

>> THERE'S A CONFLICT BETWEEN  
THE DISTRICT COURTS OF APPEAL  
OVER THAT ISSUE.

THE SECOND HAS TO DO WITH,  
AGAIN, A CONFLICT BETWEEN THE  
DISTRICT COURTS OF APPEAL OVER  
THE THIRD ELEMENT WHICH HAS TO  
DO WITH CAUSAL CONNECTION.

WITH YOUR PERMISSION, I'D LIKE  
TO ADDRESS THE FIRST ISSUE.

WITH RESPECT TO THE FIRST ISSUE,  
THE THIRD DISTRICT COURTS OF  
APPEAL REQUIRED THAT AN ADVERSE  
ACTION BE QUANTIFIABLE MEANING A  
LOSS OF PAY, A DEMOTION, A  
DISCHARGE OF SOMETHING YOU CAN  
MEASURE.

THE THIRD DCA BELOW CITED TO THE  
GRAHAM V. DEPARTMENT OF  
CORRECTIONS CASE FROM SEVERAL  
YEARS AGO, 1998.

THAT WAS NO LONGER VALID LAW AT  
THE POINT IT WAS CITED TO LAST  
SUMMER.

THAT HAD BEEN OVERTURNED BY THE

UNITED STATES SUPREME COURT, THE  
BURLINGTON NORTHERN AND SANTA FE  
RAILROAD V. WHITE.

>> DID THEY EVEN NOTICE THE  
CASE?

>> IN A FOOTNOTE.

NO, I'M SORRY, THEY DID NOT.

OKAY.

>> SO JUST SO, BECAUSE I THINK  
THIS POINT IS -- YOU'RE SAYING  
THE TRANSFER IS AN ADVERSE  
EMPLOYMENT ACTION.

>> YES.

>> AND THE THIRD DISTRICT,  
ESSENTIALLY, HELD THAT WASN'T  
SUFFICIENT FOR, AGAIN, ALL  
YOU'RE TRYING TO DO HERE IS GET  
INTO THE DOOR OF THE HEARING,  
NOT WIN THE CASE, RIGHT?

[LAUGHTER]

>> THAT IS CORRECT.

>> WHAT ABOUT THE OTHER TWO?  
BECAUSE THERE WAS THE OTHER TWO  
WHERE HE IS THREATENED WITH  
DISMISSAL.

THERE WERE TWO OTHERS.

WOULD THOSE SATISFY, UM, THE  
TEST OF ADVERSE EMPLOYMENT OR  
JUST A TRANSFER?

>> NOT BY THE THIRD DCA'S  
STANDARDS.

>> NO, I'M ASKING YOU BASED ON  
WHAT THE LAW IS ACCORDING TO THE  
SECOND DISTRICT AND WHAT YOU SAY  
THE LAW SHOULD BE.

>> MOVING ON TO THE SECOND --  
YES.

THE SHORT ANSWER IS, YES.

MOVING ON TO THE SECOND  
DISTRICT -- I'M SORRY, LET'S DO  
THE FIRST DISTRICT, FIRST DCA  
FIRST.

GAETZ V. GADSDEN, AND THAT WAS  
THE 1990 -- I'M SORRY, THE 2010  
CASE.

ALSO THE DONOVAN V. BROWARD CASE  
THAT'S A 2008 CASE OUT OF THE  
FOURTH DCA, AND BOTH OF THESE  
SUBSCRIBE TO THE FEDERAL TEST.

THE FEDERAL TEST WAS HANDED DOWN

IN 2006 BY THE UNITED STATES  
SUPREME COURT IN BURLINGTON --

>> BEFORE WE GO FURTHER INTO  
THAT, COULD I ASK YOU WHAT I  
CONSIDER, PERHAPS, TO BE A  
THRESHOLD QUESTION?

>> SURE.

>> HOW IS AN UNFAIR LABOR  
PRACTICE DEFINED?

WHAT DOES -- HOW DOES THE  
STATUTE AND CASE LAW DEFINE  
UNFAIR LABOR PRACTICE?

>> THE STATUTE, UM, I COULD  
PROBABLY CITE NUMBERS, AND I MAY  
TANGLE THEM, SO I'D REALLY  
RATHER NOT.

BUT ONE SAYS IT'S AN UNFAIR  
LABOR PRACTICE TO DEPRIVE  
SOMEONE OF THE RIGHTS GUARANTEED  
IN THIS SECTION.

THAT'S 447 --

>> BUT, AND THAT'S THE SECTION  
THAT GUARANTEES THE RIGHT TO  
COLLECTIVELY BARGAIN AND ALL  
THAT.

>> AND MUTUAL AID AND PROTECTION

WHICH RELATES BACK TO 447301.

>> WHERE'S THE MUTUAL AID AND  
PROTECTION SPECIFICALLY?

>> SAY AGAIN?

I'M SORRY.

>> WHAT'S THE REFERENCE TO  
MUTUAL AID AND PROTECTION?

>> 447301, NUMBER 1.

MUTUAL AID AND PROTECTION.

OKAY.

UM --

>> AND SO YOUR THEORY THAT THIS  
IS AN UNFAIR LABOR PRACTICE, I  
MEAN, THIS, I MEAN, IF THIS HAD  
BEEN, UM, A RETALIATION WITH  
RESPECT TO THE FEDERAL CIVIL  
RIGHTS VIOLATION, THAT WOULDN'T  
BE AN UNFAIR LABOR PRACTICE,  
WOULD IT?

>> NO.

>> YOU'D BE OFF OVER INTO EEOC  
LAND AND DIFFERENT REALMS.

>> SHORT ANSWER IS, YES, BUT THE  
LONGER ANSWER IS EVERYONE USES

THE SAME RETALIATION PRIMA FACIE  
CASE.

THE SHORT ANSWER IS, YES.

>> WELL, IT'S A WHOLE DIFFERENT  
STATUTORY SCHEME HERE THAT'S  
UNDER THAT.

>> INDEED, IT IS.

HOWEVER, THE RETALIATION PRIMA  
FACIE CASE HAS BEEN EXTENDED  
FROM TITLE 7 AND TO SEXUAL  
HARASSMENT ON TO ADA, AND EVEN  
THE CASES CITING PERC AND UNFAIR  
LABOR PRACTICES HAVE RESORTED TO  
THE SAME CASES.

THEY PRETTY MUCH ARE IN -- THEY  
MAY DISAGREE AS TO WHAT SOME OF  
THE SUBCATEGORY TESTS MAY BE,  
BUT THEY ALL SEEM TO AGREE THAT  
THE SAME THREE, THE SAME CASE  
WITH ITS THREE ELEMENTS --  
PROTECTED SPEECH FOLLOWED BY  
ADVERSE ACTION AND SOME CAUSAL  
PROTECTION.

>> WELL, LET ME ASK YOU THIS.

I JUST WANT TO MAKE SURE, ALSO,

ON THE FACTS OF THE CASE.

THE PETITIONER ASSISTED ANOTHER  
PERSON IN DRAFTING THE COMPLAINT  
WHERE SHE WAS ALLEGING SEXUAL  
HARASSMENT.

>> THAT IS TRUE, A SECURITY  
GUARD.

>> IF SHE WAS RETALIATED  
AGAINST, HER CLAIM WOULD BE  
UNDER -- WOULD IT BE TITLE --  
YOU KNOW, WHAT WOULD BE UNDER  
THE TITLE 7?

IN OTHER WORDS, BECAUSE HE'S  
NOT, I MEAN, HE'S ASSISTING  
SOMEBODY, AND THAT'S WHY IT'S  
BEING DEFINED AS AN UNFAIR LABOR  
PRACTICE.

BUT IT'S, ESSENTIALLY, THE  
PRACTICES THAT THEY RETALIATED  
THAT ASSISTED SOMEONE IN  
ASSERTING RIGHTS UNDER A STATE  
OR FEDERAL STATUTE.

>> I THINK YOU MAY BE CORRECT.

>> WELL, I'M ASKING YOU.

YOU'RE THE ONE THAT --

>> THERE WAS A CHOICE.

BECAUSE THE FILING OF A CHARGE  
AS IT WAS BY THE SECURITY GUARD  
IN AN INTERNAL PROCEDURE AND  
BECAUSE THAT IS COVERED UNDER  
THE SAME 447301.3, AND, IN FACT,  
IF IT'D BEEN CONSIDERED AS A  
GRIEVANCE, IT WOULD HAVE BEEN  
COVERED UNDER .4, I THINK,  
BROUGHT IT'S ALSO UNDER PERC,  
UNDER THE UNFAIR LABOR PRACTICE.

>> THIS IS JUST REALLY THE FIRST  
STEP THAT THEY'RE TAKING.

>> YES.

TO ANSWER YOUR QUESTION, IT  
PROBABLY COULD HAVE BEEN HANDLED  
ANOTHER WAY.

OKAY.

UM, I HAVE TWO ISSUES, SOME  
ISSUES, AGAIN, WITH THE  
MATERIALITY OF THE ADVERSE  
ACTION.

THE THIRD DCA HAS DONE ONE THING  
AND SAY QUANTITATIVE LOSS OF  
PAY, DEMOTION/DISCHARGE.

ON THE OTHER HAND, THE -- I WANT  
TO GET THIS CORRECT -- THE FIRST  
DCA UNDER THE GAETZ V. GADSDEN  
CASE, AND THAT'S A 2010 CASE --

>> WELL, LET ME ASK YOU THIS.

>> SURE.

>> YOU'RE SAYING YOU DON'T HAVE  
TO GO SO FAR AS TO DISCHARGE  
SOMEONE, DEMOTE THEM OR REDUCE  
THEIR PAY, BUT THAT THERE ARE  
OTHER ASPECTS OF THIS, ADVERSE  
ACTIONS IN THE PERSON IN  
RETALIATION FOR EXERCISING THEIR  
RIGHTS.

>> YES.

>> THAT'S BASICALLY YOUR  
ARGUMENT.

SO THE FIRST ACTION IT SEEMS TO  
ME WAS THAT THEY SEE -- HE WENT  
ON SOME KIND OF LEAVE, WAS  
INJURED AND WENT ON SOME KIND OF  
LEAVE, IN FACT, SENT THEM NOTICE  
ABOUT IT, DEFINED IT.  
BUT THEN SHE SAYS SHE WAS ON  
LEAVE ABOUT --

>> THAT IS CORRECT.

>> WOULD THAT ALONE HAVE BEEN  
ENOUGH TO SATISFY THE  
REQUIREMENT THAT BRING --

>> IT MAY VERY WELL HAVE BEEN,  
HOWEVER, THERE WERE TWO  
ADDITIONAL.

>> OKAY.

THAT'S WHAT I'M TRYING TO GET  
TO.

THAT MAY HAVE OR MAY NOT HAVE  
ALONE DONE IT.

THEN WE HAVE THE NEXT ACTION  
THAT SHE TOOK, I DON'T KNOW,  
SENIOR MOMENT HERE.

WHAT WAS THE NEXT ACTION SHE  
TOOK?

>> SECOND ACTION WAS AN  
ATTEMPTED TWO WEEK DISCIPLINARY  
SUSPENSION WITHOUT PAY --

>> BASED ON HIS PASSWORD OR  
SOMETHING.

>> ALLEGEDLY, FOR SHARING A  
PASSWORD WITH A SUBSTITUTE  
TEACHER TO HAVE GRADES ENTERED.

NO ONE ELSE HAD EVER BEEN

DISCIPLINED FOR THAT.

>> WOULD THAT HAVE BEEN ENOUGH

TO BRING THIS ACTION ALSO?

ALONE OR EITHER IN COMBINATION

WITH THE OTHER ACTIONS?

>> BOTH, I BELIEVE, YOUR HONOR.

IN FACT, EVEN UNDER THE OLD

QUANTIFIABLE STANDARDS THEY WERE

LOOKING FOR TWO WEEKS OF PAY,

ALTHOUGH ONE MIGHT WELL SAY,

WELL, EVENTUALLY, THEY THOUGHT

BETTER OF IT AND GAVE THEM A

REPRIMAND.

OSTENSIBLY, UP FRONT IT WAS A

TWO WEEK SUSPENSION THEY WERE

LOOKING FOR.

>> NOW, AS WE LOOK AT THE

TRANSFER AND KNOWING THE SIZE OF

METRO DADE COUNTY FROM ONE END

TO THE OTHER, THIS ONE,

CERTAINLY, AT LEAST IN THE

BRIEFS IT'S BEEN QUANTIFIED.

I MEAN, THE AMOUNT OF TRAVEL,

THE ADDITIONAL AMOUNTS.

IS THAT NOT QUANTIFIABLE EVEN  
UNDER THE OTHER STANDARD THAT  
YOU MUST HAVE QUANTIFIABLE  
AMOUNTS?

>> THE ANSWER IS IT SHOULD HAVE  
BEEN, BUT I DON'T BELIEVE --

>> YOU DON'T HAVE TO.

I UNDERSTAND.

EVEN THOUGH YOUR POSITION IS IT  
DIDN'T HAVE TO, BUT THIS ONE  
EVEN USING THE THIRD DISTRICT  
STANDARD ABOUT A QUANTIFIABLE  
AMOUNT, THIS WAS QUANTIFIABLE AT  
LEAST TO THAT EXTENT.

>> YES, SIR, I BELIEVE THAT TO  
BE THE TRUTH.

I CAN ONLY IMAGINE THAT THE  
THIRD DCA IN LOOKING AT THE 960  
MILES OF ADDITIONAL DRIVING A  
MONTH ALONG WITH THE \$250 EXTRA  
GASOLINE CHARGE WHY THE THIRD  
DCA WAS RELUCTANT OR FAILED TO  
DISCUSS THIS AT ALL, I CAN ONLY  
THINK THAT IN THEIR MINDS IT  
OCCURRED OFF THE WORKSITE AND

REALLY WASN'T RELATED TO THE  
WORKDAY OR THE EMPLOYMENT.  
>> IT'S A CONSEQUENCE OF TRAVEL  
TO AND FROM, HAS THAT  
TRADITIONALLY BEEN EXCLUDED FROM  
THESE KINDS OF CLAIMS OR NO?

I --

>> NOT THAT I KNOW.  
THAT'S THE FIRST TIME THAT I'VE  
SEEN THAT.  
IT'S THE ONLY THING I COULD  
THINK OF.

HOWEVER, BURLINGTON, THE UNITED  
STATES SUPREME COURT 2006  
BURLINGTON SPECIFICALLY  
ADDRESSED THAT.

THEY SAID IT DOESN'T HAVE TO  
TAKE PLACE IN THE WORKPLACE, IT  
DOES NOT HAVE TO PERTAIN TO  
EMPLOYMENT.

>> OKAY.

>> IS THERE ANY PART OF JUDGE  
KOCH'S DISSENT THAT YOU WOULD  
AGREE WITH?

>> NONE WHATSOEVER.

I THOUGHT JUSTICE KOCH POINTING  
OUT THAT THIS WAS -- IN ORAL  
ARGUMENT HE SAID THIS, HE WROTE  
THE DISSENT -- IN ORAL ARGUMENT  
HE SAID, "THIS IS A POSTER CHILD  
FOR A PRIMA FACIE CASE."

I BELIEVE THAT'S A DIRECT QUOTE.  
AND WE BELIEVE A --

[INAUDIBLE]

>> YOU KNOW, ON THIS ISSUE  
BECAUSE THE PERC COUNCIL HAD A  
CHANCE TO LOOK AT THE FIRST TWO  
BUT, APPARENTLY, NOT THE THIRD,  
THE TRANSFER OCCURRED AFTER.  
AND IT SEEMS TO ME AS JUSTICE  
LEWIS IS SAYING THAT UNDER  
EITHER ANY STANDARD THE TRANSFER  
IS 24 MILES AWAY IN MIAMI-DADE  
COUNTY.

I MEAN, THAT'S PRETTY  
SIGNIFICANT AND QUANTIFIABLE.  
BUT IN TERMS OF TRYING TO  
INDICATE THE PURPOSE OF THESE  
ACTS, IT SEEMS THAT WE OUGHT TO  
BE VERY EXPANSIVE IN WHAT AN

ADVERSE EMPLOYMENT ACTION IS.  
BECAUSE IF SOMEBODY ASSISTS IN A  
LEGITIMATE WAY TO HELP SOMEBODY  
DRAFT A COMPLAINT AND THEN  
THEY'RE JUST HARASSED FOR THE  
NEXT YEAR WITH WHAT APPEARS AT  
LEAST -- AND, AGAIN, THERE'S  
BEEN NO HEARING -- JUST  
VINDICTIVE ACTIONS SO THAT HE'S  
GOT TO WATCH HIS BACK AT EVERY  
TURN, UM, I WOULD HOPE THAT THE  
DEFINITION THAT HAS BEEN  
ADOPTED, BURLINGTON, AND AS YOU  
SAID BY THE OTHER DISTRICT  
COURTS OF APPEAL WOULD BE BROAD  
ENOUGH TO INCLUDE ALL THOSE  
THREE.  
NOW, IF ONLY ONE HAPPENED, IT  
MAY BE THAT THE PRINCIPAL COULD  
DEFEND ON SAYING, LISTEN, NO,  
I HAVE AN EXPLANATION FOR THAT.  
MAYBE IT'S IMPORTANT TO SEE ALL  
THREE IN CONTEXT.  
YOU SEE A PATTERN OF WHAT  
STARTED, DRAFT THE COMPLAINT AND

THEN THESE THINGS START TO  
OCCUR.

SO DO YOU -- WHAT IS -- SO IS  
THAT SOMETHING THAT AS FAR AS,  
AGAIN, IN PUBLIC POLICY WHY IT'S  
IMPORTANT THAT WE JUST DON'T  
RESTRICT THIS TO SOMETHING THAT  
IS A WAY TO FINANCIAL DEFICIT  
BEFORE SOMEBODY CAN BRING A  
CLAIM FOR AN UNFAIR LABOR  
PRACTICE?

>> I THINK IT'S QUITE IMPORTANT  
THAT THIS IS NO LONGER LIMITED  
TO WHAT IS QUANTIFIABLE.  
THE CASES THAT HAVE REACHED US  
HAVE INVOLVED, AS IN BURLINGTON,  
LATERAL TRANSFER TO A LESS  
AGREEABLE JOB.

THE CASE IN BURLINGTON INFLICTED  
A 37-DAY DISCIPLINARY LAYOFF  
WITHOUT PAY, BUT THEN GAVE HER  
THE MONEY BACK AND ARGUED BEFORE  
THE SUPREME COURT IT DOESN'T  
COUNT, SHE DIDN'T LOSE ANY  
MONEY.

THAT IS INTIMIDATING TO ANYONE  
ELSE WHO MIGHT EVER WANT TO FILE  
A CHARGE.

MAYBE I WILL WIN, BUT THEY MIGHT  
VERY WELL TRY TO GET RID OF ME  
OR DISCIPLINE ME FOR 37 DAYS.

I HOPE I ANSWERED THAT QUESTION.

UM, I'LL MOVE ON TO THE SECOND,  
SECOND POINT --

>> AS YOU'RE GOING INTO THAT,  
YOU'RE DOWN TO ABOUT FIVE  
MINUTES.

BE AWARE OF THAT.

>> OKAY IF I TALK FASTER?

[LAUGHTER]

>> I DON'T THINK, YOU KNOW, I  
THINK IF YOU WANT TO, YOU KNOW,  
THE THIRD DISTRICT'S MAJORITY  
USES A TEST ABOUT SAYING THAT A  
REASONABLE BELIEF ISN'T ENOUGH  
WHEN IT'S CLEAR THAT BURLINGTON  
AND THE OTHER COURTS HAVE SAID  
IT.

YOU'VE GOT CONFLICT.

I GUESS THE ISSUE IS JUST TO SAY

WE KNOW THERE'S CONFLICT.

>> YES.

>> BUT WHY IS IT THAT WE  
SHOULDN'T GO WITH THE THIRD  
DISTRICT'S VIEW VERSUS THE OTHER  
DISTRICTS?

>> AT THE RISK OF  
OVERSIMPLIFYING, THE THIRD  
DISTRICT IS FOCUSED ON THE MIND  
OF THE PERSON WHO WAS  
DISCIPLINED OR DISCHARGED OR GOT  
A DIRTY LOOK FROM THE BOSS.  
ENFORCEMENT OF THE ACT DEPENDS  
ON THE PERCEPTION OF THE  
REASONABLE PEOPLE YET TO COME  
WHO MAY BE INTIMIDATED BY WHAT  
HAPPENED.

>> BUT THEN THE THIRD DISTRICT  
SAYS, AND PERHAPS I'M WRONG, BUT  
CORRECT ME IF I AM, DIDN'T THEY  
USE THE TERM "OBJECTIVE  
EVIDENCE"?

>> YES, BUT I BELIEVE BOTH --  
RESPECTFULLY, I BELIEVE BOTH  
TESTS ARE OBJECTIVE.

CERTAINLY QUANTIFIABLE --

>> WHAT'S IN SOMEBODY'S MIND IS  
NOT OBJECTIVE.

I MEAN, I DON'T -- I MEAN, I  
THINK THAT THE WAY YOU DESCRIBE  
A SUBJECTIVE TEST, THE WAY IT  
WAS PERCEIVED BY A PARTICULAR  
PERSON, BUT THE OBJECTIVE TEST  
WOULD BE SOMETHING THAT WOULD BE  
A REASONABLE PERSON'S STANDARD.

>> YES, SIR.

REASONABLE PERSON'S STANDARD HAS  
BEEN WITH US FOR TWO OR THREE  
HUNDRED YEARS.

YOU MAY MOST RECENTLY RECALL  
THAT REASONABLE STANDARD WAS  
BROUGHT INTO HOSTILE ENVIRONMENT  
SEXUAL HARASSMENT IN THE '90s  
AND IS QUITE A MAINSTAY OF  
JURISPRUDENCE.

>> WELL, BUT WHAT THEY SAID,  
"OBJECTIVE EVIDENCE," SO WHAT IS  
IT THAT SHOWS THAT'S NOT THE  
TEST THEY WERE USING?

>> I, FRANKLY, DID NOT

UNDERSTAND THEIR -- THIRD DCA  
SAID THERE'S A LACK OF OBJECTIVE  
EVIDENCE.

BY THE TIME YOU HAVE A 17-DAY  
GAP BETWEEN THE INITIAL  
ASSISTANCE FOR THE SECURITY  
GUARD AND THE ANGRY  
CONFRONTATION BY THE PRINCIPAL,  
THAT'S PRETTY OBJECTIVE.

>> WELL, I GUESS HERE'S THE  
DEAL.

>> SURE.

>> THEY SAY A SUCCESSFUL CLAIM  
DOES NOT HINGE ON THE EMPLOYEE'S  
REASONABLE BELIEF.

BURLINGTON SAYS WHETHER A  
PARTICULAR REASSIGNMENT IS  
PARTICULARLY ADVERSE DEPENDS  
UPON THE CIRCUMSTANCES AND  
SHOULD BE JUDGED FROM THE  
PERSPECTIVE OF A REASONABLE  
PERSON IN THE PLAINTIFF'S  
POSITION CONSIDERING ALL THE  
CIRCUMSTANCES.

IT SEEMS TO ME THE THIRD

DISTRICT HAS REJECTED THE IDEA  
THAT YOU WOULDN'T USE A  
REASONABLE -- WHAT A REASONABLE  
PERSON WOULD THINK ABOUT WHAT  
HAPPENED.

AND THAT'S WHY IT SEEMS THAT  
THEY'RE IN CONFLICT AND THEY'RE,  
APPARENTLY, IN CONFLICT WITH  
WHAT -- NOT THAT WE HAVE TO, I  
GUESS, FOLLOW THE U.S. SUPREME  
COURT IN HOW WE INTERPRET OUR  
STATE ACT, BUT THEY'RE IN  
CONFLICT WITH HOW THE U.S.  
SUPREME COURT HAS REVIEWED THIS,  
AGAIN, FOR A PRIMA FACIE CASE,  
NOT IF HE'S GOING TO WIN.

>> EXACTLY.

I REALIZE I'M OFF INTO AMBER  
TIME HERE, BUT AT THIS POINT AS  
OF DECEMBER 2ND, THERE HAVE BEEN  
756 CITATIONS TO BURLINGTON  
ACROSS THE COUNTRY, AND THAT  
INCLUDES EVERY CIRCUIT COURT  
WITH THE EXCEPTION OF THE NINTH  
AND IN NINE STATE COURTS FROM

THE APPELLATE INCLUDING FLORIDA.

>> WELL, THAT'S ALL GOOD, BUT WE  
DON'T HAVE -- FOR THIS CASE WE  
DON'T HAVE TO FOLLOW BURLINGTON.

>> OF COURSE NOT.

>> IF THERE'S A BETTER POLICY AS  
TO WHAT THE THIRD DISTRICT'S  
ENUNCIATING.

BUT I DON'T REALLY KNOW WHAT  
STANDARD THEY ARE ENUNCIATING IN  
TERMS OF WHETHER IT'S A PRIMA  
FACIE CASE.

IT JUST SEEMS THEY DISAGREED OR  
AGREED WITH HER THAT THIS WASN'T  
ENOUGH TO SHOW THAT HE WAS  
RETALIATED AGAINST.

>> IF I UNDERSTAND THE QUESTION  
CORRECTLY, MOST OF THE COURTS  
ARE GOING WITH BURLINGTON.

THE STATE COURT HERE, THE THIRD  
DCA WAS RELYING ON AN OLD COURT  
THAT HAS BEEN OVERTURNED, AND I  
THINK I BETTER QUIT SO I STILL  
HAVE A MINUTE LEFT.

THANK YOU.

[LAUGHTER]

>> GOOD MORNING.

I'M LUIS GARCIA, AND I'M HERE ON  
BEHALF OF THE SCHOOL BOARD OF  
MIAMI-DADE FLORIDA, THE  
RESPONDENT IN THIS CASE.

JUST TO RESPOND TO SOME OF THE  
ARGUMENTS PRESENTED BY THE  
PETITIONER, FIRST OF ALL, THE  
THIRD DCA DID NOT GO IN  
CONTRADICTION TO THE BURLINGTON  
CASE.

THE CASE INVOLVED A FEMALE  
DRIVER WHO WAS REASSIGNED --

>> WE'RE TALKING NOW ABOUT WHAT  
WOULD CONSTITUTE AN ADVERSE  
EMPLOYMENT ACTION?

>> CORRECT.

WHAT WOULD BE A MATERIALLY  
ADVERSE EMPLOYMENT ACTION.

>> OKAY.

SO YOUR ARGUMENT IS, AND I JUST  
WANT TO MAKE SURE THAT SOMEBODY  
THAT IS AFTER THEY DO SOMETHING  
THAT IS LEGAL THAT A MEMBER OF

THE SCHOOL BOARD OF, I MEAN,  
MIAMI-DADE, A PRINCIPAL, COULD  
HARASS SOMEBODY AND THREATENING  
THEM WITH DISCHARGE AND ALL  
THESE THINGS, AND IF THEY'RE NOT  
DEMOTED OR FIRED, THERE WOULD BE  
NO COGNIZABLE CLAIM?

>> THAT'S CORRECT.

WE BELIEVE THAT YOU HAVE TO  
PROVIDE SOME THRESHOLD FOR THE  
ADVERSE EMPLOYMENT ACTION,  
OTHERWISE --

>> WHAT WOULD THEIR REMEDY BE?

WE CERTAINLY DON'T WANT  
PRINCIPALS HARASSING TEACHERS  
THAT, YOU KNOW, THAT ARE  
ASSERTING RIGHTS THAT ARE  
STATUTORY RIGHTS AND IN SOME  
RESPECTS CONSTITUTIONAL RIGHTS.

>> WELL, OUR FIRST RESPONSE TO  
THAT QUESTION IS NOT, THE  
PRINCIPAL IN THIS CASE WAS NOT  
ACTUALLY RETALIATING OR  
HARASSING HIM BECAUSE HE FILED A  
COMPLAINT.

>> WE DON'T KNOW THAT, BUT WE  
DON'T REALLY KNOW THAT.  
THE QUESTION HERE IS DON'T GET  
IN THE DOOR TO TRY TO MAKE THEIR  
CASE.

ISN'T THAT WHAT WE'RE TALKING  
ABOUT --

>> WELL, OUR FIRST ARGUMENT ON  
THE JURISDICTIONAL ISSUE WAS  
THAT THIS WAS A PERC TYPE OF  
COMPLAINT, AN UNFAIR LABOR  
PRACTICE IS WHAT YOU'RE LOOKING  
AT.

AND WHAT HE WAS ASSISTING THE  
EMPLOYEE WITH WAS A SEXUAL  
HARASSMENT COMPLAINT.

IT WASN'T THE SAME TYPE OF  
COMPLAINT THAT PERC USUALLY --

>> WELL, I UNDERSTAND THAT  
ORDINARILY THIS MAY NOT FALL  
INTO RUN OF THE MILL.

BUT WHY DOESN'T IT FALL WITHIN  
THIS RIGHT, THIS PUBLIC EMPLOYEE  
RIGHT FOR OTHER MUTUAL AID OR  
PROTECTION?

THE MAIN PART OF THAT RIGHT IS  
THE RIGHT TO ENGAGE IN CONCERTED  
ACTIVITIES NOT PROHIBITED BY LAW  
FOR THE PURPOSE OF COLLECTIVE  
BARGAINING, OKAY?

I THINK THAT'S KIND OF  
PARADIGMATIC OF SOMETHING THAT  
INTERFERES WITH THAT COMES TO  
MIND IMMEDIATELY WHEN WE THINK  
OF AN UNFAIR LABOR PRACTICE.

BUT THE STATUTE HERE GOES ON  
BEYOND THE PURPOSE OF COLLECTIVE  
BARGAINING TO SAY "OR OTHER  
MUTUAL AID OR PROTECTION."

AND WHY WASN'T THIS ASSISTANCE  
PROVIDED BY ONE EMPLOYEE TO  
ANOTHER FILLING OUT A COMPLAINT,  
SOME THINGS WITHIN THE SCOPE OF  
MUTUAL AID OR PROTECTION?

>> THE SECTION 447.501 WHICH IS  
A PERC JURISDICTIONAL SECTION,  
IT PROVIDES WHAT TYPE OF  
COMPLAINTS FALL WITHIN AN UNFAIR  
LABOR PRACTICE.

IN THIS INSTANCE THAT COMPLAINT

WAS NOT FILED WITH PERC.

THE OPERATIVE LANGUAGE UNDER THE  
STATUTE SAYS IT'S FOR COMPLAINTS  
TAKEN UNDER THIS PART.

IN OTHER WORDS, UNDER 447.501.

NOT A COMPLAINT THAT WAS FILED  
WITH THE INTERNAL CIVIL RIGHTS  
COMPLAINT OFFICE.

>> BUT IF HE HAS A RIGHT UNDER  
CHAPTER 447 TO ENGAGE IN  
CONCERTED ACTIVITIES NOT  
PROHIBITED BY LAW FOR MUTUAL AID  
OR PROTECTION OF ANOTHER  
EMPLOYEE, WHY ISN'T THAT RIGHT A  
RIGHT THAT WOULD AT LEAST  
POTENTIALLY INFRINGE, DEFY  
RETALIATORY ACTION?

IF HE ENGAGES IN THIS  
ACTIVITY -- HE'S GOT A RIGHT TO  
DO IT.

SAYS RIGHT HERE, "MUTUAL AID AND  
PROTECTION."

EXPLAIN TO ME WHY I'M WRONG IN  
THINKING THAT.

>> YOU'RE CORRECT THAT HE HAS A

RIGHT TO FILE ANY COMPLAINT --

>> I'M NOT TALKING ABOUT  
SOMEBODY'S RIGHT TO FILE A  
COMPLAINT.

I'M TALKING ABOUT THE RIGHT THAT  
MR. KOREN HAD HERE TO ASSIST  
SOMEONE, TO ENGAGE IN MUTUAL AID  
AS A PUBLIC EMPLOYEE?

>> WE AGREE WITH THAT, THAT HE  
HAS A RIGHT TO ASSIST, BUT IT  
WOULD BE FOR A COMPLAINT THAT IS  
FILED WITH PERC.

THIS WAS A COMPLAINT --

>> SO YOU'RE DRAWING THE  
DISTINCTION WHERE THE SECURITY  
OFFICER FILED THE COMPLAINT, AND  
SOMEHOW IF HE IS, IF THIS  
INDIVIDUAL ASSISTS IN THAT AND  
IT'S FILED SOMEWHERE ELSE AND IS  
THEN FIRED BECAUSE OF ASSISTING  
ANOTHER TEACHER, THAT THERE'S NO  
REMEDY?

>> HE DOES HAVE A REMEDY, YOUR  
HONOR.

HE HAS THE ABILITY TO FILE A

COMPLAINT WITH THE CIVIL RIGHTS,  
UNDER THE FLORIDA CIVIL RIGHTS  
ACT --

>> HIS CIVIL RIGHTS HAVE NOT  
BEEN VIOLATED.

HE'S MERELY ASSISTED SOMEONE IN  
PUTTING WORDS TO THE PAPER, AND  
THAT PERSON HAS FILED WHATEVER  
THEY HAVE FILED.

AND HE'S FIRED, TERMINATED  
BECAUSE WE MADE THAT ASSISTANCE.

>> HE CAN ALSO FILE A COMPLAINT  
UNDER TITLE 7 LIKE THE  
BURLINGTON CASE.

>> I DIDN'T ASK THAT QUESTION.  
HE HAS NO RIGHTS UNDER FLORIDA  
STATUTES, IS THAT YOUR ANSWER?

>> THE ANSWER IS THAT PERC IS  
FOR COMPLAINTS THAT ARE FILED  
WITH IT --

>> ALL THAT IS IS A YES OR NO,  
SIR.

DOES HE OR DOES HE NOT HAVE A  
RIGHT TO PROCEED UNDER PERC  
UNDER THE CIRCUMSTANCES THAT THE

CHIEF'S BEEN ASKING ABOUT FOR  
THE LAST SIX MINUTES?

>> HE CAN GO AHEAD AND FILE WITH  
PERC --

>> OKAY.

SO HE CAN FILE WITH PERC.

OKAY.

SO YOU AGREE HE CAN FILE WITH  
PERC.

>> ABSOLUTELY.

>> BUT HE MUST SHOW SOME TYPE OF  
ADVERSE ACTION.

>> CORRECT.

>> AND ARE YOU SAYING THE  
TRANSFER IN DADE COUNTY,  
METROPOLITAN DADE COUNTY, TO A  
DIFFERENT SCHOOL 20-SOME MILES  
MORE IS NOT AN ADVERSE ACTION?

>> THE CASE THAT THE DISSENT  
USED FOR SHOWING THAT A TRANSFER  
WAS --

>> DIDN'T ASK WHAT THE DISSENT  
SAID, SIR.

I'M ASKING YOU.

>> IT WOULDN'T BE AN ADVERSE --

>> IT WOULD NOT.

AND WHY NOT?

WHY NOT?

>> BECAUSE IN THIS INSTANCE THE COURT WAS LOOKING AT PARTICULARLY THE DISSENT IN THE BURLINGTON CASE WAS A REASSIGNMENT OF JOB DUTIES, NOT A CHANGE IN LOCATION.

THE SECOND ARGUMENT --

>> WELL, LET ME ASK THIS THEN.

ARE YOU SUGGESTING TO THIS COURT THAT EVERY HIGH SCHOOL IN METROPOLITAN DADE COUNTY IS OF EQUIVALENT DESIRABILITY FOR TEACHERS EMPLOYED IN THAT COUNTY?

>> WELL, YOUR HONOR, THAT'S A MUCH BROADER QUESTION --

>> WELL, I'M ASKING THAT QUESTION.

>> WE WOULD PRESUME THAT THEY ARE.

THERE'S ABOUT --

>> WELL, LET ME SUGGEST TO YOU

THAT YOUR PRESUMPTION MAY NOT,  
MAY BE WITHOUT A FACTUAL  
FOUNDATION.

FOR YOU TO SUGGEST TO THIS COURT  
THAT TEACHING AT SOME OF THE  
UPPER ECHELON NEIGHBORHOODS AND  
BEING IN THOSE SCHOOLS IS THE  
SAME AS BEING ASSIGNED TO A  
SCHOOL THAT UNDERPERFORMS FOR  
WHATEVER REASONS, THAT THOSE TWO  
JOBS ARE EQUAL, I THINK THAT'S A  
JOKE.

>> I UNDERSTAND YOUR HONOR'S  
CONCERN.

TWO THINGS THAT COME TO MIND  
ARE, FIRST OF ALL, THAT THERE'S  
NO EVIDENCE IN THE RECORD THAT  
ANY -- THE INVOLUNTARY TRANSFER  
THAT HE WENT TO OR THE SCHOOL  
THAT HE WENT TO WAS OF ANY LOWER  
QUALITY THAN --

>> WELL, WE'RE NOT TALKING --  
THIS IS A THRESHOLD OF COMPLAINT  
WHETHER IT STATES A CAUSE OF  
ACTION.

THE IDEA THAT THE SCHOOL BOARD  
IS STANDING HERE AND SAYING,  
AGAIN, I WOULD AGREE THAT  
TEACHERS CAN BE REASSIGNED AS  
LONG AS IT'S NOT DONE IN  
RETALIATION FOR THEM EXERCISING  
THEIR LEGAL RIGHTS OR THEIR  
CONSTITUTIONAL RIGHTS.  
SO THE IDEA THAT HE'S GOING TO  
HAVE TO SHOW THE NEXUS?  
AND I'M SURE THE PRINCIPAL'S  
GOING TO SAY, WELL, WE WERE, WE  
HAD -- HE WAS ONE OF, YOU KNOW,  
ROOKIE OF THE YEAR, YOU KNOW?  
HE WAS LOWEST ON THE TOTEM POLE,  
AND WE HAD TO REASSIGN FOUR  
DIFFERENT PEOPLE.  
AND THEN YOU WIN.  
YOU MAY WIN YOUR CASE.  
BUT THE ISSUE IS, DOES HE GET IN  
THE DOOR?  
SO WHAT IS IT ABOUT SAYING, NO,  
A TRANSFER EVEN IF IT IS DONE  
FOR RETALIATION, TAKING SOMEBODY  
WHO'S BEEN A TEACHER, LET'S JUST

SAY, FOR 20 YEARS AND TAKING  
THEM, AND THEY LIVE, THEY MOVE  
THEIR HOUSE TO BE RIGHT NEAR  
THAT SCHOOL, AND THEY'VE BEEN  
THERE, AND THEY HAVE THEIR  
FAMILY THERE, AND THEY HAVE  
THEIR CHILDREN IN SCHOOL.  
AND THEN BECAUSE THEY DON'T LIKE  
THAT THIS PERSON, YOU KNOW,  
FILED A COMPLAINT, THEY TRANSFER  
THEM DOWN TO -- I'M NOT GOING TO  
EVEN SAY AN UNDERPERFORMING  
SCHOOL -- THEY'VE TRANSFERRED  
THEM 30 MILES AWAY.  
AND THEY DO IT SOLELY TO  
RETALIATE.  
WHAT YOU'RE SAYING IS, THAT'S  
JUST TOO BAD, TOO SAD THAT THERE  
IS NO -- JUST BECAUSE IT'S IN  
RETALIATION, YOU KNOW, ALL  
SCHOOLS IN MIAMI-DADE ARE EQUAL,  
AND A TRANSFER WILL NEVER BE AN  
ADVERSE EMPLOYMENT ACT.  
>> NO, YOUR HONOR, THAT'S NOT  
WHAT WE'RE SAYING.

>> I THOUGHT YOU WERE SAYING.

>> WE'RE SAYING EVEN

RETALIATION, WE'RE SAYING THERE

WERE VALID REASONS FOR THE

TRANSFER.

>> BUT WE DON'T KNOW THAT, DO

WE?

THAT'S THE WHOLE POINT.

AND HE HAS TO SHOW THAT THE

BASIS WAS RETALIATION.

IF YOU SHOWED THERE WERE VALID

REASONS, HE LOSES.

BUT NOT ON WHETHER THE COMPLAINT

STATES A CAUSE OF ACTION.

>> THAT'S CORRECT, YOUR HONOR.

BUT WE'RE NOT SAYING THAT THE

TRANSFER HAPPENED AS A RESULT OF

A RETALIATORY ACT.

>> I AGREE.

BUT I THOUGHT YOU WERE SAYING --

YOU HAVE TO SHOW AN ADVERSE

CORRECTION ACT.

>> CORRECT.

>> AND WHAT WE WERE ASKING IS

WHY ISN'T A TRANSFER WHERE

YOU'RE GOING 24 MILES AND YOU  
ARE HAVING TO PAY ALL THIS EXTRA  
GAS AND THE TIME, WHAT ABOUT  
THAT DOESN'T CONSTITUTE AN  
ADVERSE EMPLOYMENT ACT?

>> THERE'S NO DEFINITIVE CASE  
LAW THAT ACTUALLY POINTS TO JUST  
A TRANSFER OF LOCATION AS BEING  
A RETALIATORY ACT.

OR MATERIALLY ADVERSE EMPLOYMENT  
ACTION.

IF WE LOOK BACK AT THE --

>> WELL, WHY CAN'T YOU ADD THE  
OTHER THING TO IT?

>> IS THERE ONE THAT SAYS IT'S  
NOT?

IS THERE A CASE THAT SAYS THE  
TRANSFER ABSOLUTELY UNDER ALL  
CIRCUMSTANCES IS NOT --

>> NO, YOUR --

>> -- CAN NEVER BE A RETALIATORY  
ACTION?

>> NO, YOUR HONOR.

>> OKAY.

THAT'S WHAT WE'RE TRYING TO GET

TO.

THIS IS NOT AFTER A TRIAL.

WE'RE TALKING ABOUT JUST BASIC

LAW TO GET IN THE DOOR, ARE WE

NOT?

>> I UNDERSTAND, YOUR HONOR.

AND THE CASE THAT TALKS ABOUT A

TRANSFER, IN THAT CASE IT WAS

CLEAR THERE WAS A MOTIVATING

FACTOR IN THE RETALIATORY

CONDUCT --

>> WELL, SEE, I THINK, MY

FRIEND, I THINK YOU'RE MISSING

THE WHOLE ARGUMENT HERE BY

TRYING TO ARGUE THE FACTUAL

BASIS WHEN THIS CASE HAS BEEN

THROWN OUT JUST AS A MATTER OF

LAW THAT YOU HAVEN'T MET THE

THRESHOLD.

SEE, THAT'S WHERE I THINK THAT

YOU'RE MISSING THE LEGAL

ARGUMENT HERE TO SHOW US WITHOUT

REGARD TO WHETHER THEY'RE GOING

TO ULTIMATELY WIN OR NOT WHY

THEY CAN'T EVEN GET IN THE DOOR.

>> YOUR HONOR, WHEN THEY LOOK AT THE CASES IN PERC, THEY ACTUALLY LOOK TO ANY ATTACHMENTS, ANY AFFIDAVITS THAT ARE FILED, SO THEY HAVE A HIGHER BURDEN IN TERMS OF DETERMINING WHETHER IT SHOULD BE DISMISSED.

AND THE GENERAL COUNSEL FELT THERE WAS NO SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT A --

>> BUT HE'S MAKING A LEGAL DETERMINATION, RIGHT?

WHETHER THERE'S PRIMA FACIE EVIDENCE.

AND THE FACT IS THAT WHEN THE COMPLAINT GOT FILED, GUY HAD BEEN THE ROOKIE OF THE YEAR.

AND THEN THREE THINGS HAPPENED WHICH WOULD CREATE, AT LEAST FOR THE PURPOSE OF STATING A CAUSE OF ACTION, A REASONABLE BELIEF THAT IT IS BEING DONE BECAUSE OF THE FILING OF THE COMPLAINT, THAT THE TIMING SHOWS THAT.

AND I DON'T SEE UNDER THE SECOND

DISTRICT CASE AND THEN WHAT  
JUDGE KOCH SAYS IN DISSENT HOW  
THAT'S NOT A LEGALLY-SUFFICIENT  
COMPLAINT.

>> WELL, YOUR HONOR, IF YOU LOOK  
AT THE TOTALITY OF ALL THE  
COMPLAINTS THAT WERE FILED, THEY  
WERE NOT MATERIALLY ADVERSE.  
WHENEVER A TEACHER IS SLIGHTED  
BY A SCHOOLTEACHER, HE'S NUTS,  
HE'S NOT WRITTEN A STRONG ENOUGH  
LETTER OF RECOMMENDATION, HE HAS  
NOT PUT HIS NAME AS ROOKIE  
TEACHER OF THE YEAR ON THE  
SCHOOL'S MARQUEE --

>> BUT THAT ONE SHOWS CONTEXT.

I THINK WE WERE ASKING  
MR. ELFERS, WELL, IF THIS POINT  
ALONE WOULD CONSTITUTE IT.  
AND HE WAS VERY CAREFUL TO SAY  
MAYBE NOT ALONE, BUT IN CONTEXT.  
SO WHAT YOU SHOW IS, YOU KNOW,  
IF I'M TRYING TO SHOW BAD FAITH  
ON AN INSURANCE COMPANY, EACH  
ACTION MAY NOT IN ITSELF BE BAD

FAITH.

YOU LOOK AT THE TOTALITY OF THE  
CIRCUMSTANCES AS TO WHETHER THIS  
PRINCIPAL WHO WAS THE SUBJECT  
OF -- THE MALE PRINCIPAL, WAS  
THIS A MALE PRINCIPAL?

>> IT WAS A FEMALE PRINCIPAL.

>> AND WHO WAS THE SEXUAL  
HARASSMENT FILED AGAINST?

>> IT WAS FILED BY A FEMALE  
EMPLOYEE.

>> AGAINST HER?

>> AGAINST THE PRINCIPAL.

>> SO SHE COULDN'T BE VERY HAPPY  
ABOUT THAT COMPLAINT, I WOULD  
ASSUME, IF SHE'S A NORMAL HUMAN  
BEING.

>> THAT'S CORRECT, YOUR HONOR.

THAT'S AN IMPORTANT POINT.

>> AND THE ARGUMENT IS SHE TOOK  
IT OUT ON THIS PERSON WHO  
ASSISTED.

AND THAT'S A QUESTION OF PROOF.

>> MR. GARCIA, IN LOOKING AT  
THIS WHOLE THING, I CAN

UNDERSTAND PERHAPS IF WE HAD AN  
EVIDENTIARY HEARING AND THERE  
WAS A FINDING, BUT JUST GETTING  
IN THE DOOR WITH THESE TYPES OF  
ALLEGATIONS AND FOR HIM NOT TO  
GET AT LEAST A HEARING ON THESE  
THINGS BASED ON THESE  
ALLEGATIONS -- NOT JUST THE  
FORCING HIM OR TRANSFERRING HIM  
24 MILES AWAY OR WHATEVER IN  
MIAMI, BUT THE OTHER ALLEGATIONS  
THAT WERE MADE AS WELL -- FOR  
HIM NOT TO EVEN GET A HEARING,  
I'M THINKING, WELL, WHAT DOES IT  
TAKE?

BEATING?

BEATING HIM?

WHAT DOES IT TAKE TO GET A  
HEARING?

>> WELL, HE WASN'T BEATEN.

>> I KNOW THAT.

>> BECAUSE YOU CAN'T QUANTIFY IT  
ACCORDING TO THE THIRD DISTRICT,  
AND IT'S NOT OBJECTIVE, AND WE  
DON'T KNOW HOW MUCH IT HURTS TO

BE BEATEN.

THAT'S THE ABSURDITY IN THIS  
WHOLE ARENA.

>> YOUR HONOR, THE QUANTIFIABLE  
STANDARD IS NOT REALLY ONE  
THAT'S ARTICULATED BY EITHER THE  
THIRD DISTRICT OR ANY OF THE  
CASES WE HAVE HERE.

WHAT THEY'RE LOOKING AT IS  
"MATERIALLY ADVERSE."

EVEN IF YOU LOOK AT THE TOTALITY  
OF THE CIRCUMSTANCES, AT THE END  
OF THE DAY WHAT HAPPENED TO THIS  
EMPLOYEE?

HIS PRINCIPAL DID NOT GIVE HIM,  
ALLEGEDLY, A STRONG ENOUGH  
LETTER OF RECOMMENDATION FOR  
BEING THE ROOKIE TEACHER OF THE  
YEAR.

THEY DIDN'T PLACE HIS NAME AS  
ROOKIE TEACHER OF THE YEAR ON  
THE SCHOOL'S MARQUEE --

[INAUDIBLE CONVERSATIONS]

>> AS IT WAS CUSTOMARILY DONE  
FOR OTHER PEOPLE.

>> THAT IS WHAT THE ALLEGATION

IS.

>> BUT THAT'S NOT THE BASIS FOR

ONE OF THE THREE COMPLAINTS THAT

HE FILED.

IT WAS THE THREE THINGS THAT

JUSTICE QUINCE WAS ASKING ABOUT

BEFORE WHICH WAS THE FIRST WAS

HE WAS GRANTED LEAVE, AND THEN

HE WAS TOLD IF YOU DON'T GET

BACK, YOU'RE FIRED.

IT WAS, I'M GOING, AND I GAVE MY

PASSWORD TO A SUBSTITUTE

TEACHER, AND NOW, I MEAN, TO THE

WHOEVER IS NORMALLY GIVEN IT TO,

AND GONNA BE FIRED.

AND THEN NOW YOU'RE TRANSFERRED.

SO HE DOESN'T ALLEGE THAT NOT

HAVING THE NAME ON THE MARQUEE

IS A MATERIALLY ADVERSE ACTION.

THAT'S JUST PART OF SHOWING THE

LIKELY INTENT OF WHAT'S IN THIS

PRINCIPAL'S MIND BECAUSE AS WE

KNOW FROM MANY CASES YOU CAN'T

TELL WHAT'S IN SOMEONE ELSE'S

MIND.

YOU'VE GOT TO SHOW BY THE  
DEMONSTRATED, OBJECTIVE ACTS,  
CORRECT?

>> WELL, YOUR HONOR --

>> AND IS THAT CORRECT?

>> THAT'S WHAT HE STATED IN HIS  
CHARGES, THAT WAS A MATERIALLY  
ADVERSE ACTION.

>> WHICH ONE?

>> [INAUDIBLE]

>> THAT WAS THE SEPARATE CHARGE?

>> THAT WAS ONE OF THE MATERIAL  
ADVERSE ACTIONS --

>> ALL RIGHT.

WELL, THAT'S YOUR BEST ARGUMENT.

THAT IF THAT ALONE HAD HAPPENED  
AND IF THAT'S HOW THE THIRD  
DISTRICT HAD DECIDED IT, THAT  
THIS IDEA THAT HE WASN'T POSTED  
ON THE MARQUEE WAS THE ACTION, I  
THINK YOU HAVE A VERY STRONG  
CASE.

BUT YOU'VE GOT TO LOOK AT ALL --

AND YOU WOULD AGREE THAT WHEN

SOMEONE IS ALLEGING FOUR THINGS  
THAT YOU DON'T TAKE EACH ONE  
INDIVIDUALLY.  
YOU LOOK AT THE TOTALITY OF WHAT  
HAPPENED IN BOTH SHOWING WHETHER  
THERE'S A CONNECTION, WHETHER  
THERE'S RETALIATION AND WHETHER  
IT IS, THEY SUFFERED ADVERSE  
EMPLOYMENT ACTION.

>> THAT'S CORRECT, YOUR HONOR.

WE DON'T IGNORE THE ALLEGATIONS  
OF UNFAIR LABOR PRACTICE.

THE FACT THAT HE ASKED FOR LEAVE  
AND HE CLAIMED THAT HIS  
PRINCIPAL LATER RETRACTED THAT  
LEAVE WHICH WAS, ULTIMATELY AS  
THE RECORD REFLECTS, APPROVED BY  
THE SCHOOL DISTRICT.

ALSO, THE OTHER ALLEGATION THAT  
JUDGE QUINCE POINTED OUT WHICH  
WAS HIS BEING THREATENED TO BE  
SUSPENDED BECAUSE HE HAD GIVEN  
OUT HIS PASSWORD TO ANOTHER  
TEACHER WHICH ALLOWED A STUDENT  
TO GET INTO THE ELECTRONIC

GRADEBOOK WHICH IS A VIOLATION  
OF SCHOOL DISTRICT RULES, AND  
IT'S A VERY IMPORTANT  
ALLEGATION, THAT WAS  
INVESTIGATED BY THE DISTRICT.  
AND THAT IS WHAT A SCHOOL  
PRINCIPAL DOES.

IF SOMEBODY BRINGS AN ALLEGATION  
THAT A TEACHER HAS DONE THIS,  
HAS GIVEN OUT THEIR PASSWORD,  
AND NOW A STUDENT IS ALLOWED TO  
VIEW THE ELECTRONIC GRADEBOOK,  
THAT IS SOMETHING THAT HAS TO  
BE --

>> [INAUDIBLE]

EXCUSE ME.

>> I'M SORRY, YOUR HONOR.

>> THE PROBLEM IS YOU ARE STILL  
GETTING INTO WHAT THE FACTS,  
WHAT YOU BELIEVE THE FACTS ARE  
GOING TO SHOW AT SOME POINT.  
WHAT WE HAVE HERE, HE HAS MADE  
THESE ACTIONS, QUESTIONS,  
ARGUMENTS, ALLEGATIONS --

[INAUDIBLE]

>> WELL, YOUR HONOR, THOSE

WERE --

>> AT THAT HEARING HE WOULD

INDICATE WHAT HE PERCEIVED FROM

WHATEVER EVIDENCE HE HAD TO

SUPPORT THESE ALLEGATIONS.

THE SCHOOL BOARD, THE TEACHER

WOULD BRING IN ALL OF THIS OTHER

INFORMATION THAT YOU'RE TALKING

ABOUT.

THIS, TO ME, IS A SIMPLE

QUESTION.

IS THERE ENOUGH, IS THERE -- ARE

THE ALLEGATIONS --

[INAUDIBLE]

>> YOUR HONOR, BASED UPON WHAT

GENERAL COUNSEL STATED, THEY'RE

NOT.

THEY'RE INSUFFICIENT.

AND THE ARGUMENT THAT I WAS JUST

MAKING EARLIER WERE ACTUALLY THE

FACTS THAT WERE PRESENTED TO

PERC AT THAT TIME BECAUSE, AS I

SAID BEFORE, WHEN THE COMPLAINT

CHARGE WAS FILED WITH PERC, IT

ALSO INCLUDES AFFIDAVITS,  
INVESTIGATIVE MATERIALS.

ALL OF THAT IS FILED WITH A  
COMPLAINT.

AND WHEN YOU REVIEW THAT,  
GENERAL COUNSEL MADE THE  
DETERMINATION IT WAS  
INSUFFICIENT.

>> THE EQUIVALENT OF WHATEVER  
HEARING TAKES PLACE?

>> WELL, IT'S A LITTLE HIGHER  
THAN JUST A MOTION TO DISMISS  
BECAUSE THEY'RE ACTUALLY LOOKING  
BEYOND THE FOUR CORNERS, THEY'RE  
LOOKING AT THE ATTACHMENTS --

>> -- HEARINGS WITHOUT BRINGING  
UP EVIDENCE.

>> WELL, THEY LOOK AT THE  
EVIDENCE THAT'S PRESENTED IN THE  
CHARGE.

WHEREAS IN A MOTION TO ASSIST  
THEY'RE JUST LOOKING AT THE  
ALLEGATION IN THE CHARGE.

IN THIS CASE THEY'RE ACTUALLY  
LOOKING AT WHAT IS REPRESENTED

IN THE --

>> [INAUDIBLE]

>> I'M SORRY, YOUR HONOR?

>> -- SUFFICIENT EVIDENCE TO

SATISFY WHOEVER THIS PERSON IS

THAT THIS INDIVIDUAL WHO MADE

THE DECISION THAT THERE WAS A

TRANSFER?

>> I'M SORRY, YOUR HONOR?

>> WAS THERE WHATEVER YOU WANT

TO CALL IT, EVIDENCE,

INFORMATION IN THE PACKET THAT A

TRANSFER HAD OCCURRED?

>> I BELIEVE THAT WAS THE LAST

AMENDED EEOP CHARGE.

>> I DON'T CARE WHETHER IT'S THE

LAST OR THE FIRST.

THERE WAS EVIDENCE, INFORMATION

OF A TRANSFER.

>> RIGHT, YOUR HONOR.

AND THAT'S WHERE --

>> AND IT SHOWED THE SCHOOLS TO

WHICH HE WAS ASSIGNED AND TO

WHERE HE WAS REASSIGNED.

>> CORRECT, YOUR HONOR.

>> OKAY.

>> THAT'S IN THE RECORD.

AND OUR RESPONSE TO THE TRANSFER

THAT IT'S AN INVOLUNTARY

TRANSFER THAT'S PROVIDED BY THE

COLLECTIVE BARGAINING AGREEMENT

WHENEVER THE SCHOOL DISTRICT

FEELS IT'S IN THE BEST INTEREST

TO MOVE THAT EMPLOYEE.

AND IN THIS CASE THERE IS A

REASON WHY IT'S IN THE BEST

INTEREST --

>> BUT YOU'RE NOW GETTING BACK

TO WHAT THE FACTS ARE GOING TO

SHOW.

IF I'M DEMOTED AS AN EMPLOYEE,

THERE MAY BE A LEGITIMATE REASON

OR AN ILLEGITIMATE REASON.

MAYBE I AM A POOR-PERFORMING

EMPLOYEE, AND I'VE BEEN DEMOTED.

BUT THERE ALSO MAY BE AN ILLEGAL

REASON.

IT IS, THEREFORE, I ALLEGE A

DEMOTION, YOU KNOW, THE SCHOOL

BOARD SAYS I DEMOTED YOU BECAUSE

YOU'RE JUST NOT UP TO PAR.

WELL, I HAVE TO PROVE THE  
DEMOTION WAS FOR AN ILLEGAL  
REASON.

I'M GOING TO HAVE TO PROVE THAT  
AT A TRIAL.

BUT IF I SHOWED THAT IT  
HAPPENED, I WAS DEMOTED SORTLY  
AFTER I FILED A CIVIL RIGHTS  
COMPLAINT, WE'RE GOING TO LOOK  
AT IT DIFFERENTLY.

THAT'S THE PROBLEM.

YOU'RE SAYING THERE WAS A GOOD  
REASON HE WAS TRANSFERRED, AND  
WE'RE SAYING THAT'S FOR THE FACT  
FINDERS TO DECIDE.

>> WELL, COULD YOU SAY -- TELL  
US HOW LONG IT WAS AFTER THE  
ASSISTANCE WAS PROVIDED IN  
FILING THE COLLEAGUE'S COMPLAINT  
AND THE TRANSFER TOOK PLACE.

WHAT PERIOD OF TIME WAS THAT?

>> THAT WAS A YEAR AFTER.

THEREFORE, THERE WAS NO TEMPORAL  
PROXIMITY, AND THAT'S WHY WE

ARGUE IT SHOULDN'T BE

CONSIDERED --

>> IS THERE A CASE THAT SAYS ONE  
YEAR FILLED WITH ATTACKS,  
HARASSMENT AND THEN YOU'RE  
TERMINATED A YEAR LATER, THAT'S  
INSUFFICIENT AS A MATTER OF LAW?  
IS THERE ANY CASE THAT SAYS  
THAT?

>> THERE'S NO CASE, YOUR HONOR.  
NOT ONE THAT I CAN CITE TO  
ANYWAY.

BUT SINCE THOSE WERE NOT  
MATERIALLY ADVERSE ACTIONS,  
THEY'RE NOT LOOKED UPON BY THE  
COURT.

IN THIS CASE THIS IS AN EMPLOYEE  
THAT DID NOT SUFFER ANY JOB  
LOSS, AND ALSO IN THE BURLINGTON  
CASE SHE WAS ACTUALLY DEMOTED.  
SHE WAS CHANGED FROM A FORKLIFT  
DRIVER TO A -- I'M SORRY, YOUR  
HONOR.

>> YOU'RE SAYING, BASICALLY,  
THEY COULD NOT LOOK AT A SERIES

OF ACTIONS AND DETERMINE WHETHER  
OR NOT THAT WAS, IN FACT,  
RETALIATION?

THAT'S, BASICALLY, SEEMS TO BE  
YOUR ARGUMENT.

YOU CANNOT LOOK AT WHAT HAPPENED  
OVER THE WHOLE PERIOD OF ONE  
YEAR TO MAKE A DETERMINATION AS  
TO WHETHER OR NOT THERE WAS  
RETALIATION?

>> WELL --

>> YOU ONLY LOOK AT THE END  
RESULTS?

>> THAT'S THE CITY OF CORAL  
GABLES CASE THAT SAYS YOU MUST  
LOOK AT THAT AS TO WHETHER IT  
WAS A MOTIVATING FACTOR, SO YOU  
DO LOOK AT IT.

THE THIRD DISTRICT FELT THAT THE  
EVIDENCE IN THE RECORD DID NOT  
FEEL THERE WAS --

>> WOULD YOU AGREE, THOUGH, THE  
REVIEW -- IF WE ASSUME THERE'S A  
CONFLICT, AND WE HAVEN'T REALLY  
TALKED ABOUT THE CONFLICT TO

YOUR PART, BUT IF THERE'S A  
CONFLICT, OUR REVIEW OF WHETHER  
IT'S LEGALLY SUFFICIENT, OF  
COURSE THERE'S A LAW, DE NOVO.

>> YES, YOUR HONOR.

[LAUGHTER]

>> ON THAT --

>> TO CONCLUDE, YOUR HONOR, LILY  
TOMLIN ONCE OBSERVED THAT MAN  
INVENTED --

[INAUDIBLE]

THIS IS A CASE ABOUT THE ABILITY  
TO COMPLAINT.

AND THE PETITIONER IN THIS CASE  
HAS HAD THAT ABILITY.

IT'S BEEN UNFETTERED, HE HAS  
FILED REPEATED COMPLAINTS, YET  
HE STILL HAS NOT SUFFERED JOB  
LOSS, LOSS IN PAY OR ESTEEM BY  
HIS COWORKERS SINCE HE WAS  
SELECTED ROOKIE TEACHER OF THE  
YEAR.

BASED UPON THE EVIDENCE IN THE  
RECORD, WE URGE THE COURT TO  
AFFIRM THE THIRD DISTRICT COURT

OF APPEALS' DECISION IN THIS  
MATTER.

THANK YOU.

>> JUSTICE LEWIS, THE CASE YOU  
WERE REFERRING TO WAS LAWSON V.  
GENERAL HOSPITAL.

THEY WERE NINE MONTHS APART, AND  
THEY WERE FILLED WITH -- I  
SHOULDN'T SAY FILLED, BUT  
LITTERED WITH ANIMUS BETWEEN ONE  
END AND THE OTHER.

I WAIVE THE REST OF MY MINUTE.

>> YOU HAVE 43 SECONDS.

[LAUGHTER]

>> 43 SECONDS.

AND I WOULD LIKE TO THANK YOU  
FOR YOUR ATTENTION, AND I WOULD  
ASK THE COURT TO REMAND FOR  
HEARING.

THANK YOU.

>> WE THANK YOU BOTH FOR YOUR  
ARGUMENTS.

THE COURT WILL NOW STAND IN  
RECESS FOR TEN MINUTES.

>> ALL RISE.