STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

J. L. NIEMAN,

Petitioner,

vs. Case No. 16-3609

CAROLINA CASUALTY INSURANCE COMPANY (W.R. BERKLEY),[1/]

Respondent.
_____/

RECOMMENDED ORDER

A formal hearing was conducted in this case on August 17, 2016, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jason Nieman, pro se
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Fruit Cove, Florida 32259

For Respondent: Kevin E. Hyde, Esquire
Leonard V. Feigel, Esquire
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One Independent Drive, Suite 1300
Jacksonville, Florida 32202-5017

STATEMENT OF THE ISSUE

The issue is whether Respondent, Carolina Casualty Insurance Group ("Carolina"), retaliated against Petitioner for

his exercise of protected rights, in violation of section 760.10, Florida Statutes (2015).[2/]

PRELIMINARY STATEMENT

On or about November 24, 2015, Petitioner, J.L. Nieman ("Petitioner"), filed with the Florida Commission on Human Relations ("FCHR") a Charge of Discrimination against Carolina. Petitioner alleged that he had been discriminated and/or retaliated against pursuant to chapter 760, Florida Statutes, Title VII of the Federal Civil Rights Act, and/or the Federal Age Discrimination Act, based upon race, sex, and/or age, as follows:

> I applied for a position (Vice President Claims) on or about 10/2/2015 and 10/23/2015. While the application was acknowledged both times I was refused interview or hire while similar or lesser qualified candidates have been sought and/or granted more favorable treatment. On 11/23/2015, after the posting was refreshed, I inquired as to status and was told that (by James R. Moody) I was disqualified because I lacked sufficient experience. This is clearly false based upon my objective qualifications, I have corrected employer as to this fact, but they have refused to alter their stance. Good evidence and/or good faith suggests that I have suffered illegal discrimination and/or retaliation by this employer and its employees and/or executive officers.

Petitioner attached a three-page letter with exhibits to his Charge of Discrimination. The letter provided more detail as to Petitioner's factual allegations and concluded as follows:

> What is not known is the exact unlawful basis for my disqualification. It is easily discernible by employers and decision makers, most of whom use the Internet or background searches on candidates, that I have taken part in protected employment conduct in the past. This has been used as a basis to blacklist me on numerous occasions and is one of the reasons I do not current [sic] use my full legal name (Jason Lee Nieman) in applications or in professional settings. However, I believe that the employer and/or decision-makers became aware of this and used it as an illegal basis to blacklist me as well.
>
> Similarly or separately we know that discrimination based upon age, gender and race is somewhat common, despite state and federal prohibitions. Because I must claim these illegal bases or forever waive them, I am including such items as the basis for my charge, but will plan to amend the charge to remove any inappropriate items if I am granted sufficient access to the records and/or communications of the employer (or if the administrative bodies are and can provide me with credible information) as to the exact nature of the unlawful discrimination that has occurred in this case.

The FCHR investigated Petitioner's Charge. In a letter dated May 20, 2016, the FCHR issued its determination that there was no reasonable cause to believe that an unlawful practice had occurred. The letter stated as follows, in relevant part:

> Complainant was unable to establish that Respondent discriminated against him due to his sex, age, or race. Respondent was not aware of Complainant’s age or race when he applied for the position in question. Evidence presented shows that Complainant was not hired for the position because he

> was not the most qualified candidate. Respondent filled the position in question during the course of this investigation with an applicant that was only three years younger than Complainant and is the same sex. Insufficient evidence was provided to demonstrate that Complainant engaged in a protected activity that could lead to unlawful retaliation, or that Respondent was aware of any such activity.

On June 20, 2016, Petitioner timely filed a Petition for Relief with the FCHR. On June 27, 2016, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was scheduled for hearing on August 16 and 17, 2016.

On July 29, 2016, Petitioner filed two motions: a Motion to Compel Proper Interrogatory Responses, Verification Thereof, Production Responses from Respondent, and to Compel Attendance of Certain Material Witnesses and/or Decision-Makers at DOAH Hearing of August 17/18, 2016 ("Motion to Compel"); and a Motion in Limine and/or Protective Order ("Motion in Limine"). Respondent filed written responses in opposition to both motions. On August 11, 2016, a telephonic hearing was convened on the pending motions. On August 12, 2016, the undersigned entered an order memorializing the rulings made at the hearing.

The Motion in Limine requested that: (1) Respondent be prohibited from presenting evidence regarding Petitioner's previous unrelated employment discrimination cases, and (2) Respondent be prohibited from seeking discovery or testimony

from Petitioner's current employer. As to issue (2), the parties agreed that no discovery from Petitioner's current employer would be taken. As to issue (1), the undersigned withheld ruling prior to the taking of evidence at the hearing. The undersigned ruled that evidence regarding previous litigation is not admissible to demonstrate propensity, but may be admitted to show a plan or scheme or to attack credibility. The undersigned determined that a ruling prior to the taking of evidence could also constitute a premature ruling on Petitioner's credibility.

The Motion to Compel requested: (1) that Respondent's interrogatory responses be stricken because they were not verified under oath; (2) that Respondent be required to produce Nelson Tavares, Senior Vice President for Respondent's parent company, W.R. Berkley Corporation, to testify at the hearing, despite the facts that Mr. Tavares does not work for the corporate entity named in this proceeding and that Mr. Tavares lives and works in Connecticut; (3) that Respondent's claims of attorney/client privilege and work product be overruled, and Respondent be required to produce all documents created during the initial investigation of Petitioner's claim by the FCHR; (4) that Respondent be required to produce information regarding everyone in the applicant pool for the position for which Petitioner applied, particularly persons alleged to have been

granted a telephone interview; and (5) that Respondent be required to produce electronic items in their native form, including metadata.

As to issue (1), the parties agreed that Respondent had cured any alleged deficiency in its interrogatory responses prior to the motion hearing.

As to issue (2), the undersigned stated that the reach of any subpoena issued by this tribunal would fall short of requiring the attendance of Mr. Tavares. The undersigned indicated his willingness to grant a continuance of the hearing to allow Petitioner time to attempt service on Mr. Tavares in Connecticut for the purpose of taking his deposition. Petitioner considered but declined the offer, opting instead to request sanctions against Respondent should it ultimately be determined that Mr. Tavares was a necessary witness, and to request that any testimony by other witnesses as to statements purportedly made by Mr. Tavares be disallowed as hearsay.[3/]

As to issue (3), the undersigned denied Petitioner's motion without prejudice to Petitioner's ability to make a more defined request for specific documents allegedly being withheld by Respondent and not subject to privilege. However, Petitioner was cautioned that the undersigned would not be inclined to order Respondent to turn over documents that included

communications between Respondent's employees and its attorneys during the FCHR investigation.

As to issue (4), Petitioner stated that the only theory of discrimination he intended to pursue at the final hearing was the retaliatory failure to hire based on Respondent's knowledge of Petitioner's past protected conduct. Having thus limited his theory of discrimination, Petitioner agreed that he no longer required access to information regarding the entire applicant pool. Petitioner indicated that he would be satisfied with information regarding the person whom Carolina hired to fill the position at issue, and regarding Michael Bellomo, an applicant who Petitioner contended had received a telephone interview. Respondent indicated that it would provide Petitioner with this information.

As to issue (5), the parties agreed that Respondent would attempt to bring to the hearing a computer that would allow Petitioner to see the CATS (candidate tracking system) data in the same format as that seen and used by Respondent's employees. Counsel for Respondent was able at the hearing to satisfy Petitioner's request to see the CATS data in its native form.

The hearing was convened and completed on August 17, 2016.

At the hearing, Petitioner testified on his own behalf and presented the testimony of Catherine Steckner, Carolina's Vice President of Human Resources; and of James Moody, a former

recruiting and training coordinator for Carolina. Petitioner's Exhibits 1 through 14 and 16 were entered into evidence. Respondent separately presented no witnesses, having been given greater scope during the cross-examination of Ms. Steckner and Mr. Moody to establish its case. Respondent's Exhibits 1 through 3, 8, 11, 14, 15, 20, 23, and 28 were admitted into evidence.

The one-volume Transcript of the hearing was filed at DOAH on August 31, 2016. Both parties timely filed their Proposed Recommended Orders.

FINDINGS OF FACT

1. Carolina is an employer as that term is defined in section 760.02(7). Carolina is an insurance company that deals exclusively with commercial transportation, more specifically the trucking industry. Carolina is an operating unit of the Berkley Insurance Company, which in turn is a subsidiary of W.R. Berkley Corporation, which owns roughly 50 niche property lines casualty insurance companies. Carolina has its own management team and is responsible for its own financial results, although there is some interaction at the executive level with Berkley Insurance Company and W.R. Berkley Corporation.

2. Catherine Steckner has been the Vice President of Human Resources for Carolina since August 2000.

3. Josephine Raimondi is an in-house attorney for the W.R. Berkley Corporation and in that role provides legal counsel to Carolina.

4. Nelson Tavares is Senior Vice President of Claims for W.R. Berkley Corporation.

5. On October 1, 2015, Carolina posted a notice that it was accepting applications for its Vice President of Claims position, hereinafter referenced as "VP Claims". The position had been open since September 2015, when the incumbent employee resigned. The job posting was done by way of Carolina's electronic applications system called "CATS,"[4/] which forwards the notice to career sites such as Indeed, Juju, Career Builders, and LinkedIn, and through which applications are received and evaluated by Carolina. The posting summarized the VP Claims position as follows:

> Oversee the Claims department; responsible for leading the development, implementation and execution of claims strategies, initiatives and processes. Lead and direct department leadership and personnel in achieving high standards of productivity, efficiency and alignment of organizational goals. Ensure compliance with all local, federal and state regulations related to claims while minimizing risk/exposure to the organization.

6. The posting stated that a bachelor's degree was preferred, and that a juris doctor degree and/or CPCU would be "a plus." "CPCU" is an insurance industry professional

certification called Chartered Property Casualty Underwriter. Ms. Steckner testified that a CPCU is generally expected of a manager or senior management employee and represented the level of mastery or career advancement that Carolina was seeking in its VP Claims.

7. Under the heading "Experience Required," the posting stated: "10+ years of liability and bodily injury claims experience; 5+ years management experience; P&C, bodily injury claims, and transportation/trucking experience preferred."

8. Ms. Steckner testified that Carolina was in no hurry to fill the VP Claims position. The critical factor was to hire the right person with the best qualifications because Carolina was a struggling business that was undergoing downsizing.

9. Ms. Steckner testified that she and Carolina President, Gerald Bushey, were involved in the planning phase for filling the VP Claims post. Because there was no incumbent VP Claims at Carolina, they looked up the corporate chain for additional assistance. Nelson Tavares, Senior Vice President at W.R. Berkley, stepped in to assist Ms. Steckner and Mr. Bushey at this stage of the process.

10. Ms. Steckner testified that she, Mr. Bushey, and Mr. Tavares determined that Carolina would prefer a candidate with a juris doctor degree and/or litigation experience because the company was about to revamp its litigation guidelines. The

company would obviously prefer trucking/transportation experience because that is the niche industry in which Carolina operates. Ms. Steckner testified that their preference was also for someone already in a senior executive position because VP Claims is solely responsible for leading, implementing, and executing Carolina's claims strategies. Carolina has no Assistant Vice President of Claims position to share the strategic load.

11. On October 2, 2015, at 6:35 a.m., Petitioner electronically submitted his resume and a cover letter, summarizing his experience and interest in the VP Claims position. Petitioner's self-description in his resume was as follows:

> Mid-level insurance claims executive with extensive knowledge and experience in the insurance industry. Highly developed exposure analysis and claims/litigation management abilities have led to favorable claims resolutions and have prevented adverse verdict situations against insureds, clients and carriers.
>
> Solid team building and motivational skills proved by formation of two claim teams from ground up, and steady improvement in results of all groups managed throughout career.
>
> Excellent written and verbal communication skills complement analytical capabilities.

12. Petitioner's professional experience was listed as follows: Senior Manager, Claims for Southeastern Grocers from

June 15, 2015 to present; Claims and Litigation Manager for the Illinois Municipal League from August 2009, to April 22, 2015 (Petitioner noted that this position was eliminated "in a broad cost cutting action"); Claims Director, Commercial Casualty and Litigation for Nationwide Insurance Company from September 2005, to June 21, 2009 (Petitioner noted that this position, too, was eliminated in a broad cost-cutting action); Commercial Claims Consultant for Nationwide Insurance Company from October 2004 until his promotion in September 2005; Excess and Surplus Claim Manager for K&K Insurance Group from January 2004 to October 2004; Litigation Specialist for K&K Insurance Group from 2001 to 2004; Litigation Specialist for Zurich North America from April 2000 to May 2001; and several positions, culminating in Claim Manager/Supervisor, for St. Paul Companies/Metlife from August 1995 through April 2000. The Zurich North America position is the only one where Petitioner noted direct experience in the trucking industry.

13. Petitioner's education included a bachelor's degree in finance from Washington State University and a master of business administration from the University of Illinois. Petitioner had the preferred CPCU designation in addition to several other industry certifications.

14. Petitioner's submission was first reviewed by James Moody, then the recruiting and training coordinator for

Carolina, who was tasked with screening the applications and forwarding any promising ones to Ms. Steckner for further review. Ms. Steckner would then determine whether the application should be sent up the line to Mr. Bushey for feedback and possible approval of scheduling a telephone interview with the candidate. If Carolina remained interested in the candidate after the telephone interview, it would arrange for an in-person interview.

15. Mr. Moody testified that Petitioner's was one of the first applications submitted and that he decided to send it on to Ms. Steckner. He estimated that he reviewed about 120 applications for the VP Claims position from October through December 2015 and that he sent about ten of those on to Ms. Steckner. Mr. Moody further stated that, in hindsight, Petitioner's was not one of the ten best applications he reviewed because the quality of the applicants improved as the process moved forward, with several candidates who had the senior executive level experience that Petitioner lacked.

16. Mr. Moody's practice was to search online to see if a candidate had a LinkedIn profile. He would compare the profile to the resume submitted by the candidate to make sure they matched. Mr. Moody testified that he never located a LinkedIn profile for Petitioner and that he did not bother with any

further online research because he had already decided to forward Petitioner's application to Ms. Steckner.

17. Ms. Steckner reviewed Petitioner's resume and cover letter and forwarded them to Mr. Bushey via email at 1:20 p.m. on October 2, 2015. In her email to Mr. Bushey, Ms. Steckner noted that Petitioner's cover letter was "rather lengthy" and that he had a "couple of quick in and out roles in a few places."

18. Ms. Steckner testified that she sent the resume and cover letter on to Mr. Bushey because it showed that Petitioner had "a touch" of experience in the trucking industry. She stated that she did not do a point-by-point comparison between Petitioner's application and the requirements of the job description because she knew what Carolina was looking for.

19. Mr. Bushey never responded to the email or followed up with her regarding Petitioner's application.

20. Ms. Steckner testified that shortly after Petitioner submitted his application, Mr. Bushey announced his retirement, with a separation date of June 30, 2016. After this announcement, Mr. Bushey began to phase himself out of the company's activities and took no further part in the recruitment process for the VP Claims position. As President and CEO of Carolina, Mr. Bushey would have been the person to interview and hire the VP Claims. Mr. Tavares stepped in to fill the void

left by Mr. Bushey in the recruitment process, as well as to fill the role of acting VP Claims for Carolina.

21. Ms. Steckner testified that after she received no response from Mr. Bushey, she engaged in a closer review of Petitioner's experience and qualifications. She conceded that Petitioner met the basic education and experience requirements set forth in the job description, but that he lacked many of the preferred qualities Carolina sought in its VP Claims. Petitioner lacked experience at the strategic, senior executive level of a company. Ms. Steckner noted that Petitioner described himself as a "mid-level insurance claims executive" and that he had no recent trucking experience. Ms. Steckner stated that she saw Petitioner as a possibility early in the recruiting process, but that stronger resumes came in later and she eliminated Petitioner from consideration.

22. Ms. Steckner testified that during her close review of Petitioner's resume, she recalled that Carolina had recently hired a claims adjustor from Southeastern Grocers, Petitioner's current employer. Ms. Steckner phoned the adjustor, Katelyn Linville, to inquire about Petitioner. She asked Ms. Linville whether Petitioner was an employee worth pursuing. Ms. Linville responded, "No, not in my opinion." Ms. Steckner thanked her and said that was all she needed. Ms. Steckner testified that the entire conversation lasted approximately 45 seconds.

23. Ms. Steckner testified that this conversation with Ms. Linville was not decisive but "solidified and cemented" her own conclusion that Petitioner was not an appropriate candidate for the VP Claims position. Ms. Steckner testified that it is common in recruiting to speak to employees about job applicants whom they know. She did not expect Ms. Linville to provide detailed information about Petitioner's executive or trucking experience. She only wanted Ms. Linville's opinion as to whether Petitioner was worth bringing in for an interview.

24. Petitioner testified that Ms. Linville had worked for him at Southeastern Grocers and that they have maintained a friendly relationship since she left the company. Petitioner testified that in an August 2015 office conversation, Ms. Linville told him that she had searched the internet and learned of his various discrimination lawsuits and administrative proceedings against previous employers and prospective employers. She told him with some admiration that this was an indication Petitioner knew how to take care of himself and not be bullied in the workplace. Petitioner testified that Ms. Linville agreed not to spread word of his litigation around the Southeastern Grocers workplace.

25. Petitioner testified that after he learned through discovery that Ms. Linville had spoken to Ms. Steckner, he phoned Ms. Linville and asked her about the conversation.

Ms. Linville told him that she had never spoken to Ms. Steckner about Petitioner.

26. Carolina has urged that Petitioner's recollection of his conversation with Ms. Linville be disregarded as unreliable hearsay. However, Petitioner's recollection is no more or less a hearsay statement than is Ms. Steckner's recollection of her conversation with Ms. Linville. The undersigned finds that both Ms. Steckner and Petitioner are truthfully and accurately recalling conversations they had with Ms. Linville. The undersigned finds that Ms. Linville was in all likelihood being deceptive when she denied to Petitioner that she had discussed him with Ms. Steckner. Through her internet research, Ms. Linville was well aware of how Petitioner tended to react when crossed.

27. Petitioner argues that Ms. Linville has always spoken of him as a great manager who treated her well and for whom she would work again "in a second." Petitioner contends that, even if the conversation with Ms. Steckner occurred, the only reason Ms. Linville would have for failing to recommend him for the VP Claims position at Carolina is her knowledge of his prior litigation.

28. Petitioner's argument on this point is rejected as unsupported by any credible evidence. Having failed to secure Ms. Linville's presence as a witness in this proceeding,

Petitioner may not offer unfounded theories regarding her motive in telling Ms. Steckner that Petitioner was not worth interviewing.

29. In any event, Ms. Linville's role in the decision not to interview Petitioner was vanishingly minor. Her "no" simply confirmed the conclusion that Ms. Steckner had already reached. The fact that Ms. Steckner saw no need to inquire further of Ms. Linville indicates that her mind was more or less made up before she placed the phone call.

30. Ms. Steckner testified that she has never conducted an internet search on Petitioner. At the time she eliminated him from consideration for the position of VP Claims, Ms. Steckner had no knowledge of Petitioner's litigation history.

31. The first round of applications did not yield any satisfactory candidates for the position. On October 23, 2015, Ms. Steckner re-posted the advertisement for the open VP Claims position.

32. On October 25, 2015, Petitioner resubmitted his resume and cover letter, without changes to either.

33. No candidate was hired as a result of the October 23, 2015, posting.

34. Michael Bellomo was one of the applicants who responded to the October 23 posting. At one time, Mr. Bellomo had been Petitioner's superior at Southeastern Groceries.

Petitioner testified that he asked Mr. Bellomo whether he had gotten an interview at Carolina. Mr. Bellomo responded, "Yeah, I got kind of--some kind of phone thing, but I haven't heard anything back." Petitioner contended that his qualifications were at least the equal of Mr. Bellomo's and that Carolina's giving a phone interview to Mr. Bellomo but not to him indicated that Carolina was discriminating against him.

35. Mr. Moody forwarded Mr. Bellomo's resume and cover letter to Ms. Steckner but she felt he was not a good fit for the position. She testified that Mr. Bellomo was in risk management, not claims. His previous experience was in a financial services role. She saw nothing on his resume regarding the trucking industry.

36. Ms. Steckner never spoke to Mr. Bellomo. Mr. Moody testified that he did not interview Mr. Bellomo. On November 6, 2015, Mr. Moody sent Mr. Bellomo a "Dear John" email declining his application for lack of trucking experience and "a heavy casualty claims background." Mr. Bellomo responded on the same day with a supplement to his resume that Mr. Moody promised to forward to the hiring manager.

37. Ms. Steckner had no recollection of reconsidering Mr. Bellomo's resume. On November 18, 2015, Mr. Bellomo emailed Mr. Moody to inquire as to the status of his application. Mr. Moody responded that he sent all of Mr. Bellomo's

information "to the next level" but that no interest had been expressed in pursuing the application further. Mr. Moody testified that at some point during these email exchanges, Mr. Bellomo phoned his office to confirm receipt of information. Mr. Moody stated that this was the only time he spoke to Mr. Bellomo on the phone. Mr. Moody's testimony on this point is credited. There was no phone interview with Mr. Bellomo.

38. On November 20, 2015, Ms. Steckner posted the job opening for the VP Claims position a third time. The third wave of responses included the resume of Bryan Fortay, the person who was ultimately hired for the position.

39. On November 23, 2015, at 7:02 a.m., Petitioner sent the following email to Mr. Moody:

> Good morning,
>
> I just noticed that this position was recently refreshed or reposted.
>
> I was curious if I might be given the opportunity to interview for this particular role, or if not, if there is a specific reason that I have been declined the opportunity to interview?

40. At 7:43 a.m., Mr. Moody responded as follows:

> Jay, your information was reviewed and the decision was made not to move forward in the process. They are looking for someone with a lot of carrier experience, heavy casualty background, and not Workers Comp or General Liability.
>
> Thanks again for your interest.

41. At 9:01 a.m., Petitioner emailed the following to Mr. Moody:

> Thank you. As my resume and cover letter show, I have extensive carrier, commercial auto, and trucking background and meet all objective requirements on the advertisement (posting). Despite this, I was denied interview while candidates with similar or lesser qualifications are still being sought. Please advise your general counsel that I am requesting preservation of all evidence as I will be initiating formal EEOC and FHRC charges immediately.

42. At 8:55 p.m. on November 23, 2015, Petitioner emailed to Mr. Moody a letter addressed to Ms. Steckner that read as follows, in relevant part:

> Good evening,
>
> As you are likely aware, I recently applied for the position of Vice President of Claims, which has been seeking applicants on media such as Indeed.com since approximately October 2, 2015. I applied initially, on or about October 2, 2015 and refreshed my posting on or about October 23, 2015 when the position was reposted. I received acknowledgements both times from Mr. James Moody. Despite this fact, I was never offered [an] interview in any way for the position.
>
> I noted that the position was again refreshed over the weekend and reached out to Mr. Moody. He responded on this date, stating:
>
> "Jay, your information was reviewed and the decision was made not to move forward in the process. They are looking for someone with a lot of carrier experience, heavy casualty

> background, and not Workers Comp or General Liability."
>
> Respectfully, such an assertion does not appear to be credible in the least. A simple review of my qualifications shows that they exceed the minimum qualifications and match or exceed the preferred qualifications sought for the role. My resume and cover letter also make it clear that I have extensive carrier and trucking experience. Despite this, I was denied interview for the role.
>
> If I am correct, I have suffered unlawful discrimination by your organization as to the refusal to even consider me for this role which I am objectively qualified for, while other candidates of similar or lesser qualifications have been sought. This is clearly unlawful and I have already established a prima facie case of discrimination and/or retaliation under federal law and/or the Florida Human Rights Act. See, e.g., Smith v. Lockheed-Martin Corporation, 644 F.3d 1321 (11th Cir.2011), Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 769 (11th Cir.2005). As such, I am moving to initiate charges with the U.S. EEOC and Florida Human Rights Commission immediately.

43. The letter concluded with three single-spaced pages of instructions regarding Carolina's responsibilities as regards the preservation of evidence, including electronically stored information.

44. On November 24, 2015, Petitioner dual-filed his Charge of Discrimination with the Equal Employment Opportunity Commission and the FCHR.

45. Ms. Steckner contacted Ms. Raimondi regarding Petitioner's charge. Ms. Steckner testified that she spoke to no one else within Carolina or any other W.R. Berkley entity about Petitioner's charge prior to the hiring of outside counsel.

46. The law firm of Foley & Lardner, LLP, was retained by Carolina to defend the company against Petitioner's charge. As noted in the Preliminary Statement, supra, Petitioner's letter to the FCHR included the following:

> [I]t is easily discernible by employers and decision makers, most of whom use the Internet or background searches on candidates, that I have taken part in protected employment conduct in the past. This has been used as a basis to blacklist me on numerous occasions and is one of the reasons I do not current [sic] use my full legal name (Jason Lee Nieman) in applications or in professional settings.

47. Based on those statements, Foley & Lardner searched court records and found that Petitioner has filed numerous actions against other insurance companies for failure to hire him. He has also filed suits against internet services that provided the public with information about his prior litigation. The investigation by outside counsel, conducted after Petitioner filed his charge against the company and during the FCHR's investigation of the charge, was the first time Ms. Steckner or

any other employee of Carolina learned of Petitioner's past litigation.

48. Ms. Steckner credibly testified that she was solely responsible for the decision not to interview Petitioner for the VP Claims position and that her reasons for the decision had to do with Petitioner's qualifications for the job, not with past litigation.

49. Bryan Fortay applied for the VP Claims position in response to the November 20, 2015, posting. Mr. Fortay's resume indicated senior executive experience with claims, including responsibility for more than $650 million in annual claims, and 16 years of experience in the claims business. His most recent claims experience was in a vice president position in which he handled trucking claims, a match for Carolina's desired qualifications. Mr. Fortay had extensive experience in the trucking and transportation industry, had led a sensitive two-year reorganization of a national claims department, and had completely turned around an underachieving litigation unit. He had a juris doctor degree and had practiced law for four years with a national law firm, with a case load that included trucking and transportation insurance defense.

50. Ms. Steckner conducted a telephone screening and then recommended Mr. Fortay for an in-person interview. Mr. Tavares conducted the interview and hired Mr. Fortay for the VP Claims

position in March 2016. Mr. Fortay began working for Carolina in April 2016.

51. At the hearing, Petitioner conceded that Mr. Fortay was qualified for the VP Claims position, though he refused to concede that Mr. Fortay was more qualified than he. Petitioner noted that Carolina is a struggling company and that it could have had him for much less money than it was paying Mr. Fortay. Carolina would not have had to pay moving expenses for Petitioner, who was already in Jacksonville, whereas it was paying to relocate Mr. Fortay and his family from Pennsylvania. Petitioner also contended that he would have accepted a smaller salary than the $230,000 that Carolina offered Mr. Fortay.

52. The undersigned is not in a position to second-guess Carolina's decision to interview and hire a management-level employee who was manifestly qualified for the position, absent evidence that the decision was rooted in retaliation against Petitioner.

53. The fact that Petitioner met the minimum posted qualifications for the VP Claims position did not give him a justiciable right to be interviewed or hired for the position, absent any evidence of a retaliatory reason for Carolina's decision not to interview him.

54. Petitioner failed to establish that Ms. Steckner or anyone else at Carolina was aware of his past protected conduct

at the time Ms. Steckner made the decision not to interview him. Petitioner's resume was not such an overwhelming match for the VP Claims position as to render Ms. Steckner's action irrational or to allow an inference that a retaliatory reason must have lain behind her decision.

55. Petitioner made much of the fact that his application was initially forwarded to Mr. Bushey for consideration. Both Ms. Steckner and Mr. Moody testified that Petitioner's was one of the better resumes to arrive during the first wave of 46 applications received in response to the October 1, 2015, posting. However, Carolina received 42 applications in response to the October 23, 2015, posting and another 41 in response to the November 20, 2015, posting. Both Ms. Steckner and Mr. Moody credibly testified that as the process went forward, Petitioner's qualifications paled in comparison to the executive level managers who were applying. It is also noted that Mr. Bushey had nothing to say about Petitioner's application.

56. Mr. Moody's employment with Carolina ended on December 31, 2015. His position was eliminated as part of a workforce reduction at Carolina. Ms. Steckner testified that Mr. Moody's dismissal was unrelated to his job performance. She stated that high-level discussions about job cuts had gone on for at least six months prior to Mr. Moody's position being cut. Mr. Moody himself testified that he had known for some months

that his job was likely to be eliminated because Carolina was not doing much hiring and thus had little immediate need for a recruiting and training person in the human resources department. Mr. Moody was given a severance package similar to those provided to other Carolina employees who were laid off during that phase of workforce reduction.

57. Petitioner alleged that Mr. Moody's dismissal was somehow tied to his actions during the recruitment process for the VP Claims position. Petitioner also implied that Carolina provided an especially generous severance package to Mr. Moody in exchange for his favorable testimony in this proceeding. Petitioner offered no credible evidence to support either claim.

58. Finally, Petitioner argued at the hearing that because Carolina had not filled the VP Claims position at the time it learned, through its outside counsel, of Petitioner's past protected activities, the company should have changed its mind and interviewed him. Further, Carolina's failure to change its mind and interview Petitioner constituted retaliation, given that Carolina now knew of Petitioner's past protected activities.

59. The undersigned places to one side the obvious question of why Carolina would change its mind and consider hiring someone who had already brought spurious charges against it at the EEOC and the FCHR. Nothing about Petitioner's

qualifications for the VP Claims position changed between Ms. Steckner's decision in October 2015 and the completion of Foley & Lardner's investigation. The only new information in Carolina's possession was the knowledge of Petitioner's prior litigation against other insurance companies. Petitioner's notion, apparently, is that subsequently learning of his past protected activities obligated Carolina to rescind its initial decision to disqualify him from consideration for the VP Claims position. Petitioner's argument on this point is rejected.

60. In summary, Petitioner offered no credible evidence that Carolina's failure to call him back for an interview was in retaliation for any complaint of discriminatory employment practices that he made in the past. Carolina had no knowledge of Petitioner's past protected activities at the time it decided not to interview Petitioner.

CONCLUSIONS OF LAW

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

62. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, prohibits employer retaliation for engaging in protected activity.

63. Section 760.10 states the following, in relevant part:

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

64. Carolina is an "employer" as defined in section 760.02(7), which provides the following:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

65. Florida courts have determined that federal case law applies to claims arising under the Florida Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under section 760.10, absent direct evidence of discrimination or retaliation.[5/] See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

66. Under the McDonnell analysis, in employment retaliation cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful retaliation. See, e.g., Burlington Northern & Santa Fe v. White, 548 U.S. 53 (2006). If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-retaliatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual. See Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

67. In order to prove a prima facie case of unlawful employment retaliation under chapter 760, Petitioner must establish that: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there was a causal relationship between (1) and (2). See Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001).[6/] To establish this causal relationship, Petitioner must prove "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Univ. of Tex. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013). This standard has also been called "but-for causation." See,

e.g., Frazier-White v. Gee, 818 F.3d 1249, 1258 (11th Cir. 2016).

68. Petitioner established that he engaged in protected activity by participating in prior employment discrimination litigation.

69. Petitioner established that he suffered an adverse employment action by not being interviewed or hired by Carolina for the VP Claims position.

70. Petitioner has failed to establish the element of causation. Petitioner offered no credible evidence that Catherine Steckner, Carolina's Vice President of Human Resources and the person who made the decision not to interview Petitioner, had any knowledge of his past litigation at the time she eliminated him as a candidate for the VP Claims position. Petitioner offered only his speculation that someone at Carolina must have performed an internet search of his full name, despite the credible denials of Ms. Steckner and of James Moody, the only Carolina employees involved in processing his application.

71. The courts recognize a "common sense" requirement that "[a] decision maker cannot have been motivated to retaliate by something unknown to him." Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000).[7/] "[T]emporal proximity alone is insufficient to create a genuine issue of fact as to causal connection where there is unrebutted evidence

that the decision maker did not have knowledge that the employee engaged in protected conduct." Corbitt v. Home Depot U.S.A., Inc., 589 F.3d 1136 (11th Cir. 2009), quoting Brungart, 231 F.3d at 799. Petitioner's unsupported contention that Ms. Steckner and/or Mr. Moody were lying does not constitute a rebuttal of their testimonial evidence.

72. Even if Petitioner had met his burden and established a prima facie case of retaliation, he failed to show that Carolina's legitimate business reasons for not selecting him for an interview were false and a pretext for retaliation. To establish pretext, Petitioner must "cast sufficient doubt" on Carolina's proffered nondiscriminatory reasons "to permit a reasonable factfinder to conclude that the [employer's] proffered legitimate reasons were not what actually motivated its conduct." Murphree v. Comm'r, 644 Fed. Appx. 962, 968 (11th Cir. 2016), quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997). If the proffered reason is one that might motivate a reasonable employer, "an employee must meet that 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). Pretext must be established with "concrete evidence in the form of specific facts" showing that the proffered reason was pretext; "mere conclusory allegations and assertions" are

insufficient. Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009), quoting Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

73. It is not the place of the court or tribunal to determine who is better qualified for the job, or to sit in judgment of the employer's selection. "[D]isparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." Cooper v. Southern Co., 390 F.3d 695, 732 (11th. Cir. 2004), quoting Lee v. GTE Fla., Inc., 226 F.3d 1249, 1254 (11th Cir. 2000).[7/]

74. A court's role is not to sit as a "super-personnel department" to re-examine a company's business decisions. The court does not ask whether the employer selected the most qualified candidate, but whether the selection was based on an unlawful motive. Denney v. City of Albany, 247 F.3d 1172, 1188 (11th Cir. 2001). The mere fact that Petitioner met the minimum qualifications for the VP Claims position did not entitle him to an interview or to be hired.

75. Petitioner presented no evidence beyond his own speculations that his limited and dated experience in the trucking industry and his lack of senior executive level experience were not the actual reasons why Carolina decided not

to interview him for the VP Claims position. In the absence of evidence that Carolina's action was retaliatory, the undersigned is constrained to defer to the company's business decision.

76. Petitioner did not come close to showing that his qualifications were so superior to Bryan Fortay's that no reasonable person could have chosen Mr. Fortay over Petitioner for the VP Claims position. The evidence demonstrated that Mr. Fortay was eminently qualified for the position, more so than Petitioner. When confronted with Mr. Fortay's manifestly superior resume, Petitioner could only respond that Carolina could have had him cheaper.

77. Petitioner also made a "cat's paw" argument that Ms. Steckner followed the biased recommendation of Ms. Linville in deciding to reject him for an interview. See Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011). This argument is unavailing. Petitioner failed to establish that Ms. Linville's advice during a 45-second telephone conversation was the reason Ms. Steckner eliminated him as a candidate. See Crawford v. Carroll, 529 F.3d 961, 979 (11th Cir. 2008)(evidence must support that the subordinate exercised "undue influence" over the decision-maker). No evidence was presented, aside from Petitioner's speculation, as to Ms. Linville's motive in telling Ms. Steckner that Petitioner was not worth an interview.

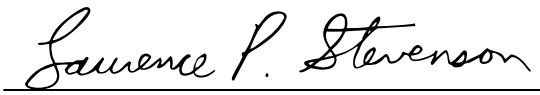
78. In summary, Petitioner failed to establish that Carolina's reason for rejecting his application and failing to interview him for the VP Claims position was for any other reason than the business reasons proffered by Carolina.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Carolina Casualty Insurance Group did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 1st day of November, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of November, 2016.

ENDNOTES

[1/] The style of the case has been amended to correct Respondent's name.

[2/] Citations shall be to Florida Statutes (2015) unless otherwise specified. Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla.

[3/] By the end of the final hearing, it had been established that Mr. Tavares had no involvement in the decision not to interview Petitioner for the position at issue. Petitioner agreed that it would not be necessary to continue the hearing in order to schedule a deposition of Mr. Tavares.

[4/] The record does not disclose what the "CATS" acronym stands for.

[5/] "Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'" Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (quoting Black's Law Dictionary 413 (5th ed. 1979)). "Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of a protected classification, constitute direct evidence." Kilpatrick v. Tyson Foods, Inc., 268 Fed. Appx. 860, 862 (11th Cir. 2008)(citation omitted). Direct testimony that a defendant acted with a retaliatory motive, if credited by the finder of fact, would change the legal standard "dramatically" from the McDonnell test. Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983). Petitioner offered no evidence that would satisfy the stringent standard of direct evidence of retaliation.

[6/] Florida courts have articulated an identical standard:

> To establish a prima facie case of retaliation under section 760.10(7), a plaintiff must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered adverse employment action and (3) that the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entm't Corp., 139 F.3d

> 1385, 1388 (11th Cir.), cert. denied 525 U.S. 1000, 119 S.Ct. 509, 142 L.Ed.2d 422 (1998). Once the plaintiff makes a prima facie showing, the burden shifts and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003). The plaintiff must then respond by demonstrating that defendant's asserted reasons for the adverse action are pretextual. Id.

Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009).

[7/] Brungart was decided under the Family and Medical Leave Act, but its reasoning as to the element of retaliation has been repeatedly applied in cases involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. See, e.g., Mitchell v. Mercedes-Benz U.S. Int'l, Inc., 637 Fed. Appx. 535, 539 (11th Cir. 2015); and Willis v. Publix Super Mkts., Inc., 619 Fed. Appx. 960, 962 (11th Cir. 2015).

[8/] In reviewing the cases of other circuits, the Lee court fastened upon a decision from the 5th Circuit: "Disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face." Lee, 226 F.3d at 1254, quoting Deines v. Tex. Dep't of Prot. & Reg. Servs., 164 F.3d 277, 280 (5th Cir. 1999). However, in Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006), the Supreme Court expressly disapproved the "slap you in the face" image as "unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications." 546 U.S. at 457. The Supreme Court approved the Cooper formulation quoted in the main text. Id.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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