STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELIAS MAKERE,	)	
Petitioner,	)	
	)	**Case No. 18-0373**
vs.	)	**2017-01432**
	)	
ALLSTATE CORPORATION,	)	
Respondent	)	

PETITIONER'S PROPOSED ORDER

A hearing was held pursuant to notice on four separate days (November 28, 2018 through November 30, 2018; and January 29, 2019), in Jacksonville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, E. Gary Early.

APPEARANCES

For Petitioner: Elias Makere, pro se
3709 San Pablo Rd. S. #701
Jacksonville, Florida 32224

For Respondent: Carmen Rodriguez, Esquire
Zascha Blanco Abbott, Esquire
Liebler, Gonzalez & Portuondo
44 W. Flagler St.
Courthouse Tower 25th Floor
Miami, Florida 33130

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992 regarding Petitioner's employment.

Filed April 11, 2019 4:55 PM Division of Administrative Hearings

PRELIMINARY STATEMENT

On June 30, 2017, Petitioner filed an employment discrimination complaint with the Florida Commission on Human Relations (hereinafter "Agency"). He claimed that the Respondent discriminated against him on the basis of race, retaliation, and sex.

On December 15, 2017, the Agency completed its investigation. At which point it granted Petitioner the right to pursue legal action before this tribunal. He obliged, and on January 19, 2018 the Agency filed his Petition for Relief.

It alleged over 45 events of employment discrimination. Respondent maintained that it did not violate employment law. After a series of continuances and adjournments, this case proceeded to trial.

At trial, the parties submitted a variety of exhibits into evidence. Much of which was admitted. Petitioner testified on his own behalf; and fifteen of the Respondent's current employees did the same.

Afterwards, a transcript of the proceedings was filed. Which was followed up by proposed recommended orders.

FINDINGS OF FACT

1. Petitioner worked for Respondent from November 18, 2013 through August 12, 2016 (1070:18-19, 801:18-20).

A | Demographic Breakdown

Name	Race	Sex	Citation	Relation
Alex Vlassov		M	273:1-5	Witness
Bridget Tennant		F	123:14-16, 1252:19-1253:6	Comparator
Catrice Hathorn	B	F	330:11-17	Witness
David Dickson		M	399:12-18	Discriminator
Ellis Manucy		M	971:20-972:1	Witness
Greg Guidos		M	1010:7-10	Discriminator
James Parks		M	416:18-21, 780:17-22, 1118:24-1119:5	Comparator
Janice Bradley	B	F	96:4-11	Witness
Kazuhiko Nagai		M	196:14-20	Comparator
Kirk Higgins	B	M	850:7-17	Comparator
Lisa Henry		F	800:3-5	Discriminator
Louis Posick		M	530:6-10	Discriminator
Marilou Halim		F	731:9-15	Discriminator
Michael Parsons		M	305:2-7	Witness
Nasreen Ali		F	123:14-16, 512:12-14	Comparator
Patricia Boland		F	365:22-366:3	Discriminator
Rodney Ashford	B	M	141:3-9	Witness
Richard Schaefer		M	836:18	Discriminator
Scott Randles		M	596:2-7	Discriminator
Tetanya Dostie		F	693:14-22	Comparator
Victor Ciurte		M	123:14-16, 763:16-19, 764:17-20	Comparator

2. At all times pertinent to this case, Petitioner was the only black actuary working for Respondent (123:14-16, 512:12-14, 764:17-20, 1115:18-19).

3. Lisa Henry was Petitioner's manager throughout his employment (890:9-14).

B | Winded Pattern of Discrimination

4. David Dickson, VP of Enterprise Solutions, was a manager of managers. He has been working for Respondent for 19 years. And at one point, he had between 100 and 175 people reporting to him (409:18-20, 411:17-20, 449:19-21, 454:18-20).
5. He fires one employee every two years, approximately (443:11-17).
6. Often, these terminations are preceded by him attempting to sequester work from the employee (454:9-456:11). The sequestration process is usually accompanied by "coaching sessions" (456:21-457:3).
7. Preceding his interactions with Petitioner, Mr. Dickson was charged with employment discrimination. Clare Latham, a former employee, filed an internal "ethics complaint" against Mr. Dickson; alleging that he terminated her based on sex discrimination (445:10-447:8).
8. Her termination was preceded by Mr. Dickson sequestering her work (459:1-7).
9. Respondent's "ethics complaint" is its umbrella for all things discriminatory (428:24-429:3, 1121:2-8). At trial, Mr. Dickson testified that the Clare Latham case was still going on (446:8-12).
10. Mr. Dickson, flying with this methodology, continued this practice at Petitioner's expense.

C | Roots of Discrimination

11. Petitioner is a member of the actuarial profession (1065:19-21). A profession which enjoys a high esteem from many of Respondent's employees (313:25-314:25). They regard it highly because of the intelligence they believe is necessary for someone to become an actuary (118:20-24, 168:15-21, 234:2-15, 412:8-18, 532:18-533:4, 784:10-23).
12. This high esteem, however, is at odds with the common stereotype that black men are stupid. Commendably, some of the Respondent's employees had healthy enough sensibilities to recognize this conflict. (314:13-315:1, 351:20-352:18).
13. Petitioner recognized this conflict as well. He explained how uplifting it was for Respondent to perpetuate its narrative at Petitioner's expense (1272:12-1273:5). This esteem and conflicting stereotype were not just a theory. The Respondent put it into practice.
14. In June 2014, one of the actuarial managers, Mr. Louis Posick, marked the Petitioner for departmental ire. He proclaimed that Petitioner devalued the profession. He said that Petitioner's credentials made his worth less (1091:22-1093:2). Despite the fact that Petitioner passed actuarial exams like everyone else.
15. Importantly, Mr. Posick's proclamation invigorated his subordinates; sprouting vines for the impending hostile environment.

D | Hostile Work Environment (Race)

16. Around that same time, Petitioner's manager, Ms. Lisa Henry, characterized Petitioner as a monkey (838:2-11, 1084:4-22). She began the portrayal in a well-attended meeting. She finished it at Petitioner's desk. Later, she found herself throwing a banana at Petitioner (1260:3-12).
17. One of Petitioner's co-workers, Mr. Kazuhiko Nagai, followed this up by placing a racist doll on Petitioner's desk (Exhibit G-1). Indeed, it was a monkey. He left it on Petitioner's desk for months. (180:20-184:14, 235:8-238:23, 243:1-6, 1106:15-1108:7. 1232:7-1237:9)
18. While the racist doll sat on Petitioner's desk – symbolizing him – another actuarial manager (Ms. Marilou Halim) joined the fray. In August 2015, she screamed profanities at Petitioner. The reason: he had bought a condolence card for a grieving co-worker. Ms. Halim further admitted that she never screamed at any other employee. Her direct report, Ms. Janice Bradley, corroborated the same. (134:16-22, 135:7-16, 136:2-9, 137:3-19, 754:11-756:18, 763:16-19, 764:17-25, 1108:15-1111:12)
19. Not to be left out, Mr. Phil Kite (the Petitioner's other cubicle mate) yelled that the Petitioner looked like a chimpanzee. Demeaning him on the basis of race. (171:2-6. 172:3-172:23, 174:9-14, 1111:13-1113:6).
20. Likening a black person to a monkey is objectively derogatory (1084:24-1085:2). As Ms. Bradley recounted (122:12-14). She further explained that – if harmed again – she would go so far as contest such behavior in a court of law.

21. Petitioner tried to avoid his workplace/co-workers because of the harassment. He started by asking if he could change his work hours. He continued by requesting to work from home. Management knew that Petitioner was trying to avoid his harassers. Ultimately, they (Mr. Richard Schaefer and Ms. Henry) granted approval for a shift in hours. Management never, however, allowed Petitioner to work from home. Within his first year, Petitioner learned that his predecessor, Mr. Kirk Higgins, had also wanted to work from home. Petitioner found it ominous that the only two black men in the department's history wanted to avoid the department. (616:1-4, 652:23-24, 671:20-672:3, 846:8-13, 846:20-23, 847:20-848:3, 849:4, 858:11-20, 858:21-859:1, 859:11-14, 1091:7-21).
22. Ms. Henry responded to many of Petitioner's avoidance requests by leading him to believe that there would be new seating arrangements in the future. Thereby relieving him of his harassers (858:21-859:1, 859:11-14). This relief never came during Petitioner's tenure, though.
23. Mr. Schaefer, on the other hand, testified that it was a condition of Petitioner's employment to be near his co-workers (615:21-616:1, 618:16-20). A point that was contradicted by the working conditions of Ms. Bridget Tennant (Mr. Schaefer's direct report); who had been working from home for the past 10^{+} years (654:19-655:2, 1095:15-20).
24. As 2015 neared an end, Petitioner's hostile work environment fortified into branches of discrimination.

E | Targeted Discrimination

25. In Fall 2015, Ms. Marianne Poriecca (VP), expressed her desire for Petitioner to be fired. At that point, though, she had never even met Petitioner. Nor had the two ever communicated with one another. Even Petitioner's manager was surprised. In fact, Ms. Henry testified to being shocked that Ms. Poriecca even knew Petitioner. Importantly, the VP never gave a reason for wanting Petitioner fired. Still to this day, she has never presented any legitimate reason; leaving Petitioner's manager to speculate at trial. Come to find out, though, Ms. Poriecca was not the only VP aiming at the Petitioner. (828:6-18, 829:15-829:24, 830:22-23, 923:15-22, 1157:10-1158:13)
26. On December 17, 2015, Mr. Dickson (VP) called Petitioner to sequester his work (419:3-7). He admitted that he spoke to many [non-actuarial] people before contacting Petitioner – a person for whom he had neither met nor communicated with before (406:9-18, 478:5-18, 408:8-409:10, 415:1-4). In the phone call, he threatened Petitioner's employment. Immediately, though, Mr. Dickson wanted to take a project that Petitioner was working on (EGTL SnapQuote). He later admitted at trial, that he did not have a legitimate reason for contacting Petitioner (468:11-13).
27. Instead, Mr. Dickson's "security" concerns were a mask for disparate treatment (487:16-488:20). There were already many other snapquotes/rate generators on the agent website; most of which were made by other actuaries. Yet Mr. Dickson only targeted the one that Petitioner was known to have made (411:12-15,

436:21-437:2, 493:8-19, 494:11-15, 494:24-495:9, 512:2-6, 928:9-15, 1113:7-1122:14, 1180:23-1183:19).

F | Retaliation

28. In January 2016, Petitioner filed an internal complaint against David Dickson (427:11-428:1). Mr. Dickson knew of the complaint and believed that it alleged "racism" (428:24-429:3). Leading up to the complaint, Petitioner's manager (Ms. Henry) told Petitioner to report Mr. Dickson (868:10-21, 1120:18-25).
29. In 2016, Mr. Dickson spoke to Ms. Henry about Petitioner. He admitted, though, that he never did so prior to 2016 (411:1-14, 810:19-24). Mr. Schaefer also played audience to Mr. Dickson's lamentations of Petitioner (441:14-25).
30. Management thereby began punishing Petitioner. First, Ms. Henry attempted to have "coaching sessions" with Petitioner (803:8-15, 804:19-21, 807:4-808:22, Section B). Next, she gave Petitioner an impaired performance evaluation for the 2015 calendar year. She penalized Petitioner for the David Dickson interactions (1123:7-1126:9). Interactions which were unsolicited (434:10-13) and illegitimate (484:20-485:16).
31. Moreover, Ms. Henry admitted that her subsequent rating of Petitioner was subjective (944:7-19).
32. Thus, Petitioner refused to sign the performance evaluation (634:25-635:2, 866:2-6). Instead, he filed an internal complaint against Ms. Henry. She knew about it, and voluntarily acknowledged that it was for "retaliation" (804:4-10). Respondent's investigation into Ms. Henry extended into the summer of 2016.

33. A crucial connection exists between Petitioner's unwanted interactions with Mr. Dickson, Mr. Dickson's past [alleged] discrimination, and Respondent's pattern of discrimination (see Section B).

G | Sexual Discrimination

34. Many people singled out Petitioner on account of race, but only Ms. Henry singled him out on account of sex (1213:23-1214:11, 1214:23-1215:21). She started doing so just weeks into his employment.
35. In late 2013, she asked Petitioner to have dinner-&-a-movie with her. He was put off by it, and declined the date (840:4-11, 840:20-841:7, 1072:22-1073:24).
36. In early 2014, Ms. Henry asked to join Petitioner on a 450-mile road trip to Atlanta, GA. It was a multi-day trip which included a hotel stay. He declined her request, but she persisted. She even called the rental car agency to ask the clerk if Petitioner was alone (1074:19-1077:4).
37. Also, in 2014, Ms. Henry began asking Petitioner to go out bowling with her. She asked him on a near-weekly basis throughout his employment (an estimated 100 times). He declined her requests (842:15-843:12, 1078:5-10). At trial, Ms. Henry admitted that going out with her would have helped Petitioner '*get along well with others*' (ie, improve his employment profile).
38. To minimize the harassment, Petitioner tried to avoid Ms. Henry. Especially in one-on-one situations. He did this in two ways:
    a. One, he sent Ms. Henry Monday-morning emails (see **Exhibit E-6**) which prioritized his tasks. Said emails asked for feedback and/or instruction.

Thereby, defeating the need to be near her to accomplish the same. (863:10-12, 1078:21-1079:19)

b. Two, he asked her and Mr. Schaefer for permission to work from home. (see ¶21)

39. Management denied Petitioner's work-from-home request, though. So, he was left exposed to his manager's advances.

40. Ms. Henry admitted to making the dinner-&-a-movie request, as well as the routine bowling requests (see ¶35, ¶37). The last date request that she made, though, was the most telling.

41. In early August 2016, after business hours, Ms. Henry approached Petitioner at his desk. She [again] asked him to go bowling with her. She knew – of course – that his employment was on shaky ground (844:14-19). He declined, however, and within 1 day she put in the termination request (1148:15-1150:6).

H | Minimizing Harm

42. Petitioner remained a model employee despite the harassment and discrimination. His co-worker, Ms. Catrice Hathorn, testified that Petitioner remained professional despite Ms. Patricia Boland's abrasive attitude towards him (362:15-363:1).

43. Petitioner made the best out of the seating arrangement that he was "stuck with". He spent his own money and time participating in holiday events with Mr. Kite and Mr. Nagai (258:9-24). Both of whom credited Petitioner with teaching them new things and helping them out (261:11-15, 176-178:25). In fact, Mr. Kite appreciated Petitioner's work so much he nominated him for a company award.

44. Even Ms. Boland and Mr. Dickson admitted that Petitioner was helpful and cooperative (377:15-378:3, 385:8-16, 403:12-16, 407:11-16, 425:2-10, 464:5-12).
45. Petitioner even sought out a mentor on his own accord (871:11, 1103:16-1104:17).
46. Petitioner's manager, Ms. Henry, said that Petitioner did "incredible work" on one project (882:3-17). Which was not even the project that she begrudgingly nominated him for a quarterly award (1097:21-1098:8).
47. Importantly, despite having a progressive discipline policy, Respondent never subjected Petitioner to it (ie, no written reprimands, verbal reprimands, "UN" notices, etc.). (937:16-22, 982:3-).

I | Core Facts | Prima Facie | Member

48. Petitioner is a black male. Both he and his manager knew this; and neither were in doubt (1065:19-20, 884:2-12).

J | Core Facts | Prima Facie | Qualified

49. Ms. Henry deemed Petitioner qualified for his job (937:5-6).
50. In early 2014, Petitioner attained his first actuarial credential (ASA). Both Mr. Schaefer and Ms. Henry were aware of this (650:25-651:5, 830:17-18, 1074:9-18). His ASA legally qualified him to sign off on the Respondent's actuarial decisions (188:12-189:24).
51. Shortly thereafter, Respondent promoted Petitioner. Exams and experience were still the Respondent's primary qualifications for the new position (see **Exhibit E-7**). Petitioner had more than the minimum exams/experience upon promotion, and more than the maximum exams/experience upon separation.

52. Respondent had four employee ratings ("better than expected", "expected", "inconsistent", "unsatisfactory"). Respondent never deemed Petitioner to be "unsatisfactory".
53. Petitioner never lost his actuarial credential.
54. Nevertheless, exam progress was not a requirement to work for Ms. Henry or for the Respondent's actuarial department (823:23-25).

K | Core Facts | Prima Facie | Adverse Employment Action

55. Respondent terminated Petitioner on August 12, 2016 (801:16-20).

L | Core Facts | Prima Facie | Similarly-Situated Comparators

56. The Respondent admits every newly-hired actuarial student into its ACP (Actuarial Career Program).

    (256:11-24, 536:4-7)
57. All of the areas of work (Pricing, Valuation, Health, Life) are interchangeable. On many past occasions, actuaries and actuarial students have shifted between the different areas.

    (582:4-7, 582:19-583:11, 660:17-20, 702:4-11, 786:11-14, 1067:2-6, 1254:21-1257:10)
58. Mr. Kazuhiko Nagai was hired into the ACP. He worked on the 7th floor. He worked in the actuarial department. He worked on the Life Insurance side of the department [with Petitioner]. He sat in the same aisle as Petitioner. He attained his ASA while working for Respondent. He did actuarial work.

    (202:19-24)

59. Mr. Phil Kite worked on the 7th floor. He worked in the actuarial department. He worked on the Life Insurance side of the department [with Petitioner]. He sat in the same aisle as Petitioner. He got a degree in actuarial science. He took actuarial exams after college. He refers to himself as an "Assistant Actuary". He did actuarial work.
(144:19-21, 151:5-10, 158:23-25)
60. Ms. Bridget Tennant worked in the actuarial department. She worked on the Life Insurance side of the department [with Petitioner]. She did actuarial work.
(654:19-655:20)
61. Ms. Tanya Dostie was in the ACP. She worked on the 7th floor. She worked in the actuarial department. She worked on the pricing side of the department [with Petitioner]. She attained her ASA while working for Respondent She did actuarial work.
(734:20-735:17).
62. Mr. Victor Ciurte was a member of the ACP. He worked on the 7th floor. He worked in the actuarial department. He attained his ASA while working for Respondent. He did actuarial work.
(145:17-146:25, 550:12-17)
63. None of the above individuals are black (see Section A).

M | Core Facts | Prima Facie | Disparate Treatment

64. Respondent did not force Mr. Nagai to purchase his third attempt of an actuarial exam.
(226:16-227:10)
65. Respondent did not force Mr. Ciurte to purchase his third attempt of an actuarial exam.
(584:20-23, 589:2-9)

66. Respondent did force Petitioner to purchase his third attempt of an actuarial exam. An action that cost Petitioner $1,025.

(874:14-877:2, 1129:25-1131:4, 1136:8-1137:9, 1237:14-1238:25, 1241:10-1242:1).

67. Respondent allowed Ms. Tennant to work from home. Which is what she has done for over 10 years; on a permanent basis.

(654:19-655:2, 1095:15-20)

68. Respondent also allowed Ms. Dostie to work from home

(749:10-14)

69. Ms. Halim has allowed her direct reports to work from home

(749:20-25)

70. However, Respondent denied all of Petitioner's requests to work from home

(849:4-16, 1089:24-1090:11)

N | Core Facts | Prima Facie | Replacement Hires

71. Mr. Parsons replaced Petitioner's duties on the EGTL SnapQuote project

(293:19-294:3)

72. Mr. James Parks became Mr. Parsons' manager on the SnapQuote project in August 2016 (ie, soon after Petitioner was fired). Mr. Parks remained in the Actuarial department, though, after Respondent moved the SnapQuote team to a different department. He was neither an actuary nor an actuarial student.

(319:11-320:1, 779:1-781:3)

73. After Petitioner's termination, Respondent hired six actuarial students with less qualifications than Petitioner. They were all non-black. (598:24-601:9)

74. Ms. Henry hired two non-black, non-actuarial employees to assume Petitioner's duties. Their work assignments were a complete subset of Petitioner's (ie, no new tasks). (602:19-603:1, 606:7-12, 671:13-19, 672:16-24, 822:15-823:22)
75. Ms. Marilou Halim hired two actuarial students; each with just one passed exam. (739:4-740:5)
76. Mr. Scott Randles hired a female with zero actuarial credentials, and just one actuarial exam.
(739:4-740:5).

O | Core Facts | Prima Facie | Open Position

77. Ms. Henry did not want to create a new position for Petitioner. Instead, she wanted to hire a different actuary to be her successor. For over two years, she has kept the titled position open (even though she replaced Petitioner's duties with two non-actuarials). So, technically, Respondent kept Petitioner's old position vacant. Practically, though, the job duties are being completed by less-qualified individuals.
(822:1-14)

P | Core Facts | Prima Facie | Retained Employees with Equal-or-Lesser Qualifications

78. Mr. Phil Kite failed every actuarial exam that he took; before giving up (160:14-161:25). He has never passed an actuarial exam (160:5-7). He performs the same actuarial work that actuaries perform (156:25-157:16, 158:10-15). Respondent knew about Mr. Kite's exam failures. He did not have any objective qualifications to merit being in the actuarial

department (543:22-544:14). Respondent never fired Mr. Kite for exam failure/lack of exam success (163:3-17). (1251:6-1251:22)

79. Similarly, Ms. Bridget Tennant failed every actuarial exam that she took; before giving up. She has never passed one. She performs a subset of the tasks that Petitioner performed. She also did not have any objective qualifications to merit being in the actuarial department. (655:18-20, 1095:7-15, 1252:15-1253:6)

Q | Core Facts | Prima Facie | Discriminatory Inference

80. The above facts and circumstances led Petitioner to infer that Respondent discriminated against him. Thus, he filed a complaint with the FCHR.
(1250:18-1251:1)

R | Core Facts | Rebuttal

81. Respondent has a "1-in-3" rule (see **Exhibit E-1**). In short, an actuarial student must pass at least one exam in the past eighteen months to maintain status in the ACP.
82. In May 2016, Petitioner failed to satisfy the "1-in-3" rule.
(1129:24-1130:5)
83. Ms. Henry's only reason for firing Petitioner was his failure to satisfy the "1-in-3" rule. Ms. Henry confirmed this rationale many times.
(801:2-25, 821:13-25, 824:21-825:9, 955:14-20)
84. The rationale was so strong that even people who were excluded from the decision knew the reason. Mr. Parsons knew, and Ms. Halim knew (318:2-22, 767:7-14).

85. Moreover, Mr. Ellis Manucy, HR Manager, was the actual person who told Petitioner that he was fired. He recalled that the only reason for Petitioner's termination was his failure of an exam (ie, failing the "1-in-3" rule)

    (978:14-20)

86. Petitioner corroborated the given reason. (1150:10-1154:3).

87. Perhaps, most concrete, is Respondent's official statement for terminating Petitioner (emphasis added):

    "*Complainant was terminated **solely** because he failed to pass his [FSA] [sic] exam*"

    (see **Exhibit L-3**)

S | Core Facts | Pretext

88. Mr. Kazuhiko Nagai also failed to satisfy Respondent's "1-in-3" rule for actuarial exams. The Respondent, however, never fired him. In fact, Mr. Nagai's roles did not change at all ("*nothing changed*").

    (219:3-17, 224:10-16, 225:16-23, 231:21-23, 227:20-228:14, 1252:2-14).

89. Mr. Victor Ciurte failed to satisfy Respondent's "1-in-3" rule for actuarial exams as well. The Respondent, however, never fired him. Contrary, actually, Respondent promoted Mr. Ciurte after his exam failures. (540:22-542:2, 548:6-7)

90. Respondent's ACP is centrally managed at its headquarters in Northbrook, IL (535:13-536:3). It is also HQ that makes the employment decisions (549:10-14).

91. Respondent terminated Petitioner for failing his exam but never did the same to his non-black counterparts (1160:17-1162:8, 1164:21-1165:8, 1250:2-1251:1, 1272:12-24).

CONCLUSIONS OF LAW

92. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action. §120.57(1) (FS), §120.569, and 60Y-4.016(1).

93. The State of Florida, under the legislative scheme contained in §760.01 through §760.11 and §509.092, known as the Florida Civil Rights Act of 1992 ("the Act"), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, et seq.

94. At all times material hereto, §760.10, Florida Statutes, provides, in part, that:

> (1) It is an unlawful employment practice for an employer:
>
> > (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

95. Also, pursuant to §760.10(7), it is an unlawful employment practice for an employer to discriminate against a person because that person has, "*opposed any practice which is an unlawful employment practice*" or because that person "*has made a charge... under this subsection*."

96. Respondent is an "employer" and Petitioner is an "aggrieved person" as each term is defined under §760 FS (2018).

97. Under the shifting burden pattern developed in McDonnell-Douglas:

> First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F. 2d 864, 870 (11th Cir. 1990)(housing discrimination claim); accord, Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009)(gender discrimination claim)("*Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination.*").

98. The Prima Facie case serves to eliminate "*the most common nondiscriminatory reasons for the plaintiff's rejection.*" Texas Dep't of Community Affairs v. Burdine, 450 US 248, 253-54 (1981). The two most common non-discriminatory reasons are (a) lack of qualifications; and (b) lack of an available position.

99. "*Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination.*" Holifield, 115 F. 3d at 1562; cf. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000)(noting that "*[a] preponderance of the evidence is 'the greater weight of the evidence,' [citation omitted] or evidence that 'more likely than not' tends to prove a certain proposition.*").

100. Moreover, "*The prima facie case method was never intended to be rigid, mechanistic, or ritualistic... The elements of a prima facie case are flexible and should be tailored to differing factual circumstances.*" Ehlmann v. Florida A & M University, 21 F.A.L.R. 436, at 455 and 457 (FCHR 1998), citations from the quoted statement omitted. "*[The prima facie method] is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination*." USPS Board of Governors v. Aikens, 460 US 711 (1983).

T | Prima Facie | Racial Discrimination

101. The most sensible prima facie evaluation would be the one used in past cases which were based on similar material allegations. In the instant case, the material allegation is disparate treatment surrounding work-related exams. The two cases which were judicially noticed (Portales et al v. School Board of Broward County, 1:16-cv-62935-MORENO/TURNOFF) (Foster v. Pepsi-Cola Bottling Company, DOAH Case No. 05-1455) assert that Petitioner must show that:

a. He is a member of a protected group;
b. He was qualified for the position;
c. He was subjected to an adverse employment decision; and
d. He was treated less favorably than similarly-situated persons outside of his protected class. – OR – alternatively, Petitioner can satisfy this fourth prong by showing that Respondent kept Petitioner's position open while seeking other applicants (see Evans v. McClain of Georgia, Inc. 131 F.3d 957, 964 (11th Cir. 1997)) – OR – alternatively, Petitioner can satisfy this fourth prong by showing

that Respondent replaced him with someone outside his protected class (see Kelliher v. Veneman, 313 F.3d 1270, 1275 (11th Cir. 2002)).

102. Petitioner, in the instant case, has established a prima facie case of racial discrimination by satisfying all four prongs.

103. First, Petitioner is a member of a protected group (specifically: a racial group). See ¶48.

104. Second, Petitioner was qualified for his job. See ¶49.

a. In Drayton v. Lowe's (DOAH Case No. 11-5266), this Tribunal held that a plaintiff's alleged deteriorated performance in her third year did not negate her qualifications for the position. Likewise, in the instant case, Petitioner's third-year work performance was alleged to have suffered (a claim which Petitioner proffers was unlawfully retaliatory; see ¶30), while his first two years did not.

b. In a "termination" case similar to the instant case, a Commission panel concluded that for the purpose of establishing a prima facie case of discrimination Petitioner demonstrated that "*she was at least minimally qualified for the position in question by virtue of having been hired for the position.*" Kesselman v. Department of Transportation, 20 F.A.L.R. 166, at 169 (FCHR 1996). Based on judicial economy, Petitioner is deemed qualified.

105. Third, Petitioner was subjected to an adverse employment action. He was terminated. See ¶55.

106. Fourth, Respondent treated people outside of Petitioner's racial group more favorably than him. Quantified by a $1,025 payment that only Petitioner was forced to make (see ¶56-¶63, and ¶64-66).

107. Thus, Petitioner has established a prima facie case of racial discrimination. The burden now shifts to Respondent.

U | Rebuttal | Racial Discrimination

108. Respondent rebutted Petitioner's prima facie claim by articulating a non-discriminatory reason for terminating him. It stated that it fired him for failing to satisfy the "1-in-3" actuarial exam rule. See ¶83 and ¶87.

109. Therefore, the burden shifts back to Petitioner to prove that Respondent's reason was only a pretext.

V | Pretext | Racial Discrimination

110. Petitioner satisfied this final element of the McDonnell-Douglas test. He did so by showing that two "similarly-situated" employees of a different racial group were not terminated for failing to satisfy Respondent's "1-in-3" rule. See ¶88-91.

111. Judicially noticed Case Law shows that a "similarly-situated" comparator in the instant case is an employee who:

(1) took an actuarial exam;

(2) failed to satisfy the "1-in-3"/"2-in-5" rule; and

(3) was not terminated for exam failure:

> "Here, a similarly situated employee would necessarily be a non-Hispanic individual who, like the instant Plaintiffs, failed the FSP exam."
>
> - Portales et al v. School Board of Broward County

> "In [Plaintiff]'s case, an individual "similarly situated" to him would be a merchandiser applicant who: (1) [took] the written test; (2) failed the written test; and (3) was allowed to advance to the interview phase despite failing the test."
>
> - Foster v. Pepsi-Cola Bottling Company

112. The "similarly-situated" comparators in the instant case are Mr. Kazuhiko Nagai and Mr. Victor Ciurte. See ¶58, ¶62.

W | Prima Facie | Hostile Work Environment ("HWE")

113. According to Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002), Petitioner must show the following in his HWE prima facie proof:

a. He is a member of a protected group;
b. He was subjected to unwelcome harassment;
c. The harassment was based on a protected characteristic;
d. The Workplace was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the terms & conditions of employment and to create an abusive working environment; and
e. Employer is responsible for such environment under either a theory of vicarious or of direct liability

114. Petitioner, in the instant case, has established a prima facie case of a hostile work environment.

115. First, Petitioner is a member of a protected group (specifically: a racial group). See ¶48.

116. Second, Petitioner was subjected to unwanted harassment. See ¶16-20.

117. Third, the attacks were geared towards his race (black). See ¶16-20.

118. Fourth, the frequency and severity of the attacks were grave enough to impact a term/condition of his employment. Namely, Petitioner attempted to avoid his workplace/co-workers. See ¶21. His manager's manager, Mr. Schaefer, deemed Petitioner's proximity to his harassers as a condition of employment. See ¶23.

    a. Severity: Respondent's monkey characterizations of Petitioner (¶16, ¶17, ¶19) are harsh enough to be considered direct evidence of racial animus. In DOE v. Jenkins (DOAH Case No. 00-3345), this Tribunal found that the defendant's term "little monkeys" was "clear and convincing" evidence of "unnecessary embarrassment and disparagement".

    b. Frequency: The racist doll that Petitioner's co-worker placed on Petitioner's desk sat there for months. The constant disparagement satisfies the "commonplace, daily, continuous" element necessary to prove a hostile work environment. See Richardson v. New York State Department of Correctional Service, 180 F.3d 426.

    c. In Campbell v. Bay County School Board (DOAH Case No. 92-2473), this Tribunal explained that attacking a black employee because of the racial stereotype that "blacks were of a lower intelligence" constitutes direct evidence of racial animus towards black people. Therefore, Respondent's use of such a stereotype (eg, monkey characterizations) is "severe".

119. Fifth, Respondent was aware because (a) its managers were engaged in the conduct; and (b) its managers were informed of others' conduct. See ¶16, ¶21.

    a. Moreover, in fact, federal case law holds that the 'open & observable' nature of the racist doll (see ¶17) makes Respondent liable for the abusive work

environment. An employer has constructive knowledge of the situation when the condition is open and capable of observation. See Daniels v. Essex Group, Inc., 937 F.2d 59, 63 (2d Cir. 1992); Turner v. Barr, 811 F. Supp. 1, 3 (D.D.C.1993). Once an employer has notice of the harassing behavior, the employer is required to take reasonable steps to correct it. See Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59, 63 (2d Cir.1992).

120. Thus, having satisfied his prima facie burden, the onus now shifts to Respondent to articulate a non-discriminatory reason for the HWE.

121. Note: the remainder of the process can be found in the legal conclusions for the racial discrimination portion of this pleading . It is wholly incorporated herein.

X | Prima Facie | Retaliation

122. In order to establish a prima facie case of retaliation, Petitioner must show that:

a. He was engaged in a statutorily-protected expression or conduct;

b. He suffered an adverse employment action; and

c. There is some causal relationship between the two events. Holifield, 115 F. 3d at 1566.

123. If Petitioner is able to establish a prima facie case of retaliation, then Respondent should come forward with a legitimate, non-retaliatory reason for its materially adverse action. Olmsted v. Taco Bell Corp., 141 F. 3d 1457, 1460 (11th Cir. 1998).

124. If Respondent is able to present a legitimate, non-retaliatory reason for its materially adverse action, then a plaintiff "*bears the ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for*

prohibited, retaliatory conduct." Id. In order to satisfy that burden, a plaintiff "*must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence*." Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F. 3d 1519, 1528 (11th Cir. 1997).

125. Petitioner, in the instant case, has established a prima facie case of retaliation.

126. First, Petitioner engaged in a statutorily protected activity. He did so when he reported Mr. David Dickson. A manager who singled him out for disparate treatment. See ¶25-28. He also did so when he complained of harassment to his managers. See ¶21.

a. In Brown v. Kmart-Sears Holding Corp (DOAH Case No. 16-5002), this Tribunal defined "protected activity" as an action "*giving rise to the alleged retaliatory action must… communicate to the employer that the complainant believes the employer is engaging in discrimination against him.*". Since the Respondent's VP targeted Petitioner (an entry-level employee) for work sequestration and employment threats, Petitioner's subsequent complaint satisfies the definition of a "protected activity".

b. Moreover, Ford v. Hanson Pipe and Products (DOAH Case NO. 05-4055) deems Petitioner's complaints to management as a protected activity. "*[Plaintiff] proved that he engaged in statutorily protected expression in that he complained to [his manager] about alleged discrimination.*" See ¶21.

c. Ditto for the 'opposition clause' – which "*protects activity that occurs before the filing of a formal charge with the EEOC, such as submitting an internal complaint*

of discrimination to an employer, or informally complaining of discrimination to a supervisor." Muhammad v. Audio Visual Servs. Grp., 380 Fed. Appx. 864, 872 (11th Cir. Ga. 2010) (quoting Total Sys. Servs., 221 F.3d at 1174)); see also Rollins v. State of Fla. Dep't of Law Enf., 868 F.2d 397, 400 (11th Cir. 1989). See ¶7, ¶32.

127. Second, Petitioner was subjected to an adverse employment action. This happened after Mr. Dickson spoke to Petitioner's manager; who subsequently gave Petitioner an impaired performance evaluation. See ¶29-30.

a. A negative performance appraisal can be an adverse employment action. As seen in Jones v. DOT (DOAH Case No. 96-4162), "*Petitioner did experience adverse employment actions when he received two written reprimands and a negative performance appraisal.*". Several Commission Panels have affirmed the same.

b. Ms. Henry's subjective performance appraisal of Petitioner further exemplified its impropriety. In Tate v. Mold-Ex (DOAH Case No. 00-3846), this Tribunal held that an employer's rationale must be objective (emphasis added), "*A Respondent meets its burden of production to show a legitimate, non-discriminatory reason by providing evidence that the decision to terminate was based on objective management criteria.*".

128. Third, the two events were closely connected. As evidenced by Ms. Henry mentioning Mr. Dickson during Petitioner's 2015 review. In other words, Petitioner's manager punished Petitioner's 2015 performance because of the complaint he filed in 2016. See ¶29-32.

a. The Eleventh Circuit Court of Appeals construes the "causal link" requirement broadly: "*a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated.*" Equal Employment Opportunity Commission v. Reichhold Chemicals, Inc., 988 F.2d 1564, 1571-1572 (11th Cir. 1993). See also Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001); Olmsted v. Taco Bell Corporation, 141 F.3d 1457, 1460 (11th Cir. 1998). Since Petitioner's manager mentioned his "protected activity" during the "adverse employment action" the two are related.

129. Having satisfied his prima facie burden, the onus now shifts to Respondent to articulate a non-discriminatory reason for the retaliation.

130. The remainder of this process also follows that seen in the legal conclusions for the racial discrimination portion of this pleading. It is wholly incorporated herein.

Y | Prima Facie | Sexual Discrimination

131. For Petitioner's sex discrimination case, the most sensible prima facie evaluation would be the classic one used for a manager's spurned advances. Under the authority of Mendoza v Borden, Inc., 195 F. 3d 1238, 1245 (11th Cir. 1999), Petition must show that:

a. He is a member of a protected group;

b. He was subjected to unwanted sexual advances;

c. It was based on gender;

d. It affected a term/condition/privilege of his employment; and

e. Respondent knew or should have known about it and failed to take prompt action

132. Petitioner, in the instant case, has established a prima facie case of sexual discrimination by satisfying all five prongs.

133. First, Petitioner is a member of a protected group (ie, a gender group). See ¶48.

134. Second, Petitioner was subjected to unwanted sexual advances. See ¶34-37.

135. Third, Petitioner was singled out because of his gender. See ¶34, ¶36, ¶37.

136. Fourth, the advances affected a term and/or condition of Petitioner's employment. Namely, Petitioner repeatedly tried to avoid Ms. Henry. See ¶38. A maneuver that his higher manager, Mr. Schaefer, denounced. Stating that being near his manager was a condition of Petitioner's employment. See ¶23.

137. Fifth, Respondent knew of the sexual harassment because it was emanating from one of its managers. In Henson v. City of Dundee, 682 F.2d 897, 903-905 (11th Cir. 1982), "*[A]n employer is strictly liable for the actions of its supervisors that amount to sexual discrimination or sexual harassment resulting in tangible job detriment to the subordinate employee.*"

138. Therefore, Petitioner has established a prima facie case of sexual discrimination.

139. The burden shifting process follows that seen in the legal conclusions of this pleading's racial discrimination section. It is wholly incorporated herein.

Ultimate Fact

140. Notwithstanding the burden-shifting analysis from above, a case that has been "fully tried" (such as this one) can resort to an examination of the ultimate facts.

> Where the administrative law judge does not halt the proceedings "*for lack of a prima facie case and the action has been fully tried, it is no longer relevant whether the [complainant] actually established a prima facie case. At that point, the only relevant inquiry is the ultimate, factual issue of intentional discrimination… [W]hether or not [the complainant] actually established a prima facie case is relevant only in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination.*" Green v. School Board of Hillsborough County, 25 F.3d 974, 978 (11th Cir. 1994) (citation omitted); see also Aikens, 460 U.S. at 713-715 ("*Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non… [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection [as a candidate for promotion], the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.' After Aikens presented his evidence to the District Court in this case, the Postal Service's witnesses testified that he was not promoted because he had*

turned down several lateral transfers that would have broadened his Postal Service experience. The District Court was then in a position to decide the ultimate factual issue in the case… Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'") (citation omitted); Wallace v. Louisiana Board of Supervisors for the Louisiana State University Agricultural & Mechanical College, 364 Fed. Appx. 902 (5th Cir. 2010)("*Because this case was tried on the merits, we are not concerned with the adequacy of the parties' showing under McDonnell Douglas and instead review the district court's finding on the ultimate factual issue of discrimination vel non for clear error.*"); Beaver v. Rayonier, Inc., 200 F.3d 723, 727 (11th Cir. 1999)("*As an initial matter, Rayonier argues it is entitled to judgment as a matter of law because Beaver failed to establish a prima facie case. That argument, however, comes too late. Because Rayonier failed to persuade the district court to dismiss the action for lack of a prima facie case and proceeded to put on evidence of a non-discriminatory reason--i.e., an economically induced RIF--for terminating Beaver, Rayonier's attempt to persuade us to revisit whether Beaver established a prima facie case is foreclosed by binding precedent.*"); and Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1129 (11th Cir. 1984)("*The plaintiff has framed his attack on the trial court's findings largely in terms of whether the plaintiff made out a prima facie case of discrimination. We are mindful, however, of the Supreme Court's admonition that when a disparate treatment case is fully tried, as*

> *this one was, both the trial and the appellate courts should proceed directly to the 'ultimate question' in the case: 'whether the defendant intentionally discriminated against the plaintiff.*'").

141. The ultimate fact in the instant case can be summarized with the following statement:

'**Allstate Only Fired the Black Employees Who Failed Exams**'

RECOMMENDATION

Upon the consideration of the facts found and conclusions of law reached, it is RECOMMENDED:

a) That the Florida Commission on Human Relations enter a final order finding that Allstate Insurance Company violated the Florida Civil Rights Act of 1992 when it terminated Petitioner's employment; and

b) Ordering the parties to confer on the requisite relief; and/or

c) Remanding the case back to DOAH for the limited purpose of determining an award of damages consistent with said final order.

Dated this 3rd day of April 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of April 2019, I electronically filed the foregoing with the Clerk of Courts by using the Florida Courts E-filing Portal which will send a notice of electronic filing to the following:

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44 West Flagler Street
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(*respondent's lawyer*)

on behalf of:
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/s/ Elias Makere