STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHAKARIA MITCHELL,

Petitioner,

vs. Case No. 13-0499

SUPPORTED EMPLOYMENT PLUS, INC.,

Respondent.
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RECOMMENDED ORDER

Pursuant to notice, the final hearing was held in this case on July 17, 2013, in St. Petersburg, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Michael A. Serrano, Esquire
Wesley Chapel Law Group, LLC
25275 Wesley Chapel Boulevard
Lutz, Florida 33559

For Respondent: Patricia Alten, Esquire
Alten and Cangro, PLLC
Post Office Box 274127
Tampa, Florida 33688

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent committed an unlawful employment practice in violation of section 70-53 of the Pinellas County Code, by terminating Petitioner's employment

allegedly because of her race. If so, an appropriate remedy will be determined.

PRELIMINARY STATEMENT

On September 28, 2011, Shakaria Mitchell (Petitioner or Ms. Mitchell) filed a charge of discrimination against Supported Employment Plus, Inc. (Respondent or SEP), with the Pinellas County Office of Human Rights (Pinellas OHR). Ms. Mitchell alleged that Respondent committed an unlawful employment practice by terminating her employment because of her race, black.

Pursuant to the procedures set forth in section 70-77, Pinellas County Code, the Pinellas OHR conducted an investigation and found reasonable cause for Petitioner's allegations. Following a failed attempt at conciliation, the case was forwarded to DOAH for assignment of an Administrative Law Judge to conduct an evidentiary hearing on Petitioner's charge of discrimination.

An Initial Order issued on February 12, 2013, required Petitioner to coordinate with Respondent to file a joint response identifying mutually available dates to schedule the hearing and the location most convenient for parties and witnesses; if a joint response was not possible, the parties were instructed to file separate responses. Petitioner did not coordinate a joint response, nor did Petitioner respond individually. Respondent filed a response providing the requested information and

requesting that the hearing not be scheduled for at least two months to allow sufficient time for discovery. Based on the information provided by Respondent and in the absence of any response by Petitioner, the hearing was set for May 8, 2013, in St. Petersburg, Florida, and orders setting pre-hearing instructions and scheduling a pre-hearing conference were issued.

On March 4, 2013, Respondent filed a Motion to Dismiss, raising pleading deficiencies, while also filing an Answer with Affirmative Defenses. That same day, Petitioner wrote two letters, which were filed at DOAH by facsimile the next morning. In one letter, Petitioner asked that the case not be dismissed. Petitioner stated that she did not respond to the Initial Order because she was in the process of retaining an attorney, which she expected to accomplish that week, and her attorney would respond to all requests. Petitioner's second letter stated that she had received the Notice of Hearing, but that since she lives in Georgia and has two small children, the scheduled date and location would not work out for her. Petitioner reiterated that she was in the process of retaining an attorney, but that "until then," she requested that the hearing be rescheduled for a Friday during the month of May.

By Order dated March 5, 2013, Respondent's Motion to Dismiss was denied. By Order dated March 27, 2013, Petitioner's request to reschedule the hearing to a Friday in May 2013 was denied,

although guidance was provided regarding what would be needed if Petitioner wanted to resubmit a request for continuance.

On April 10, 2013, a notice of appearance and motion for continuance was filed on Petitioner's behalf, asserting that new counsel had just been retained on condition that a continuance would be granted to allow sufficient time to conduct discovery. The motion was granted without opposition, and the hearing was rescheduled for July 17, 2013, based on mutual availability.[1/]

By Amended Order of Pre-hearing Instructions, the parties were required to file pre-hearing statements by July 3, 2013, listing their proposed exhibits and identifying their witnesses, and describing the issues to be litigated as well as any facts or legal conclusions that were not in dispute. The parties timely filed separate pre-hearing statements; the few undisputed items identified in the pre-hearing statements have been incorporated into this Recommended Order.

A telephonic pre-hearing conference was held on July 10, 2013, in which counsel for the two parties participated. The undersigned clarified the scope of the final hearing (i.e., a de novo evidentiary hearing on Petitioner's charge of discrimination), procedures, and hearing logistics. The pre-hearing statements were reviewed and discussed. The parties were directed to exchange all listed proposed exhibits that were not

already in the possession of the other party, by close of business on Monday, July 15, 2013, and this was accomplished.

At the final hearing, Petitioner testified on her own behalf and also presented the testimony of Kathryn Reed[2/] and Regina Anderson. Petitioner's Exhibits 1, 2, and 5 were admitted in evidence. Respondent presented the testimony of Darlene Sahlin, Kim Robinson, and Ms. Anderson. Respondent's Exhibits 1, 3 through 10, and 12 through 14 were admitted in evidence.

At the conclusion of the evidentiary hearing, the parties agreed to file proposed recommended orders (PROs) within 10 days after the final hearing transcript (which the parties ordered) was filed at DOAH. In addition, the parties chose to defer closing arguments and agreed to submit written closing arguments along with their PROs. The parties were also given one week to file any objections to questions in or exhibits to the depositions of Ms. Mitchell and Ms. Anderson that were received in evidence for all purposes. No objections were filed.

The two-volume Transcript of the final hearing was filed on July 26, 2013. Both parties timely filed PROs and written closing arguments. Thereafter, it was discovered that the deposition transcript in evidence as Petitioner's Exhibit 5 was incomplete, and Petitioner was directed to file the missing pages. Petitioner promptly did so, completing the record on August 16, 2013. The parties' PROs and closing arguments, as

well as the evidentiary record, were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. SEP is a non-profit corporation that was formed by Regina Anderson in 2005, for the purpose of providing employment assistance to clients referred by the State of Florida Division of Vocational Rehabilitation (VR). Pursuant to two contracts with VR, SEP provides services to adult VR clients with mental and/or physical disabilities who need assistance searching for jobs, preparing for interviews, securing employment, and retaining the jobs in which they are placed.

2. At all material times, SEP was a small business with between five and approximately 12 employees. These employees included: Ms. Anderson, who was SEP's president in charge of its day-to-day business; a varying number of employment consultants or "job coaches," to whom individual VR clients were assigned; a few part-time clerical and administrative support staff persons; and at times, a janitor.

3. During the time period pertinent to this case, SEP operated out of two Tampa Bay area offices, one in Tampa and the other in Largo. Some employees worked exclusively from one office (such as Petitioner, who was based in the Largo office), while other employees split their time between the Tampa and

Largo offices (such as witnesses Kathryn Reed, a job coach, and Kim Robinson, a part-time administrative assistant).

4. Petitioner, a black female, was interviewed and hired by Ms. Anderson on May 1, 2010, as a job coach. Petitioner met the qualifications for the position, in that she had a college degree (in Criminal Justice), a vehicle with the requisite insurance, and experience in a similar position. Petitioner had worked for Goodwill Suncoast as a case manager for about 15 months prior to being hired by Ms. Anderson. Petitioner said that she left Goodwill because it was "a very negative environment."

5. SEP has in place written policies and procedures that prohibit, among other things, discrimination on the basis of race, color, religion, sex, national origin, age, or disability. At the time of her hiring, Petitioner received a copy of Respondent's employee manual setting forth SEP's anti-discrimination policies.

6. The racial and national origin composition of SEP's employees is, and during the time pertinent to this case was, diverse, with members of minority racial and national origin categories well-represented. Indeed, at times, more of SEP's employees were members of minority racial or national origin categories than not. Similarly, the VR clientele served by SEP is, and always has been, diverse in racial and national origin

make-up. A majority of VR clients belong to a minority racial or national origin category.

7. The duties of SEP job coaches are to provide appropriate individualized services to the VR clients assigned to them. These services might include helping the client prepare an individualized career plan (ICP), working with the client to develop a resume, conducting mock interviews to prepare the client for actual interviews, and helping the client look for and apply for jobs. Then, if a client secures employment, the job coach would follow up with the client, check with the employer regarding the client's performance, and help address any issues that might increase the chance that the client would be retained in the job.

8. SEP is directly reliant on the success of its job coaches to generate revenue. Simply put, if VR clients do not get and keep jobs, SEP does not get paid under its VR contracts. These contracts provide for payment to SEP for job placement and thereafter at certain job retention benchmarks, such as at 45 days, 90 days, and 150 days.

9. SEP's employee manual specifies, and all job coaches understand, that they are expected to place one client in a job in their first month of employment as a job coach; two placements are expected in the job coach's second month; and three

placements or more are expected by the third month and every month thereafter. Petitioner understood these requirements.

10. SEP's job coaches all worked on a full-time basis (40 hours per week). The job coaches all earned the same base pay: $15.00 per hour for 40 hours per week. All job coaches also received a monthly stipend of $150.00 to cover gas and other expenses incurred in using their own cars to perform their duties. In addition, all job coaches were eligible to earn a bonus in any month in which they were credited with more than five VR notices of approval (NOAs) for billings for any combination of placements and post-placement benchmarks. The bonus amount was 20 percent of the revenue brought in for each NOA over five. For example, if a job coach placed four VR clients and met post-placement benchmarks for two more VR clients in the same month, a total of six NOAs, that job coach would receive a bonus of 20 percent of the revenue for the sixth NOA.

11. It was expected that approximately half of an SEP job coach's time would be spent "in the field," meeting prospective or actual employers of VR clients, setting up interviews, and carrying out other duties that could not be performed in the office. The other half of the job coach's time was spent on tasks that could be performed in the office: doing paperwork, including keeping up with VR reporting requirements for the job coach's assigned clients; searching for job leads in

advertisements and following up with phone calls; scheduling appointments with VR clients, prospective employers, and employers of hired VR clients; and meeting with VR clients to develop career plans and resumes, or to conduct mock interviews.

12. A great deal of autonomy and flexibility in the day-to-day schedule of a job coach is inherent in the position; those qualities made the position highly susceptible to abuse.

13. Ms. Anderson was the boss, serving as the supervisor of job coaches and other employees at the two office locations. Ms. Anderson also did some job-coach work herself, which meant that she spent some time out in the field in addition to supervising two offices.

14. Ms. Anderson tried to keep an eye out for job-coach employees who were taking advantage of the job flexibility and skimping on their 40-hour work weeks by doing personal business during their workday, such as using the computer at the office for personal matters, or leaving the office ostensibly for VR client business and spending some or all of the time on personal endeavors. Ms. Anderson instructed her administrative assistant to watch the job coaches and report any compliance issues she observed when the assistant was in the office (either in Largo or in Tampa) when Ms. Anderson was not there. Ms. Anderson also kept track of job-coach schedules, particularly for those job coaches who were not producing results for their VR clients.

Ms. Anderson required that job coaches begin and end their workdays in the office: they were to start the day at 8:00 a.m. in the office and they were to end the day at 5:00 p.m. in the office. To ensure compliance, Ms. Anderson would call into the office at or shortly after 8:00 a.m., and the telephone would be passed around from employee to employee to verify their presence and get a report of their plans for that day. Ms. Anderson would call again or come in at 4:45 p.m., to check on each job coach.

15. Ms. Anderson would allow quite a bit of deviation from these strict rules, but there was one strict proviso: the employee was required to call Ms. Anderson and obtain her permission first. Ms. Anderson was adamant about this direct-telephone-call rule. If a job coach set up an early morning or late afternoon meeting with an employer, and the job coach wanted to be excused from the 8:00 a.m. or 5:00 p.m. office attendance requirement because of the conflicting appointment, the job coach was required to call Ms. Anderson in advance to request permission not to come into the office, and Ms. Anderson would give permission. If an employee was ill and was going to be absent all day, the employee was supposed to call Ms. Anderson before 8:00 a.m. Ms. Anderson wanted direct telephonic contact; anything else, such as an email, was not acceptable and tended to make Ms. Anderson angry and suspicious.

16. During Ms. Mitchell's 13 months as a job coach with SEP, she had several run-ins with Ms. Anderson regarding Ms. Mitchell's failure to comply with these procedures. Ms. Anderson verbally counseled Ms. Mitchell and reprimanded her in writing (in emails) regarding Ms. Mitchell's failure to call first before being absent, failure to call first before coming in late or leaving early, and failure to account for the time she claimed to be spending in the field.

17. For example, in a series of back-and-forth emails on November 10 and 11, 2010, Ms. Anderson admonished Ms. Mitchell for coming in late because she did not answer the phone at the office one morning. Ms. Mitchell responded that she was there but was on another call and could not tell there was an incoming call. Then Ms. Anderson issued a written disciplinary warning reprimanding Ms. Mitchell for leaving 15 minutes early the next day, after having just been verbally counseled. Ms. Mitchell retorted that she only left five minutes early, not 15 minutes early; that technically, she did not leave early at all because she was still "on the premises" (in the parking lot, in her car, talking on her cell phone, after turning out the lights and locking up the building); and that she was being disciplined prematurely because her prior verbal counseling was for coming in late, not for leaving early. Ms. Mitchell refused to sign the written disciplinary warning because she believed it was unjust

and she complained that she could not work effectively while having her integrity questioned. Ms. Anderson reminded Ms. Mitchell that she had been counseled verbally numerous times, both for coming in late and for leaving early; Ms. Anderson responded that "I do not recall several of the other conversations you mentioned in your email to the degree in which you described them."[3/]

18. On November 12, 2010, the day after these back-and-forths, Petitioner sent an email to Ms. Anderson, stating: "I'm ill and will not be in today. Have a nice day." Ms. Anderson wrote back to remind Petitioner that she still needed to call in before 8:00 a.m., as they had previously discussed, and that an email stating that she would be out the whole day was unacceptable.

19. The SEP employee manual emphasizes these rules in section 4.1, which provides:

> If you are unable to report to work for any reason, notify your supervisor before regular starting time. You are responsible for speaking directly with your supervisor . . . Using email to report being absent or tardy **IS NOT** acceptable under any circumstances. . . . Not calling or using email to report being absent or tardy is grounds for termination.

Petitioner's failure to abide by these requirements was grounds for termination, but Petitioner was not terminated.

20. During Ms. Mitchell's 13 months of employment at SEP, she was not productive as a job coach. In fact, she never met the standards for job placements in any month of her employment.[4/]

21. Ms. Anderson was very tolerant of Ms. Mitchell's substandard performance. Ms. Anderson testified credibly that she probably kept Ms. Mitchell on the payroll longer than she should have, but did so because she liked Ms. Mitchell.

22. Ms. Mitchell acknowledged that until June 13, 2011, she did not experience any discrimination by Ms. Anderson or anyone else at SEP. All of the evidence suggests that Ms. Anderson was exceedingly tolerant of Petitioner and other employees not performing as well as they should, regularly violating the employee rules they agreed to abide by, and taking advantage of the flexibility of the job coach position.

23. At the heart of Petitioner's charge of discrimination are the events that took place between Monday and Wednesday, June 13-15, 2011. The precursor to these events occurred during the prior week. The credible testimony of record established that the last day of the regular school year for Pinellas County schools, before summer recess, was Tuesday, June 7, 2011. The next day, Petitioner arrived at the Largo office at around 8:00 a.m. with her two sons, who were ages three and seven at the time. Darlene Sahlin, a white female, was a newly-employed job coach who had just started working in the Largo office that week.

Ms. Sahlin credibly testified that she saw Ms. Mitchell sitting at her desk in her office that morning, and that Ms. Mitchell's two boys were with her. When Ms. Mitchell saw Ms. Sahlin, Ms. Mitchell whispered "shhh" to her two boys and pushed them under her desk. Petitioner spoke with Ms. Anderson during that morning's check-in call shortly after 8:00 a.m., but Petitioner did not tell Ms. Anderson that she had her children in the office with her, nor did Petitioner ask Ms. Anderson for permission to have either child in the office.[5/] This is a matter addressed by the employee manual, which provides that visitors to the office must be authorized.

24. As soon as Petitioner finished her morning check-in conversation with Ms. Anderson, Ms. Sahlin observed Petitioner gathering up her sons and their belongings, and they left the office and did not come back the rest of the day. Ms. Sahlin knew this, because as a new job coach, she did not yet have any field work and was spending the entire day in the office reviewing files and learning how to do paperwork.

25. Ms. Sahlin credibly testified that the same pattern was followed on Thursday and Friday, June 9 and 10, 2011: Petitioner came to the office at around 8:00 a.m. with her two boys, and stayed only until after she spoke with Ms. Anderson at the morning check-in call; then she left with the boys and did not return all day. On Friday afternoon, Ms. Sahlin told Kim

Robinson, the part-time administrative assistant who split her time between the Largo and Tampa offices, about this curious pattern followed by Ms. Mitchell that week; Ms. Robinson had not been present in the Largo office on the three mornings when Petitioner brought her sons to work and then left. Ms. Sahlin asked whether job coaches were allowed to bring their children to work and whether they could leave for the day the way Petitioner had been doing. Ms. Robinson responded strongly that Ms. Anderson would be very upset to know what Petitioner had been doing, and that Ms. Sahlin had to tell Ms. Anderson.

26. Ms. Robinson and Ms. Sahlin both ended up telling Ms. Anderson about Ms. Sahlin's observations. Ms. Robinson was under instructions from Ms. Anderson to serve as her "eyes and ears" when Ms. Anderson was not there; it was Ms. Robinson's responsibility to observe whether employees were following the rules and to report anyone who did not follow the rules.

27. At around the same time that Ms. Robinson told Ms. Anderson about Petitioner having brought her children to the office, Ms. Robinson also reported to Ms. Anderson that job coach Kathryn Reed had been committing rules violations. Ms. Robinson informed Ms. Anderson that Ms. Reed had been coming in late and leaving early without first calling Ms. Anderson for permission.

28. On Monday, June 13, 2011, Petitioner had a normal conversation with Ms. Anderson during the regular morning check-

in call. Although Ms. Anderson knew at that time about Petitioner having brought her children to work the prior week without permission, Ms. Anderson did not bring up that subject. Ms. Anderson credibly testified that, although she was angry that Petitioner had not followed rules by telling Ms. Anderson and asking permission to have the children in the office or asking for time off because of problems arranging for a babysitter, Ms. Anderson still would not have terminated Petitioner's employment based on these violations, despite Petitioner's other compliance and performance issues.

29. Later that morning, Petitioner called Ms. Anderson to complain about an email from Ms. Anderson announcing an upcoming change to the pay periods. Petitioner had just received a full month's pay on June 5, 2011, but understood the change to mean that in two weeks, her next paycheck would be for less than a full-month's pay (which would stand to reason if she had just received one-month's pay). Petitioner complained that employees should get more than two weeks' notice, and told Ms. Anderson the change was "not fair." Ms. Anderson responded that if Petitioner wanted to talk about "not fair," then what was really not fair was Petitioner bringing her children to work without asking permission first, and without telling Ms. Anderson that she had done so. At first, Petitioner denied that she had brought any children to work. Ms. Anderson then told Petitioner that

Ms. Sahlin had reported that she saw Petitioner with her children in the office. Petitioner then admitted the incident in part (see endnote 5), and ended the call.

30. After Petitioner got off the phone with Ms. Anderson, Petitioner went straight to Ms. Sahlin's office to confront her for telling on Petitioner. Ms. Reed went with Petitioner to confront Ms. Sahlin. Ms. Sahlin was seated at her desk in her small office, which was approximately eight feet by eight-to-ten feet in size. Petitioner, a tall, large-framed woman, stood in front of Ms. Sahlin's desk. Ms. Sahlin was perhaps as tall as Petitioner, and though not petite, she was more slender than Petitioner. With Ms. Sahlin seated and Petitioner standing in front of her desk, Petitioner would have been an imposing figure. In addition, Ms. Reed stood in Ms. Sahlin's doorway; as Ms. Reed explained it, there would have been no room for her to also enter the office, as small as the office was. Ms. Sahlin could not have exited without running into Ms. Reed or unless Ms. Reed retreated.

31. Although the testimony regarding some of the details of this confrontation was in dispute, the core facts were admitted. To the extent the testimony was in dispute, Ms. Sahlin's version is accepted as more credible and more consistent with the core admitted facts.

32. According to Ms. Sahlin, Petitioner confronted her in an accusatory, threatening manner. Petitioner shook a finger in Ms. Sahlin's face and called her a "snitch" for reporting to Ms. Anderson that Petitioner had her boys in the office. Ms. Reed's presence in the doorway served to make Ms. Sahlin feel trapped, because she could not have left through the doorway with Ms. Reed blocking it. Petitioner ended the confrontation by telling Ms. Sahlin that she should not speak to Petitioner and should act like Petitioner does not exist when Ms. Sahlin sees her. Ms. Sahlin was understandably shaken by this confrontation, not in the sense of feeling physically threatened by Petitioner and Ms. Reed, but rather, in the sense of being a new employee confronted by the two experienced employees who held the same position she did. She was left wondering how she was going to be able to manage working while being frozen out in this fashion.

33. Petitioner's version of this confrontation differed only as to the details regarding tone and physical posturing. Petitioner admitted that she went to Ms. Sahlin's office to confront her about telling Ms. Anderson that she had brought a child to work one day the prior week, and that Ms. Reed was with her the whole time. While Petitioner attempted to characterize her confrontation as "simply ask[ing] her in a respectful tone" why Ms. Sahlin told Ms. Anderson, the very fact of Petitioner's going into Ms. Sahlin's small office, with Ms. Reed in tow, and

standing over a seated Ms. Sahlin for the purpose of asking why Ms. Sahlin told on Petitioner, was inherently confrontational. This was not a neutral inquiry, such as if Petitioner had asked Ms. Sahlin what she was working on. Moreover, Petitioner's announcement to this new employee that she should pretend that Petitioner did not exist when she saw her in the future is inherently threatening, serving as a warning that Petitioner intended to freeze out this new employee, not cooperate with her or be helpful, as punishment for Ms. Sahlin having snitched on her.

34. Ms. Sahlin called Ms. Anderson to complain about Petitioner's confrontation. Ms. Anderson had Ms. Sahlin document her complaint in writing, which was done by Ms. Sahlin that same day.

35. June 13, 2011, proved to be quite the drama-filled day. In addition to the Mitchell-Reed confrontation with Ms. Sahlin, Ms. Reed had her own confrontation with Kim Robinson about Ms. Robinson telling on Ms. Reed. Ms. Reed was the instigator. She followed Ms. Robinson into an office, closed the door behind them, and proceeded to accuse Ms. Robinson of being a "snitch" by telling Ms. Anderson that Ms. Reed had been coming in late and leaving early. Ms. Robinson responded that it was part of her job to be a snitch. In describing this confrontation, Ms. Reed did not attempt to characterize her tone as simple or respectful,

although she disputed Ms. Robinson's testimony that she used off-color language in threatening Ms. Robinson. Regardless of what was said, once again the very nature of the encounter, instigated by Ms. Reed, was inherently confrontational and threatening. Ms. Reed made it clear that she did not want Ms. Robinson to report her again, while Ms. Reed believed that to be her responsibility.

36. Ms. Robinson complained to Ms. Anderson about Ms. Reed's confrontation and documented the complaint in writing.

37. Ms. Anderson apparently was not in the Largo office during all of the drama on June 13, 2011, but after spending a good part of her day fielding complaints from the Largo office, she informed each of the four employees--Petitioner, Ms. Reed, Ms. Sahlin, and Ms. Robinson--that there was too much drama and they were being too emotional, and she directed each of them to take the rest of the day off without pay.

38. Ms. Anderson called Petitioner on her cell phone that day after Petitioner left the office for field work, to discuss the confrontation with her. Ms. Anderson told Petitioner that she knew Petitioner had gone into Ms. Sahlin's office, and asked Petitioner how she could have scared that old lady the way she did. Petitioner admitted that she spoke with Ms. Anderson that day, but did not say how she responded to Ms. Anderson's question or what else was said about the incident. Petitioner did

remember that she was told to take the rest of the day off without pay, but Petitioner claimed she did not know that the other three employees were also sent home without pay.

39. Petitioner did not go to work the next day. Instead, she called Ms. Anderson to inform her that she would be out sick. At the hearing, Petitioner testified that she was "all stressed out" because she had been sent home without pay and without being asked to tell her side of the story.

40. Ms. Anderson sent an email to Petitioner later in the morning on June 14, 2011, telling Petitioner to contact her when she was on her way to the office the next morning, and not to go in the office without checking with her first. That next morning, June 15, 2011, Petitioner went to the office and found Ms. Anderson waiting for her in the parking lot. Petitioner went into the office with Ms. Anderson, where she found that her belongings had been packed up. Petitioner stated that she knew what that meant, and Ms. Anderson confirmed that Petitioner was being terminated for creating a hostile work environment by her confrontation with Ms. Sahlin.

41. At some point, Petitioner learned that Ms. Reed had been terminated the day before while Petitioner was taking a sick day for her stress. Ms. Reed was informed that she was being terminated for creating a hostile work environment by her confrontation with Ms. Robinson.

42. Petitioner's claim at issue here is that she was terminated because of her race. As evidence of that claim, Petitioner asserts that Ms. Anderson took Ms. Sahlin's word and never asked Petitioner for her side of the story regarding the June 13, 2011, encounter; that Petitioner was sent home without pay; and that she was fired, when Ms. Sahlin was not fired. Petitioner asks for the inference that because she is black, Ms. Anderson is white, and Ms. Sahlin is white, the termination must have been based on race.

43. The credible evidence does not support a finding that Petitioner was terminated because of her race. Instead, the credible evidence establishes that Petitioner could have been, and perhaps should have been, but had not been, terminated for a number of legitimate business reasons: her performance that was far below the required standards; her documented violations of the established office rules requiring advance telephone calls to obtain permission for late arrivals, early departures, and days off; and her dishonesty in bringing her children to work three days in a row without permission, and never disclosing that fact to her boss until Ms. Sahlin reported her. The credible evidence establishes that the last straw that caused Petitioner to be terminated was Petitioner's confrontation with Ms. Sahlin, in which Petitioner's behavior was inappropriate and threatening,

ending on Petitioner's warning to Ms. Sahlin that she could expect such hostility to continue.

44. To the extent Ms. Reed's treatment bears on the validity of Petitioner's charge, the credible evidence establishes that, like Petitioner, Ms. Reed could have been terminated for any number of legitimate business reasons prior to June 14, 2011, including substandard performance as a job coach and noncompliance with rules, but that the last straw that caused her to be terminated was when Ms. Reed confronted Ms. Robinson in an inappropriate and threatening way, on the same day that Ms. Reed joined Petitioner to confront Ms. Sahlin.[6/]

45. While it is factually correct to observe that both of the instigators of these confrontations were black, and both persons who were confronted and whose reports led to the terminations were white, the credible evidence establishes that the terminations were because of the confrontations, not because of the race of the instigators.[7/]

46. The evidence does not establish, as Petitioner argued, that she was not asked for her side of the story because of her race. Instead, Ms. Anderson testified with a great deal of credibility that she did not ask Petitioner to give her side of the story because Petitioner admitted the confrontation. As to the details, by that point in their employment relationship, Petitioner had earned Ms. Anderson's mistrust. It would not have

mattered what Petitioner said to explain the confrontation, not because Petitioner was black, but because Ms. Anderson believed that Petitioner had been dishonest with her before, had shown a propensity to deny everything, and could not be trusted.

47. Ms. Anderson also testified that she believed Ms. Sahlin's description of the confrontation because Ms. Sahlin was a new employee on her best behavior and would have no reason to lie. In other words, Ms. Anderson had not yet come to distrust Ms. Sahlin. Rather than a function of race, this was a function of time; before long, Ms. Anderson would come to distrust Ms. Sahlin just as she distrusted Petitioner.

48. Ms. Anderson's perspective through which she considered the events of June 13, 2011, could be fairly summarized this way: at the time of the Mitchell-Reed confrontation with Ms. Sahlin, Ms. Anderson knew that Ms. Sahlin had, in fact, reported that Petitioner brought her children to work; Ms. Anderson also knew from her own past encounters with Petitioner regarding rules violations that Petitioner would try to deny any violations, just as she tried to deny that she brought children to work until she learned that Ms. Sahlin, an eyewitness, had reported her. Knowing these facts, it was reasonable for Ms. Anderson to find Ms. Sahlin's description of the confrontation to be credible. This was not a situation in which both Ms. Sahlin and Petitioner were accused of wrongdoing, with both of them pointing the blame

at the other one. Instead, Petitioner was the instigator of a confrontation and Ms. Sahlin was the person confronted. Petitioner admitted this much.

49. Finally, Petitioner offered, as circumstantial evidence that she was terminated because of her race, the alleged disparate treatment of Ms. Sahlin.[8/] According to Petitioner, Ms. Sahlin committed many more egregious violations during the roughly seven months of her employment at SEP until the end of 2011 when she was terminated or otherwise ended her employment under unpleasant circumstances.[9/]

50. The credible evidence does not establish that Ms. Sahlin was treated more favorably than Petitioner, nor does the evidence establish that Ms. Sahlin's employment record was comparable to, or worse than, Petitioner's.

51. Petitioner remained employed at SEP as a job coach for 13 months; Ms. Sahlin lasted at SEP as a job coach for only about half that long.

52. Petitioner's performance and productivity as a job coach were shown to be well below the established standards. To meet the required standards, Petitioner should have secured at least 37 job placements while employed as a job coach at SEP. Instead, according to SEP's business records, she only secured three job placements in total: one in January 2011, one in March 2011, and one in April 2011. Ms. Sahlin's performance was also

described as below standards, but the only comparative testimony on this subject was that Ms. Sahlin's performance was better than Petitioner's. From the perspective of job performance and productivity, it appears that Petitioner was treated more favorably than Ms. Sahlin by continuing to draw the same salary for twice as long as Ms. Sahlin, despite being more of a financial drain on SEP.

53. Petitioner and Ms. Sahlin both engaged in their fair share of rule violations during their employment, such as failing to call in for permission to come in late or leave early, failing to document their schedules upon request, using the work computer for personal business, and talking back to, or arguing with, Ms. Anderson.[10/] The details and timing of Ms. Sahlin's transgressions were not documented in the record and thus cannot serve as the basis for meaningful comparison. However, it was documented that during her seven-month tenure at SEP, not only was Ms. Sahlin verbally counseled and reprimanded in writing, but she was also suspended three times without pay: the first time on June 13, 2011, when she was sent home early without pay (along with Petitioner, Ms. Reed, and Ms. Robinson); the second time, in November 2011, when she was suspended for three days without pay; and the last time, when she was suspended for two weeks without pay, after which she was either terminated or left under unpleasant circumstances that were tantamount to termination.

54. In contrast, during Petitioner's 13-month tenure at SEP, she was disciplined by written reprimand and verbal counselings, and she was only suspended once without pay when she was instructed to take the rest of the day off without pay on June 13, 2011. Once again, it appears from the evidence that if anything, Petitioner was treated more favorably than Ms. Sahlin, not the other way around.

55. Ms. Anderson reasonably articulated the single biggest difference between Petitioner's record and Ms. Sahlin's record: Ms. Sahlin's transgressions never involved the sort of confrontational, threatening behavior directed at another employee that Petitioner engaged in. The fact that Petitioner was terminated as a result of having confronted Ms. Sahlin is not evidence that Petitioner was treated less favorably than another employee who is not in a protected category. There was no evidence that any other employee engaged in similar confrontational, threatening behavior directed to another employee and was not terminated as a result. The only evidence of another employee engaging in similar confrontational, threatening behavior was with respect to Ms. Reed, and her confrontation of Ms. Robinson, for which she was terminated.

56. An equally reasonable explanation for Petitioner's termination, not articulated by Ms. Anderson, was offered by Ms. Sahlin. Ms. Sahlin, who was subpoenaed to testify, was the

only witness to testify against what her personal interests would dictate, which added to the credibility attributed to her testimony by reason of the substance of what she said and her demeanor. Ms. Sahlin testified that despite being terminated, and despite the bad working relationship she and Ms. Anderson had, and despite the fact that--quite candidly--she does not like Ms. Anderson, Ms. Sahlin strongly rejected the notion that Ms. Anderson was motivated by racial discrimination in terminating Petitioner. Instead, Ms. Sahlin explained that Ms. Anderson had serious trust issues as a result of having been taken advantage of in the past. From this perspective, the terminations of Petitioner and Ms. Reed are understandable because their confrontations threatened the "snitch" system that was critical to Ms. Anderson as a means to guard against job coaches taking advantage of her again.

57. Based on the totality of the more credible evidence, Petitioner failed to meet her burden of proving that Respondent engaged in unlawful discrimination. Petitioner did not prove her charge of discrimination that her employment was terminated because of her race.

CONCLUSIONS OF LAW

58. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding. § 120.65(7), Fla. Stat. (2013); §§ 70-51 and 70-77, Pinellas County Code.

59. At issue is whether Respondent violated section 70-53(a)(1), which provides that it is an unlawful discriminatory employment 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.

60. The parties stipulated that Respondent is an "employer" within the meaning of the Pinellas County Code, and the facts found above support that conclusion.

61. The prohibitions against employment discrimination in section 70-53 are virtually identical to the prohibitions in state and federal laws. See §§ 760.01-760.11, Fla. Stat. (Florida Civil Rights Act of 1992); 42 U.S.C. § 2000e-2, et seq. (Title VII of the Civil Rights Act of 1964, as amended); cf. § 70-52(a)(2) (stating that a purpose of Chapter 70 is to "[p]rovide for execution within the county of the policies

embodied in the Federal Civil Rights Act of 1964, as amended"). As a result, section 70-53 should be construed in a manner that is consistent with those laws. See, e.g., Conway v. Vacation Break, Case No. 01-3384 (Fla. DOAH Nov. 16, 2001) (construing chapter 70 of the Pinellas County Code in accordance with the comparable state and federal laws); Blacknell v. Freight Mgmt. Servs., Inc., Case No. 04-2854 (Fla. DOAH Oct. 27, 2004)(same).

62. Complainants alleging unlawful discrimination bear the ultimate burden of proving intentional discrimination. For Petitioner to prevail, Petitioner must prove her charge that SEP purposefully terminated her employment because of her race. See Silvera v. Orange Cnty. Sch. Bd., 244 F.3d 1253, 1262 (11th Cir. 2001) (stating that "racial discrimination is an intentional wrong"); EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002) ("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 [Petitioner] remains at all times with the [Petitioner]."); 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.").

63. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d

1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

64. "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." Schoenfeld v. Babbitt, supra. Based on the findings of fact above, Petitioner presented no credible, competent direct evidence that she was terminated because of her race. Although Petitioner points to the comment attributed to Ms. Anderson in Ms. Reed's unemployment compensation hearing regarding blacks ganging up on whites, and Ms. Anderson's use of the phrase "racially charged" in the final hearing in this case, neither of those comments is direct evidence that Petitioner was terminated because of her race, as explained in the findings of fact above.

65. Direct evidence of intent is often unavailable. 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 Auth., 128 F.3d 337, 348 (6th Cir. 1997).

66. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden

analysis established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), is applied. Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. If the complainant is able to establish a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991) (discussing shifting burdens of proof in discrimination cases under McDonnell and Burdine). The employer has the burden of production, not persuasion, and need only articulate that the decision was non-discriminatory. Id.; Alexander v. Fulton Cnty, 207 F.3d 1303, 1339 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. Schoenfeld v. Babbitt, supra, at 1267. The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly, by showing that the proffered reason for the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, supra, at 1186; Alexander v. Fulton Cnty., supra.

67. Petitioner here seeks to prove discrimination circumstantially through a disparate treatment theory.

Accordingly, Petitioner must prove the following to establish a prima facie case: (1) Petitioner is a member of a protected class; (2) Petitioner was subjected to adverse employment action; (3) Respondent treated similarly-situated employees outside of the protected class more favorably than Petitioner; and (4) Petitioner was qualified for the position. City of W. Palm Bch. v. McCray, 91 So. 3d 165, 171 (Fla. 4th DCA 2012) (citing U.S. E.E.O.C. v. Mallinckrodt, Inc., 590 F. Supp. 2d 1371, 1376 (M.D. Fla. 2008)); see also Rice-Lamar v. City of Ft. Lauderdale, 232 F.3d 842, 843 (11th Cir. 2000).

68. Petitioner met her burden of proving the first, second, and fourth elements of a prima facie case. Petitioner proved that she is a member of a protected racial class, African-American (or black, as she described her race in the charge of discrimination, consistent with the parlance of the parties throughout this case). Petitioner proved that she was subject to adverse employment action on June 15, 2011, when she was terminated. Petitioner also proved that she met the qualifications for the position of job coach.

69. To satisfy the third component of a prima facie case, Petitioner was required to prove that a "comparative" employee was "similarly situated in all relevant respects," which requires consideration of whether the comparative employee was "involved in or accused of the same or similar conduct" as the Petitioner

but was "disciplined in different ways." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). Based on the findings of fact above, Petitioner failed to meet her burden of proving that any similarly-situated employee outside of a protected class was treated more favorably than Petitioner. Petitioner offered no evidence that another employee who was not African-American had confronted a fellow employee in the accusatory, threatening manner that Petitioner did. That was the conduct that resulted in the adverse employment action.

70. Petitioner attempted, but failed, to prove that Ms. Sahlin was a similarly-situated employee who was treated more favorably than Petitioner. As found above, Petitioner did not prove that Ms. Sahlin was similarly situated, nor did Petitioner prove that Ms. Sahlin was treated more favorably than Petitioner.

71. Petitioner also failed to prove that Ms. Robinson, a part-time administrative assistant, was a similarly-situated employee who was treated more favorably because she asked for and was granted permission to bring her teenaged daughter to the office several times. As found above, nothing about this attempted comparison was similar, from Ms. Robinson's job position, to the difference in whether permission was requested or not, to the difference in age of the children brought to the office. Moreover, the adverse employment action against Petitioner was not because she brought her two children to the

office on three occasions, or even because she did so without permission and then lied about it.

72. Petitioner's failure to meet her prima facie burden of proof ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (Fla. 1996).

73. Even if Petitioner had met her prima facie burden of proof, Respondent met its burden of production of a legitimate, non-discriminatory reason for terminating Petitioner's employment, and Petitioner failed to prove that Respondent's legitimate reason was a mere pretext for intentional discrimination.

74. As set forth in the findings of fact above, the totality of the more credible evidence establishes that Respondent reasonably terminated Petitioner's employment because of her inappropriate actions confronting Ms. Sahlin, with Ms. Reed in tow, and threatening Ms. Sahlin for having snitched on her. Accordingly, Petitioner failed to meet her ultimate burden of proving that Respondent committed an unlawful employment practice by intentionally discriminating against her on the basis of her race.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Respondent Supported Employment Plus, Inc., did not commit an

unlawful discriminatory employment practice as charged, and dismissing Petitioner Shakaria Mitchell's charge of discrimination.

DONE AND ENTERED this 30th day of August, 2013, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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 30th day of August, 2013.

ENDNOTES

[1/] Section 70-77(e) of the Pinellas County Code gives the directive that the administrative hearing shall be conducted within 60 days of the Pinellas OHR director's request, but this time frame was waived by the parties by their requests to allow more time for discovery and by their agreement to a later hearing date to allow for the hearing to be conducted live, instead of an earlier video teleconference hearing date that was offered. Indeed, Petitioner's counsel did not even file a conditional notice of appearance (conditioned on a continuance being granted) until more than 60 days after the Pinellas OHR director's transmittal of this case to DOAH for a hearing. Under these circumstances, the hearing was held within a reasonable time of the director's request. See section 70-77(h), Pin. Cnty. Code.

[2/] The former SEP job coach who was known as Kathryn Reed during her employment from December 2010 to June 14, 2011, testified at the final hearing that her name is now Kathryn Reed Clark. She

is referred to herein as Kathryn Reed, as she was known during the time pertinent to this case, and as she is referred to in emails and business records in evidence.

3/ It is clear from the tenor of the back-and-forth volleying between Ms. Anderson and Petitioner that this snippet was not the first such episode, although it may have been the first laid out in detail in writing. Petitioner showed a propensity to deny everything, from having been verbally counseled before, to having left work early because she was technically still on the premises after having turned off the lights, locked the building, and was in her car in the parking lot talking on her cell phone. Consistent with this pattern, Petitioner represented to Pinellas OHR in its investigation, in sworn discovery responses in this case, and again in her final hearing testimony that she had never been counseled or disciplined while employed at SEP. The evidence establishes to the contrary; at the time, Petitioner complained to Ms. Anderson that she was being disciplined prematurely, so she plainly understood she was being disciplined.

4/ Despite the undisputed record of Ms. Mitchell's substandard job performance, Ms. Mitchell represented to Pinellas OHR during its investigation that she had been performing well and that she had, in fact, met the required performance standard of three placements per month. Ms. Mitchell's representation was plainly false, and does not reflect well on Ms. Mitchell's credibility.

5/ Petitioner admitted this incident in part. She admitted that she brought one child, the three-year-old, to work with her for only about ten minutes, on only one day that week. She claimed there was a mix-up with a babysitter who she could not name and had never met, who had been hired by her husband. When asked where her other son was, she said that he was in school; however, she could not respond to the suggestion that school had already ended for the year. In contrast, Ms. Sahlin testified with credibility, certainty, and clarity that summer recess had started the day she first saw Petitioner with her boys at the office. She also testified with credibility, certainty, and clarity that she saw two boys, not just one boy; she described them as young, estimating their ages as three and six. Ms. Sahlin's testimony is accepted as more credible than Petitioner's contrary testimony.

6/ After Petitioner and Ms. Reed had been terminated, Ms. Anderson discovered a letter on Petitioner's office computer that Petitioner drafted on or before the evening of June 13, 2011. The letter purported to be written by Ms. Anderson

verifying Ms. Reed's employment and income. Petitioner testified that she prepared the letter as a favor to Ms. Reed who was trying to buy a house, and that Petitioner prepared the letter at home since it was not work-related. Inconsistently, and perhaps in an attempt to explain why the letter was on her work computer, Petitioner suggested that she prepared the letter as part of her regular duties, because she sometimes did work for Ms. Anderson. Both Petitioner and Ms. Reed were evasive and defensive in attempting to describe this letter, which substantially overstated Ms. Reed's income at SEP. The letter also provided a telephone number to call Ms. Anderson for more information, but the number in the letter was not Ms. Anderson's telephone number. The letter was transmitted by email from Petitioner's personal email address to Ms. Reed and to another friend of Petitioner's, Pam Frazier. Petitioner testified that the wrong telephone number was a "misprint;" she had no explanation for why the email and letter were "mistakenly" sent to her friend Pam Frazier; and when asked if the phone number in the letter was Pam Frazier's phone number, Petitioner responded evasively: "I don't -- not -- I don't recall that being her telephone number." Ms. Reed testified that she did not notice that the letter was sent to Pam Frazier and claims she did not check the phone number in the letter because it was only a rough draft. Inconsistently, Ms. Reed responded to Petitioner's email transmitting the letter by saying that "everything looks great" and that Ms. Reed would put the letter on SEP letterhead. This letter had no bearing on the termination of either Petitioner or of Ms. Reed, as it was not discovered on Petitioner's office computer until afterwards; however, the unsatisfactory explanations and evasive testimony offered by Petitioner and Ms. Reed on the subject is evidence of their dishonesty, and is a factor bearing on their credibility.

7/ In the same vein, Petitioner argued that a post-termination comment that Ms. Reed claimed that Ms. Anderson made in a telephonic hearing in Ms. Reed's proceeding for unemployment compensation was evidence of Ms. Anderson's discriminatory intent in terminating Petitioner's employment. According to Ms. Reed, Ms. Anderson characterized the drama-filled day of June 13, 2011, as "the blacks ganging up against the whites." At the final hearing in this case, Ms. Anderson did not recall that statement, but said that she might have made it because it was certainly a "racially charged" atmosphere that day. Even if Ms. Anderson made such a statement, that does not prove that Ms. Anderson fired Petitioner because she was black, as opposed to because she and another employee, both of whom are black, were "ganging up" against two other employees, both of whom are white. Similarly, the fact that Ms. Anderson described the atmosphere created by

Petitioner's and Ms. Reed's confrontations and threats as "racially charged" does not prove that Ms. Anderson fired Petitioner because of race, as opposed to because she was the instigator causing that "charged" atmosphere. It may have been a misstatement for Ms. Anderson to describe the atmosphere on June 13, 2011, as "racially" charged (which might suggest that the charged atmosphere was caused by confrontations that involved racial slurs), but it was not a derogatory comment, any more than was Ms. Anderson's use of the phrase "emotionally charged" when she told Ms. Sahlin to go home for the day, or Ms. Anderson's contemporaneous email description of the behavior of her employees on June 13, 2011, as being "so emotional" that they should go home and cool off. The mere use of words such as "black," "white," and "racial" do not prove that Ms. Anderson terminated Petitioner because of her race.

8/ As a secondary claim of disparate treatment, Petitioner pointed to the fact that Ms. Robinson (Caucasian), the part-time administrative assistant, brought her teen-aged daughter to the office on a few occasions, whereas Ms. Anderson got mad that Petitioner brought her three-year-old son to the office once for ten minutes. Leaving aside the more credible facts found above regarding Petitioner having brought her children to the office, Petitioner's claim of disparate treatment fails on several points. First, Ms. Robinson asked for and received permission from Ms. Anderson; second, Ms. Robinson, as a part-time administrative assistant, was not a similarly situated employee; and third, bringing a teenager to the office cannot be equated to bringing a three-year-old toddler to the office, in terms of the supervisory needs and potential disruption.

9/ Both Ms. Anderson and Ms. Sahlin testified that Ms. Sahlin's employment was terminated. When pressed by counsel for Petitioner about whether Ms. Sahlin was technically terminated or left under unpleasant circumstances after serving a two-week unpaid suspension, they both expressed some uncertainty. However, they both described a confrontation at the end where Ms. Sahlin had a police escort to retrieve her belongings. As Ms. Sahlin put it, "I felt like I was fired. [Ms. Anderson] told me to get my things and go. That's pretty much being fired."

10/ Ms. Sahlin's encounters of record with Ms. Anderson were notable because Ms. Sahlin's natural voice, as demonstrated at the hearing, is loud. For example, when confronted by Ms. Anderson for an office rule violation, Ms. Sahlin said in her loud voice, "Fire me, fire me, fire me." That was when she was

suspended for three days without pay, after which she came back to work and apologized to Ms. Anderson.

COPIES FURNISHED:

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

Michelle Wallace, Esquire
Pinellas County Attorney's Office
6th Floor
315 Court Street
Clearwater, Florida 33756

Patricia Alten, Esquire
Alten and Cangro, PLLC
Post Office Box 274127
Tampa, Florida 33688

Michael A. Serrano, Esquire
Wesley Chapel Law Group, LLC
25275 Wesley Chapel Boulevard
Lutz, Florida 33559

Paul Valenti, Director
Pinellas County Office of Human Rights
5th Floor
400 South Fort Harrison Avenue
Clearwater, Florida 33756

Stephanie N. Rugg
City of St. Petersburg
175 Fifth Street, North
St. Petersburg, Florida 33701

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the Division of Administrative Hearings to be considered by the above-signed Administrative law Judge, which will issue the Final Order in this case.