on May 13, 2009. Therefore, Respondent met its burden of providing a legitimate, non-discriminatory reason for Ms. Menz's termination.

48. The record shows that Ms. Menz met her burden of showing that Respondent's offered reasons were pretextual and that the real reason for her termination was her complaint against the office manager. Respondent's offered explanation that Dr. Kontos had already made the decision to terminate Ms. Menz for performance issues before May 13, 2009, is pre-textual for three reasons.

49. First, the majority of Respondent's exhibits show that they were compiled after the date of Ms. Menz's termination and in response to the human relations complaint filed by Ms. Menz. According to Ms. Marchese, she made notes each day documenting

Ms. Menz's errors. Further, Ms. Marchese explained that the offered exhibits documented these daily errors and condensed lengthy information. At hearing, the "daily sheets" and notes made contemporaneous with Ms. Menz's alleged errors were not brought forward into evidence. It is inconsistent that Ms. Marchese would make daily notes concerning Ms. Menz's errors, but then seven months later have to compile the documented information into a condensed form. Had the daily error reports been compiled each day, as Ms. Marchese testified, then documents made contemporaneous with the observations would have been offered into evidence. It is clear that these offered exhibits, for the most part, were documents generated to answer the investigation by the Pinellas County Human Relations Commission regarding Ms. Menz's complaint. Moreover, Exhibits 6, 7, 8, and 9 appeared to be contemporaneous notations of errors that Ms. Menz made at her job before her termination that were not the basis for her termination. The dates from those errors are January 22, 2009; February 3, 2009; March 2, 2009; and April 27, 2009. These dates, with the exception of the April 27, 2009, date occur well before the date that Ms. Menz was terminated. The lack of temporal proximity to the date that Ms. Menz was terminated, May 13, 2009, shows that these errors were not considered as basis for her termination. Again, a reasonable person would reach the conclusion that if a

serious employment error as described by Dr. Kontos is occurring in the workplace that an employer either will counsel the employee or terminate the employee. Here, Dr. Kontos did neither action. Thus, it is not plausible that any of these complained of errors in Exhibits 6 through 9 formed the basis for Dr. Kontos's decision to terminate Ms. Menz.

50. Second, Dr. Kontos' testimony that he did not terminate Ms. Menz earlier in the year because he lacked courage is not plausible in light of his and Ms. Marchese's testimony about the scope and quantity of Ms. Menz's errors. According to Dr. Kontos and Ms. Marchese, Ms. Menz made constant errors and that these errors cost the dental practice an estimated $100,000.00. Further, according to both Dr. Kontos and Ms. Marchese, Ms. Marchese would inform Dr. Kontos about these errors daily. The record showed that Dr. Kontos hired Ms. Marchese by November 2008 and that by the end of 2008 Ms. Marchese was informing him about Ms. Menz's errors. Yet, despite the constant and costly errors, Dr. Kontos did not give Ms. Menz any one-on-one counseling about her job or terminate her. Rather, the record shows that two days after she complained about the office manager, who was Dr. Kontos's friend, she was terminated. It is not plausible that an employer would allow an employee to keep making costly mistakes each day without taking some action. The more credible

explanation is that Respondent terminated Ms. Menz in retaliation for her complaint.

51. Third, and finally, the reason that Respondent's explanation is pretextual is seen in the facts concerning the April 8, 2009, advertisement, and Dr. Kontos's testimony that he had already hired Ms. Chase to replace Ms. Menz before the May 13, 2009, termination. The record clearly showed that Respondent took an advertisement on April 8, 2009, for a front office receptionist. The dispute, however, centers on whether the advertisement was taken to replace Ms. Menz or Ms. Benzel. Ms. Menz credibly testified that she asked Dr. Kontos and Ms. Marchese about the advertisement and whether or not she was being replaced. She was also credible in her testimony that Dr. Kontos told her not to worry and that she was doing a great job. Ms. Menz credibly testified that Ms. Marchese had told her the office was replacing Ms. Benzel. This explanation was supported by Ms. Menz's observation that Dr. Kontos had been taking jobs away from Ms. Benzel.

52. Respondent's explanation that Ms. Menz had made a mistake on April 8, 2009, which almost cost the office $2,000.00, was not supported by documentation. Respondent offered Exhibit 10 as evidence of the mistake on April 8, 2009. However, as discussed earlier, the documentation of this error occurred after Ms. Menz's termination. Thus, Respondent's

offered explanation is not supported by documentation that occurred contemporaneous with the event.

53. Next, the record did not support Dr. Kontos's explanation that he had already offered the receptionist job to Ms. Chase before terminating Ms. Menz. Ms. Chase credibly testified that she did not receive the phone call offering the job until May 14, 2009, which is after Ms. Menz's termination. Therefore, Dr. Kontos's offered explanation that he had already offered the job to Ms. Chase before terminating Ms. Menz is pretextual.

54. Under section 70-78, Pinellas County Code, the undersigned has the authority to award actual damages and reasonable costs and attorney's fees incurred by a party which were caused by a violation of this division. Based on the evidence presented at hearing, Ms. Menz's actual damages are $37,410.00, and she is entitled to an award of reasonable costs and attorney's fees.

ORDER

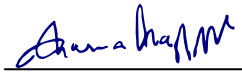
Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

A. Respondent violated section 70-54, Pinellas County Code.

B. Respondent is to pay Ms. Menz the sum of $37,410.00 for lost wages, which shall accumulate interest until fully satisfied at the statutory rate of six percent per annum; and

C. Respondent shall pay Ms. Menz reasonable attorney's fees and costs in prosecuting this action. Jurisdiction is retained to determine the amount of reasonable attorney's fees and costs. The parties are directed to confer within 20 days concerning the amount of attorney's fees and costs. Within five days of conferring with each other, the parties are to inform the undersigned whether or not they are able to stipulate to an amount of attorney's fees and costs. If the parties are able to stipulate an amount of the attorneys' fees and costs, then the stipulation shall be sent to the undersigned for review and approval. If the parties are unable to reach a stipulation as to attorney's fees and costs, then a hearing shall be set to determine the reasonable amount of attorney's fees and costs.

DONE AND ORDERED this 1st day of June, 2011, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of June, 2011.

COPIES FURNISHED:

William C. Faulkner, Esquire
Pinellas County Attorney's Office
315 Court Street
Clearwater, Florida 33756

Jeremy W. Rodgers, Esquire
Spector Gadon and Rosen, LLP
390 Central Avenue, Suite 1550
St. Petersburg, Florida 33701

Matthew K. Fenton, Esquire
Wenzel, Fenton, and Cabassa, P.A.
1110 North Florida Avenue, Suite 300
Tampa, Florida 33602

Leon W. Russell, Director/EEO Officer
Pinellas County Office of Human Rights
400 South Fort Harrison Avenue, 5th Floor
Clearwater, Florida 33756

Peter J. Genova, Jr., EEO Coordinator
Pinellas County Office of Human Rights
400 South Fort Harrison Avenue, 5th Floor
Clearwater, Florida 33756

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.