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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
APPELLATE DIVISION

FILED

2014 FEB 24 AM 11 54

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

SUNCOAST ARCHITECTURE &  
ENGINEERING, LLC,

Petitioner,

Lower Tribunal (DOAH)  
Case No. 13-3257

vs.

KENAN TUZLAK

**Petition for Certiorari filed pursuant  
to Rule 9.100, Florida Rules of  
Appellate Procedure**

Respondent.

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**PETITION FOR CERTIORARI**

Petitioner, SUNCOAST ARCHITECTURE & ENGINEERING, LLC

("Suncoast"), by and through its undersigned counsel, hereby files this Petition for  
Certiorari and in support hereof states as follows:

**BASIS FOR INVOKING JURISDICTION**

This Court has jurisdiction pursuant to Rules 9.030(c)(3) and 9.100(a),  
Florida Rules of Appellate Procedure.

Further, this Court has jurisdiction pursuant to §70-77(g)(14), Pinellas  
County Code. ("The [ALJ's] final order shall be the final action under this section,  
and may be appealed by filing a petition for writ of certiorari in the circuit court of  
the Sixth Judicial Circuit in and for Pinellas County, Florida...").

## FACTUAL BASIS FOR THIS PETITION

1. Petitioner Suncoast is a Florida limited liability company, was a party in the proceeding below, and is entitled to seek this review as having been adversely affected by the Final Order dated January 17, 2014 (conformed copy attached).

2. Respondent Kenan Tuzlak (“Mr. Tuzlak”) is an individual who initiated and was a party to the proceeding below.

3. On January 17, 2014 the ALJ issued its Final Order in the proceeding below. (Appendix – A).

4. The Final Order held that Petitioner Suncoast violated §70-54(1), Pinellas County Code, when Suncoast’s counsel sent a settlement offer to Respondent Kenan Tuzlak (“Mr. Tuzlak”) in response to Mr. Tuzlak’s filing a Charge of Discrimination (“COD”) against Suncoast in which Mr. Tuzlak alleged that he was subjected to a hostile work environment while employed by Suncoast and also that he was terminated from employment in retaliation for making a schedule accommodation request for his religious beliefs. (Appendix – A).

5. Petitioner brings this Petition for Certiorari before the Court because in the proceeding below (I) Petitioner Suncoast was not afforded procedural due process; (II) the essential requirements of law were not observed; and (III) the final action of the Pinellas County Office of Human Rights (taken through the

Administrative Law Judge appointed by the Florida Division of Administrative Hearings) is not supported by competent substantial evidence.

6. As set forth herein below, Suncoast was not afforded procedural due process as Suncoast raised an affirmative defense upon which the ALJ never ruled, thus denying Suncoast its right to be heard.

7. Petitioner Suncoast was additionally denied procedural due process as Mr. Tuzlak was not compelled to appear physically at the final hearing to give testimony, resulting in significant communication issues during the final hearing, and thus inhibiting the ALJ's ability to conduct a meaningful hearing and adequately assess witness credibility.

8. Further, there was a significant departure from the essential requirements of law as the ALJ, in making its determination below, did not apply the correct law in making its conclusions of law and issuing its recommended and final orders, thus resulting in a serious miscarriage of justice.

9. Finally, and as further set forth herein below, the agency action taken through the ALJ's final order is not supported by competent substantial evidence.

### NATURE OF RELIEF SOUGHT

10. Petitioner Suncoast requests that this Petition for Certiorari be granted, that the ALJ's Final Order be quashed, that this cause be remanded to the ALJ with instructions to enter a Final Order ordering that Suncoast did not violate Pinellas County Code §70-54(1) pursuant to an application of the correct law, that Respondent (Petitioner below) Kenan Tuzlak's claim is barred by Florida's litigation privilege, and that Suncoast shall recover its reasonable attorney's fees and costs incurred below from Respondent Kenan Tuzlak as Respondent's claim is frivolous and unreasonable.

11. Alternatively, Petitioner Suncoast requests that this Petition for Certiorari be granted, and that this Court remand the action to the ALJ to conduct a de novo review of the proceedings below, apply the correct law as set forth by the United States Supreme Court, and both fully consider and issue a ruling upon Suncoast's affirmative defense that Florida's litigation privilege serves as a bar to Mr. Tuzlak's claim.

12. Finally, Petitioner Suncoast requests that this Petition for Certiorari be granted and that this Court order that the ALJ conduct a new final hearing during which Respondent Mr. Tuzlak is physically present to give testimony so that Petitioner Suncoast may be afforded procedural due process.

## STANDARD OF REVIEW

13. Under Florida law, certiorari in this Court to review administrative action under Rule 9.030(c)(3), Florida Rules of Appellate Procedure, “is not truly discretionary common-law certiorari, because the review *is of right.*” *Haines City Community Development v. Heggs*, 658 So.2d 523, 530 (Fla. 1995) (*emphasis added*); *citing City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 625-26 (Fla. 1982).

14. In reviewing the Final Order and the administrative action taken by the ALJ (on behalf of the Pinellas County Office of Human Rights), this Court must consider whether Suncoast (1) was afforded procedural due process; (2) whether the essential requirements of law were observed; and (3) whether the action is supported by competent, substantial evidence. *Haines City*, 658 So.2d at 530 (Fla. 1995); *citing Vaillant*, 419 So.2d at 626.

### **Factual Background of Dispute**

15. The proceeding below was a quasi-judicial proceeding initiated when Mr. Tuzlak filed a Charge of Discrimination (“COD”) with the Pinellas County Office of Human Rights (“PCOHR”) alleging that Suncoast violated §70-54(1), Pinellas County Code.

16. Mr. Tuzlak was employed by Suncoast as a draftsman beginning in November 2011 and until his termination on June 11, 2012. (Appendix – E:22)

17. Immediately after his termination from employment, Mr. Tuzlak sought legal counsel and formally retained counsel within days of his termination in order to pursue discrimination charges against Suncoast. (Appendix – E:32-33).

18. Approximately On November 5, 2012, with the assistance of counsel, Mr. Tuzlak filed a COD with the PCOHR alleging that he was subjected to a hostile working environment based on his religion, and also that his termination was in retaliation for his having requested a work schedule accommodation based on his religious prayer schedule.<sup>1</sup> (Appendix – E:33-34)

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<sup>1</sup> This charge was investigated by the PCOHR, which determined that no reasonable cause existed to believe that any discrimination had occurred. Mr. Tuzlak requested a review of this determination pursuant to §70-77(d). As a result, the PCOHR conducted further investigation and review of the matter. After this subsequent review, the PCOHR affirmed its determination that no reasonable cause existed to believe that discrimination had occurred.

19. In response to this COD, Suncoast's counsel sent a letter ("the Letter") to Mr. Tuzlak on December 21, 2012, setting forth:

(1) that Mr. Tuzlak's termination was based solely on legitimate business necessities and had no relation to any sort of discrimination;

(2) that the allegations in the COD were false;

(3) that, in response to the COD and the false allegations contained therein, Suncoast would pursue all legal remedies available against Mr. Tuzlak including filing a lawsuit for trade slander; and

(4) that in the event Mr. Tuzlak agreed to withdraw his COD, Suncoast would agree not to pursue any potential causes of action against Mr. Tuzlak, whether related to trade slander or otherwise. (Full text of letter at Appendix – F:5).

21. This letter was written, signed, and sent by Suncoast's counsel directly to Mr. Tuzlak as, as neither Suncoast nor Suncoast's counsel had any way of knowing at this point in time that Mr. Tuzlak was represented by counsel. (Appendix – F:5).

22. Shortly after sending the Letter, Suncoast's counsel was notified by Mr. Tuzlak's counsel that the letter had been received by Mr. Tuzlak, that Mr. Tuzlak's counsel had been representing Mr. Tuzlak since prior to his filing the original COD, and that Mr. Tuzlak's counsel would be encouraging Mr. Tuzlak to pursue a

new COD for a violation of §70-54(1), Pinellas County Code, based entirely on the Letter. (Appendix – F:6).

23. On January 22, 2013, Mr. Tuzlak filed a new COD (the subject of the proceeding below) alleging that the Letter from Suncoast’s counsel constituted unlawful retaliation under §70-54(1), Pinellas County Code, which prohibits retaliation or discriminating against person because they have made a charge of discrimination with the PCOHR.

24. The PCHOR investigated Mr. Tuzlak’s charge and determined that there was reasonable cause to believe a violation of §70-54(1) occurred.

25. Suncoast’s counsel requested a review of this determination under §70-77(d) (similar to the review provided to Mr. Tuzlak on his first COD), however no review occurred as the Pinellas County Code does not allow a Defendant/Respondent a review of a PCOHR determination in the same manner as a Complainant/Petitioner under the Code.

26. The PCOHR subsequently attempted to conciliate the matter.

27. When conciliation failed, the PCOHR referred the matter to the Florida Division of Administrative Hearings (“DOAH”), pursuant to the Pinellas County Code and a contract between DOAH and Pinellas County, in order to have an ALJ conduct a de novo formal administrative hearing (“final hearing”) to determine whether a violation occurred.

28. The PCOHR referral to DOAH was filed on August 26, 2013 and the ALJ's Initial Order and Summary of Procedures were furnished to the parties on August 27, 2013. (Appendix – L).

29. Shortly thereafter, Mr. Tuzlak's counsel contacted Suncoast's counsel regarding the fact that Mr. Tuzlak had, since the initiation of the proceedings, moved to Canada, and that Mr. Tuzlak would like to appear for the final hearing telephonically.

30. In the spirit of professionalism and overall efficiency of the judicial proceedings, Suncoast's counsel agreed to file a joint motion with opposing counsel allowing Mr. Tuzlak to testify telephonically at the final hearing, and this motion was filed on September 10, 2013 and subsequently granted by the ALJ on September 23, 2013. (Appendix – K).

31. On October 10, 2013, pursuant to notice properly given and filed, Suncoast took Mr. Tuzlak's deposition via video-conference in Tampa, Florida and Edmonton, Canada. (Appendix – J).

32. During this deposition, Suncoast's counsel learned that Mr. Tuzlak spoke with a thick accent and, despite having video technology available, it was often difficult to understand Mr. Tuzlak's responses throughout the deposition.

33. As a result, Suncoast subsequently filed a motion to compel Mr. Tuzlak's physical appearance at the final hearing arguing, among other things, that

the physical appearance would be necessary for the ALJ to adequately perform its task of effectively assessing witness credibility and that Florida law typically only allows telephonic testimony where both parties consent and that Suncoast had withdrawn its prior consent to the telephonic testimony. (Appendix – I).

34. Further, this motion argued that it would prejudice Suncoast's case, given the potential for communication difficulties, if Mr. Tuzlak were not compelled to physically appear to testify. (Appendix – I).

35. Suncoast's motion to compel Mr. Tuzlak's physical appearance to testify at the final hearing was denied on October 29, 2013. (Appendix – H).

36. Suncoast did not appeal the denial of this motion in the hope that even though Mr. Tuzlak would be appearing by phone, at least all of the other parties, including the ALJ, would be physically present for the hearing in the event that there were communication, technology, or other comprehension issues with Mr. Tuzlak's potential testimony.

37. On November 1, 2013, Mr. Tuzlak and Suncoast filed a joint motion to continue the final hearing for one week, and on November 4, 2013 the ALJ issued an order granting the continuance and scheduling the final hearing for November 19, 2013 at 1:00 PM in St. Petersburg, Florida.

38. One day prior to the final hearing, the parties received a notice from the ALJ setting forth that the ALJ would not be physically present at the final hearing,

and would instead appear via video-conference from Tallahassee, Florida.

(Appendix – G).

39. At the final hearing the ALJ appeared via video conference from Tallahassee, Mr. Tuzlak testified telephonically from Canada via a telephone speaker in the St. Petersburg conference room, and Mr. Keith Burnett (“Mr. Burnett”), owner of Suncoast, appeared physically in St. Petersburg to testify. These were the only two witnesses.

40. The ALJ admittedly had difficulty understanding Mr. Tuzlak’s testimony, though it is unclear whether this is because of Mr. Tuzlak’s accent, or because the ALJ was listening to his testimony via a speakerphone in a conference room which was being transmitted via microphone using the video conference technology to the ALJ in Tallahassee, or both. (Appendix – E:35)

41. During the final hearing, Mr. Tuzlak’s counsel presented argument that Suncoast had violated §70-54(1), Pinellas County Code. (Appendix – E:13-16).

42. During the final hearing, Suncoast’s counsel argued that (1) the complained-of actions did not constitute a violation of §70-54(1); and (2) that regardless of whether the actions constituted such a violation, Suncoast was immune from civil liability for the complained-of actions based on Florida’s litigation privilege, as the Letter was the only complained-of action and it was sent

in the due course of (quasi-) judicial proceedings, and Mr. Tuzlak's claim based on the Letter was thus barred. (Appendix – E:16-20, E:55-70).

43. After the final hearing and pursuant to §70-77, Pinellas County Code, both Suncoast and Mr. Tuzlak submitted proposed recommended orders (“PROs”) containing recommended findings of fact and conclusions of law for the ALJ's consideration.

44. Suncoast's PRO again set forth the argument, this time in writing, that Florida's litigation privilege acted as a bar to Mr. Tuzlak's COD because the COD was based entirely on the Letter sent by Suncoast's counsel, and the Letter was protected by Florida's litigation privilege. (Appendix – D).

45. The ALJ submitted her recommended order on January 3, 2014.

46. The ALJ's recommended order did not contain any findings of fact or conclusions of law related to Suncoast's affirmative defense that Florida's litigation privilege barred Mr. Tuzlak's claim. (Appendix – C)

47. The ALJ's recommended order also contained a conclusion of law that the Letter, and Mr. Tuzlak's receipt thereof, constituted “materially adverse action” because receiving the Letter was material to Mr. Tuzlak. (Appendix – C)

48. The recommended order also contained a conclusion of law that Suncoast “did not provide a legitimate, non-discriminatory, non-retaliatory reason for the [L]etter.” (Appendix – C)

49. Pursuant to the ALJ's recommended order and §70-77(g)(13), Pinellas County Code, Suncoast timely submitted written exceptions to the ALJ's recommended order; Mr. Tuzlak did not submit exceptions.

50. Suncoast's First Exception set forth, once again, that Florida's litigation privilege acted as a bar to Mr. Tuzlak's claim brought solely on the basis of Suncoast's litigation activity (the Letter sent by Suncoast's counsel). (Appendix – B).

51. Suncoast's Second Exception set forth that the ALJ did not apply the correct law in analyzing whether the Letter constituted "materially adverse action" for the purposes of a retaliation claim, specifically by appearing to apply a subjective legal standard to the analysis<sup>2</sup> and also by possibly failing to consider, as is required, the specific circumstances surrounding the events at issue. (Appendix – B).

52. Additionally, Suncoast's Third Exception took exception to the ALJ's conclusion that Suncoast did not provide a legitimate, non-retaliatory, non-discriminatory reason for sending the Letter. (Appendix – B).

53. The Third Exception was based on the fact that at the final hearing, Mr. Burnett's testimony clearly set forth multiple non-retaliatory, non-discriminatory

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<sup>2</sup> The United States Supreme Court stated unequivocally that an *objective* determination is necessary, and thoroughly described the reasons for using an objective test. *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53 at 68-69 (2006).

reasons including to (1) attempt to settle the dispute without subjecting either party extended legal proceedings, and (2) to inform Mr. Tuzlak that he was not terminated for any discriminatory purpose and that Suncoast would be defending itself vigorously from any charge to the contrary. (Appendix – B).

54. On January 17, 2014, the ALJ issued the Final Order in the case ordering that Suncoast violated §70-54(1), Pinellas County Code, and that Suncoast pay Mr. Tuzlak’s reasonable attorney’s fees and costs incurred in pursuing the action. (Appendix – A).

55. The Final Order incorporated all of the findings of fact and conclusions of law contained in the recommended order, including those to which Suncoast took exception. (Appendix – A).

56. In ruling on the three exceptions described above, the ALJ in each case did not appear to address the analysis or legal argument of the exceptions, instead holding that these three exceptions were “nothing more than an attempt [by Suncoast] to reargue its case, and therefore [are] rejected.” (Appendix – A).

57. The Final Order also adopted the ultimate holdings of the recommended order in that it held that Suncoast violated §70-54(1), Pinellas County Code and that Suncoast shall pay Mr. Tuzlak’s reasonable attorney’s fees and costs incurred in prosecuting the action. (Appendix – A).

## ARGUMENT IN SUPPORT OF PETITION

58. In the proceeding below, Petitioner Suncoast (I) was not afforded procedural due process; (II) there was a substantial departure from the essential requirements of law, and (III) the final agency action is not supported by competent, substantial evidence.

### **I. PETITIONER SUNCOAST WAS NOT AFFORDED PROCEDURAL DUE PROCESS IN THE PROCEEDING BELOW.**

59. Procedural due process requires that a party receive a real opportunity to be heard in a meaningful manner. *DHSMV v. Hofer*, 5 So.3d 766, 771 (Fla. 2d DCA 2009) quoting *Key Citizens for Responsible Gov't, Inc., v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001).

60. Stated differently, to meet the standards of due process, “the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive.” *Rucker v. City of Ocala*, 684 So.2d 836, 841 (Fla. 1st DCA 1996).

#### **A. Petitioner Suncoast was not afforded a meaningful opportunity to be heard as the lower tribunal failed to consider Suncoast’s affirmative defense duly risen during the course of the proceedings.**

61. Florida’s litigation privilege is typically raised as an affirmative defense and then considered by the court after the facts are fully developed. *Eggitt v.*

*Atlantic Credit & Finance, Inc.*, No. 09-000024AP-88B (Fla. 6th Cir. App. Ct. June 22, 2010).

62. In administrative proceedings conducted under the DOAH Rules of Procedure, affirmative defenses may be raised at any time prior to the entry of the ALJ's recommended order. *Abilities, Inc. v. Dept. of Ed.*, Recommended Order p. 45, Case No. 04-2053 (Fla. DOAH May 9, 2005) (as to the timing of raising an affirmative defense in DOAH proceedings, "[t]here is no requirement of a mandatory answer, let alone a requirement of timely notice of an affirmative defense, under the Administrative Procedure Act); *See also Plaisime v. Marriott Key Largo Resort*, Recommended Order pp. 6-1, Case No. 02-2183 (Fla. DOAH Feb. 14, 2013); *See also Adley v. St. Johns River Water Mgmt. Dist.*, Recommended Order of Dismissal, p. 19, Case No. 05-3209 (Fla. DOAH Jul. 10, 2006).

63. Further, a party's legal position is timely and sufficiently raised in administrative proceedings so long as the position is made clear by motion, objection, or argument to the ALJ prior to entry of the recommended order. Padovano, Philip J., *Florida Appellate Practice*, §25:3 (2014, Volume 2).

64. Specifically as to proceedings before the PCOHR and DOAH, the PCOHR investigation and subsequent final hearing constitute quasi-judicial

proceedings. See *Gandy v. Transworld Computer Tech. Group*, 787 So.2d 116, 119 (Fla. 2d DCA 2001).

65. As recently reaffirmed by the Florida Supreme Court in 2013, Florida's litigation privilege applies with equal weight to acts occurring during both judicial proceedings and quasi-judicial proceedings. *DelMonico v. Traynor*, Case No. SC10-1397 (Supreme Court of Florida, February 14, 2013) citing *Robertson v. Industrial Ins. Co.*, 75 So.2d 198 (Fla. 1954).

66. Suncoast raised Florida's litigation privilege as a defense to Mr. Tuzlak's charge twice prior to entry of the ALJ's recommended order; first on the record at the final hearing in argument to the ALJ, again then again in writing in Suncoast's proposed recommended order.

67. When the ALJ's recommended order contained no ruling on this issue, Suncoast again raised the litigation privilege in timely submitted written exceptions to the recommended order.

68. Neither the recommended order nor the Final Order entered in the proceedings below contain a ruling or even a discussion of the applicability of Florida's litigation privilege as a defense to Mr. Tuzlak's claim.

69. Because Suncoast's timely raised defense that Florida's litigation privilege acts as a bar to Mr. Tuzlak's claim was not considered, or at the very least was not ruled upon in the proceeding below, Suncoast was denied a

meaningful opportunity to be heard and was thus not afforded the procedural due process to which it is entitled.

**B. Petitioner Suncoast was denied a meaningful, full and fair opportunity to be heard as Mr. Tuzlak was not compelled to appear physically at the final hearing, thus significantly impairing the ALJ's ability to adequately perform its function of evaluating and assessing witness credibility.**

70. The determination of whether procedures used during an administrative hearing provide a real opportunity to be heard in a meaningful manner “depends on the nature of the private interest at stake and the nature of the government function involved.” *Cafeteria Rest. Works Union, Local 473 v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743 (1961).

71. “Accordingly, the amount of process due varies based on the particular factual context surrounding an administrative proceeding.” *Hofer*, 5 So.3d at 771; citing *Zinerman v. Burch*, 494 U.S. 113, 127, 110 S.Ct. 975 (1990).

72. As a result, a procedure which may satisfy due process in some instances does not necessarily satisfy procedural due process in all cases. *Bell v. Burson*, 402 U.S. 535, 540, 91 S.Ct. 1586 (1971).

73. In determining whether procedural due process was afforded in a specific instance, the Court must consider three factors:

“[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 332-35, 96 S.Ct. 893 (1976).

74. Here, Suncoast’s private interest consists of its business and professional reputation (i.e. it is at risk of publicly being held as a business which engaged in an unlawful discriminatory practice) and its financial stake at risk in the form of a potential judgment against Suncoast for damages, and potentially for Mr. Tuzlak’s attorney’s fees.

75. The risk of an erroneous deprivation of these rights was high in the present case, given that Mr. Tuzlak speaks English as a second language and has an accent which frequently makes it difficult to understand what he is saying.

76. This risk is even higher when Mr. Tuzlak is being allowed to testify via telephone, over objection from Suncoast.

77. Still further, the risk is heightened once more by the fact that the ALJ appeared for the hearing via video conference, meaning there was yet another electronic medium for Mr. Tuzlak’s testimony to travel through prior to being received by the fact finder.

78. Finally, the government's interest in this case, including the fiscal and administrative burden potentially imposed by compelling Mr. Tuzlak to testify in person, is minimal.

79. The burden of compelling Mr. Tuzlak to testify in person would have cost the government literally nothing: Mr. Tuzlak was the petitioner in the proceeding below and was pursuing the case of his own free will, meaning that he would solely bear the burden of any expense incurred in traveling to testify in person during a hearing which he demanded.

80. During Mr. Tuzlak's deposition, Suncoast's counsel noted that there were significant difficulties in interpreting Mr. Tuzlak's responses, and Suncoast's counsel thereafter filed a motion with the ALJ notifying her that these issues existed, withdrawing Suncoast's consent to allow Mr. Tuzlak to testify telephonically, and demanding that Mr. Tuzlak be compelled to appear physically at the final hearing.

81. At the time Suncoast filed this motion, and as stated in the motion itself, counsel for both parties had already agreed to jointly seek a continuance of the final hearing, meaning that neither party would be prejudiced by any potential delay caused by Mr. Tuzlak needing to make arrangements to appear in person to testify.

82. The ALJ denied this motion without explanation.

83. Furthermore, just one day before the actual final hearing took place, the ALJ issued a notice stating that the final hearing would be held via video conference.

84. Thus, only one day before the hearing, Suncoast learned that not only would Mr. Tuzlak be appearing telephonically, but also that his telephonic testimony would have to be transmitted electronically to Tallahassee.

85. Overall, the denial of Suncoast's motion to compel Mr. Tuzlak's physical appearance at the final hearing, the court's allowance of Mr. Tuzlak to testify telephonically over Suncoast's objection, and the last minute notice of the court's intent to conduct the final hearing via video conference, all result in a denial of the procedural due process to which Suncoast was entitled.

86. As the competing government interest and potential added expense of compelling Mr. Tuzlak to appear in person were minimal, and potentially nonexistent altogether, it is unjust to deny Suncoast due process in this manner.

87. Because Suncoast was not afforded due process in the proceedings below, this cause should be remanded to the lower tribunal with instructions for issuance of a new final order reflecting the results of a hearing in which Suncoast is afforded procedural due process, or alternatively should be remanded to the lower tribunal with instructions to conduct a new final hearing which shall recognize Suncoast's rights to due process.

**II. IN ISSUING ITS FINAL ORDER, THE LOWER TRIBUNAL  
SUBSTANTIALLY DEPARTED FROM THE ESSENTIAL  
REQUIREMENTS OF LAW.**

88. This Court should grant Suncoast's Petition for Certiorari because the proceedings below departed from the essential requirements of law.

89. For the purposes of this Court's review, whether the lower tribunal "observed the essential requirements of law" is synonymous with inquiring as to whether the lower tribunal "applied the correct law." *Heggs*, 658 So.2d at 530; citing *Manatee County v. Kuehnel*, 524 So.2d 1356, 1358 (Fla. 2d DCA 1989), review denied, 548 So.2d 663 (Fla. 1989).

90. In this case, the recommended order and Final Order entered by the ALJ clearly demonstrate that the incorrect law was used in reaching the Final Order, thus resulting in a miscarriage of justice.

**A. The lower tribunal erroneously applied a subjective standard in  
determining whether Mr. Tuzlak suffered a "materially adverse"  
action.**

91. As the claim below was a claim of unlawful retaliation based on Mr. Tuzlak having filed a prior charge of discrimination, the ALJ correctly concluded that Mr. Tuzlak was required to establish a prima facie case of retaliation by showing that (1) he engaged in statutorily protected activity; (2) he experienced a

materially adverse action; and (3) there was some causal relationship between the protected activity and the materially adverse action. *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1277 (11th Cir. 2008).

92. Whether Mr. Tuzlak met elements (1) and (3) of this test is presently undisputed.

93. However, in determining whether Mr. Tuzlak suffered a materially adverse action, and thus met the second prong of the prima facie case, the ALJ was bound to follow the *objective* standard set forth in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-69 (2006) (*emphasis added*).

94. The *Burlington* test requires the fact finder to examine whether a reasonable employee, in the specific circumstances of the complainant, would have found the challenged action materially adverse. *Id.*

95. Thus, the ALJ substantially departed from the essential requirements of law in concluding that Mr. Tuzlak suffered a materially adverse action, and thus satisfied the second prong of the prima facie case, because “[t]he fear and apprehension instilled in Mr. Tuzlak after receiving...the [L]etter...was significant.” (Appendix – C:Para. 17).

96. By taking Mr. Tuzlak’s subjective feelings into account, and by failing to apply the correct, objective standard mandated by the US Supreme Court in *Burlington*, the ALJ substantially departed from the essential requirements of law.

**B. The lower tribunal substantially departed from the essential requirements of law by failing to take into account the specific circumstances and context of the challenged action as mandated by the US Supreme Court in *Burlington*.**

97. In determining whether Mr. Tuzlak satisfied the “materially adverse action” prong of his prima facie case, the ALJ was *required* to take into account the factual circumstances surrounding the challenged action (i.e. Mr. Tuzlak’s receipt of the Letter).

98. The lower tribunal was required to consider these circumstances as, in determining whether an action rises to the level of “materially adverse” because “the significance of any given act of retaliation will often depend upon the circumstances. *Context Matters.*” *Id.* (*emphasis added*).

99. The *Burlington* court emphasized the importance of considering such surrounding facts and circumstances, noting that an act which might be materially adverse in some instances may not be materially adverse in others. *Id.* at 69; *citing Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005).

100. These factual circumstances, all of which were introduced through undisputed testimony at the final hearing, include that Mr. Tuzlak was represented by counsel at the time he received the Letter, that he was not actually dissuaded

from pursuing his original charge by the letter (as evidenced by his continued pursuit of his first charge and subsequent initiation of the charge which is the subject of this matter), and that he had not been employed by Suncoast for over six months at the time he received the letter.

101. Each of these factors tends to show that a reasonable employee likely would not be dissuaded from making or supporting a charge of discrimination in Mr. Tuzlak's circumstances, however they were entirely disregarded by the lower tribunal.

102. The recommended order and Final Order issued below are devoid of any consideration or discussion of these circumstances, or any other facts and circumstances surrounding the challenged act, and this failure to consider the circumstances as mandated in *Burlington* constitutes a substantial departure from the essential requirements of law.

**C. The ALJ's failure to apply Florida's litigation privilege as a bar to Mr. Tuzlak's claim constitutes a substantial departure from the essential requirements of the law.**

103. Florida's litigation privilege provides full immunity from civil liability for the actions of all parties to litigation (including litigants, their lawyers, and judges), so long as action in question bears some relation to the proceeding. *Echevarria, et al. v. Cole*, 950 So.2d 380, 384 (Fla. 2007).

104. In determining whether the privilege applies, “[t]he nature of the dispute simply does not matter,” as the *Echevarria* decision expanded the privilege to all causes of action in Florida, whether arising pursuant to common law, statute, or some other origin. *Id.* (emphasis added).

105. It was undisputed in the proceeding below that Mr. Tuzlak initiated quasi-judicial proceedings when he filed his November 5, 2012 COD against Suncoast with the PCOHR.

106. Furthermore, it is undisputed that the Letter which is the subject of this action was sent by Suncoast’s counsel (a party protected by the litigation privilege) and was directly related to, and in fact inextricably linked with, these proceedings.

107. As a result, the ALJ’s failure to dispose of Mr. Tuzlak’s claim as barred by Florida’s litigation privilege constitutes a substantial departure from the essential requirements of law and this case should be remanded to the lower tribunal with instructions for issuance of a new final order finding that Mr. Tuzlak did not prove a prima facie case of retaliation, and in any event, Mr. Tuzlak’s claim was barred by Florida’s litigation privilege.

**III. THE AGENCY'S ACTION, TAKEN THROUGH THE ALJ'S FINAL ORDER, IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.**

108. The final action of the PCOHR, taken through the ALJ, is to issue an order holding that Suncoast violated §70.54(1), Pinellas County Code, and ordering that Suncoast pay Mr. Tuzlak's reasonable costs and attorney's fees incurred in pursuing the claim.

109. This action is based on findings that (1) Mr. Tuzlak proved a prima facie case of retaliation; and (2) that Suncoast did not provide a legitimate, non-discriminatory reason for taking the challenged action (i.e. sending the Letter).

110. Neither of these findings are based on competent, substantial evidence in the record.

**A. There is no evidence in the record to support that a reasonable employee would have been dissuaded from making or supporting a charge of discrimination based on the challenged action.**

111. As set forth above, Mr. Tuzlak was required to show that he suffered a materially adverse action by proving that a reasonable employee, in Mr. Tuzlak's circumstances, would have been dissuaded from making or supporting a charge of discrimination by receiving the Letter. *See Burlington*, 548 U.S. at 68-69.

112. The mere fact that something happens to an employee, including being threatened with a lawsuit, does not in and of itself constitute materially adverse action. *See Hasan v. Foley & Lardner, LLP*, Case No. 10-61479-CIV (N.D. Ill., July 26, 2007) (Hasan was fired by Foley and Hasan then filed a discrimination complaint against Foley. In response, Foley threatened to sue Hasan for making false statements about Foley. Hasan amended his complaint to add retaliation counts based on Foley's threats. On summary judgment, Hasan's retaliation claim based on the threats was dismissed; the court reasoned that, under *Burlington*, responding to a discrimination charge with a counter-suit would not be unlawful retaliation unless the suit was an abuse of process, *so it is difficult to see how threatening a lawsuit could be considered retaliation* once the employee has formally filed his own claim) (*emphasis added*).

113. At the final hearing, Mr. Tuzlak never stated that he was actually dissuaded from making his charge, and his counsel did not make this argument before the ALJ.

114. Mr. Tuzlak's counsel did present argument that the anti-retaliation provision exists to protect employees or former employees who may not have the resources to retain counsel and defend against a potential trade slander lawsuit.

115. However, such an argument is entirely inapplicable in the present case, as Mr. Tuzlak had been represented by counsel since within days of his

termination for employment and throughout the months leading up to his filing his first charge against Suncoast, and also when he received the Letter.

116. As a result, there is no evidence in the record to suggest that a reasonable employee, under Mr. Tuzlak's circumstances, would be dissuaded from making or supporting a charge of discrimination by receiving the Letter, and any finding that Mr. Tuzlak has proven a prima facie case of retaliation is unsupported by the competent, substantial evidence in the record.

**B. There is no competent, substantial evidence in the record to support a finding that Suncoast did not provide a legitimate, non-retaliatory reason for sending the Letter.**

117. Assuming, *arguendo*, that Mr. Tuzlak did make out a prima facie case of retaliation, the burden would then shift to Suncoast to articulate a legitimate, non-retaliatory reason for sending the Letter. *McDonnell Douglas Corp. v. Green*, 411 U.S. 802, 802-805 (1973).

118. A legitimate, nondiscriminatory reason given by Suncoast is not a pretext for prohibited conduct unless it is shown that the reason is false and that the real reason is impermissible retaliation or discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993).

119. If Suncoast's proffered reason is one that might motivate a reasonable employer, then Mr. Tuzlak may not merely recast the reason, but must

meet it “head on and rebut it.” *Chapman v. Al Transport*, 229 F.3d 1371, 1376 (11th Cir. 2000) (*en banc*).

120. At the final hearing, Mr. Burnett offered several legitimate, non-discriminatory reasons for sending the letter, including to (1) inform Mr. Tuzlak that his termination was completely unrelated to his personal beliefs; and (2) to try to settle the case by agreeing not to pursue any potential causes of action against Mr. Tuzlak if Mr. Tuzlak agreed to withdraw his claim.

121. The Letter, on its face, clearly contains a settlement offer and states that Mr. Tuzlak was not terminated due to his personal beliefs; thus, and regardless of whether the ALJ agrees with the terms of Suncoast’s settlement offer, Suncoast’s actions may not be summarily dismissed as pretextual without requiring Mr. Tuzlak to provide direct evidence of pretext.

122. Furthermore, there is competent, substantial evidence to support a conclusion that Suncoast actually sought out its counsel so as to avoid taking any unlawful action in response to receiving Mr. Tuzlak’s charge.

123. Thus, though the ALJ may not agree with Suncoast’s reasons for sending the Letter, the reasons offered by Suncoast are legitimate and would motivate a reasonable employer to take action similar to that of Suncoast.

124. As a result, there is no competent substantial evidence to support a conclusion that Suncoast failed to provide a legitimate, non-discriminatory reason

for its actions, and the ALJ may not summarily dismiss Suncoast's proffered reasons, even if the ALJ does not find them persuasive.

125. The question for the ALJ is not whether Suncoast's reasons are persuasive, but whether they might motivate a reasonable employer; as a result, Mr. Tuzlak must be required to rebut Suncoast's reasons in an attempt to show that they are a pre-text for unlawful discrimination, and his failure to do so results in final agency action which is unsupported by competent substantial evidence.

**WHEREFORE**, Petitioner, Suncoast Architecture & Engineering, LLC, respectfully requests the Court to grant this Petition for Certiorari, quash the Final Order entered in this cause on January 17, 2013, and remand the case to the lower tribunal with instructions to enter an order holding that (1) Suncoast did not violate §70-54(1), Pinellas County Code; (2) that Florida's litigation privilege acts as a bar to Mr. Tuzlak's claim; and (3) that the award of attorney's fees to Mr. Tuzlak be reversed so that Suncoast shall recover its reasonable attorney's fees and costs incurred from Mr. Tuzlak for his relentless pursuit of a claim barred in its entirety by the litigation privilege.

Alternatively, Suncoast requests that this Petition be granted and that this Court remand this case to the lower tribunal with instructions for the ALJ to conduct a de novo review of the proceedings and apply the correct law in

determining whether Mr. Tuzlak made out a prima facie case of retaliation, whether Suncoast provided legitimate, non-discriminatory reasons for the challenged action, and whether Florida's litigation privilege acts as a bar to Mr. Tuzlak's claim.

Finally, and to the extent this Court finds that Suncoast was denied procedural due process when Mr. Tuzlak was allowed to appear telephonically for the final hearing over Suncoast's objection, and when the parties received notice just one day before the final hearing that the hearing would take place via video conference, Suncoast requests this Court remand the proceedings to the ALJ with instructions to conduct a new final hearing during which Mr. Tuzlak shall be physically present to proffer testimony.

[Certificates of Service & Compliance to Follow]

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been served via Email to *Michelle Wallace, Esq. at mwallace@pinellascounty.org, Paul Valenti at pvalenti@co.pinellas.fl.us, Pete J. Genova, Jr. at pgenova@co.pinellas.fl.us and Thania Diaz Clevenger, Esq., Counsel for Petitioner, at tclevenger@cair.com* on this 17th day of February, 2014.

**SPARTAN LAW GROUP**

/s/ WILLIAM M. HURTER, ESQ.

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**CERTIFICATE OF COMPLIANCE**

**I HEREBY CERTIFY** that this Petition for Certiorari complies with the font requirements of Rule 9.100, Florida Rules of Appellate Procedure.

**SPARTAN LAW GROUP**

/s/ WILLIAM M. HURTER, ESQ.

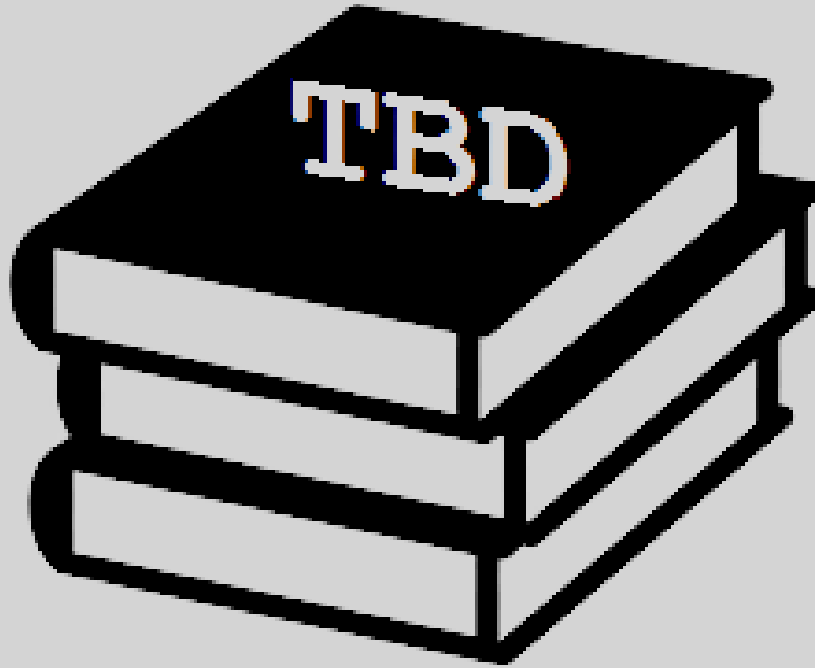
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