

United States District Court - Middle District of Florida - Ocala Division

<https://www.unitedstatescourts.org/federal/flmd/213312/>

U.S. Judge Wm. Terrell Hodges - Case No. 5:08-cv-00165

Nature of Suit: 442 Civil Rights: Jobs

Antonio J. Ortiz-Carballo v. David R. Ellspermann, in his individual and in his Official capacity as Clerk of the Circuit Court, Fifth Judicial Circuit In and For Marion County, Florida.

<http://www.plainsite.org/dockets/igyh5mva/florida-middle-district-court/ortizcarballo-v-ellspermann/>



David R. Ellspermann

\$125,000 Settlement



David Moore Kathy Bryant Stan McClain Carl Zalak, III Earl Arnett

Marion County Board of County Commissioners - BOCC

Settlement Agreement and General Release

\$125,000.00 paid to Plaintiff Antonio J. Ortiz-Carballo

Settlement agreement by ANTONIO ORTIZ-CARBALLO ("PLAINTIFF") and DAVID ELLSPERMANN, in his individual capacity and in his official capacity as the Clerk of the Circuit Court, Fifth Judicial Circuit, Marion County, Florida ("Defendant").

B. As used in this Settlement Agreement and General Release the term "DEFENDANT" shall mean DAVID ELLSPERMANN, in his individual capacity and in his official capacity as the Clerk of the Circuit Court, Fifth Judicial Circuit, Marion County, Florida and MARION COUNTY BOARD OF COUNTY COMMISSIONERS as well as their past and present officials, commissioners, officers, directors, employees, boards, agents and attorneys, in both their individual and official capacities, jointly or severally, singular or plural, where ever the context so admits or requires.

- Plaintiff alleged violations of his rights protected by Title VII of the Civil Rights Act of 1964, the Florida Civil Rights Act and 42 U.S.C. §§1981 and 1983; and

PLAINTIFF specifically waives, releases, acquits, and forever discharges any claims, actions, right of action whatsoever he may have against the DEFENDANT, its insurers and PGIT, under the United States Constitution, the Florida Constitution, Title VII of the Civil Rights Acts of 1964, the Civil Rights Act of 1991, 42 U.S.C. § 1983, § 1985, § 1988, the Age Discrimination in Employment Act (ADEA), the Florida Human Rights Act, the Florida Civil Rights Act of 1992 (§§ 760.01-760.11 and 509.092, Fla. Stat.), the Americans with Disabilities Act (42 U.S.C. § 12132 et. seq) the Florida Whistle Blower Act (§ 112.3187 et. seq Fla. Statutes), the Florida Workers' Compensation Act, § 119.07, Fla. Stat., including attorneys' fees or costs, or any other state, federal or administrative rule, statute; ordinance or law of any nature relating to employment....read more in the attached Settlement Agreement and General Release.

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United States District Court - Middle District of Florida - Ocala Division

Antonio J. Ortiz-Carballo v. David R. Ellspermann, Case No. 5:08-cv-00165

- Exhibit 1 **Order of Dismissal**, The Court has been notified that the above-styled cause has been settled
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- Exhibit 2 **Stipulation of Dismissal with Prejudice** Pursuant to Rule 41(a)(1)(A)(ii), Fed.R.Civ.Pro.
Case 5:08-cv-00165-WTH-DAB Document 88 Filed 03/01/11 Page 1 of 2 PageID 1408
- Exhibit 3 Letter February 8, 2011 Cindy A. Townsend to Ms. Jaime Acker, Claims Analyst,
Growth Enterprises, Insured: Marion County, Claimant: Anthony Ortiz-Carballo
- Exhibit 4 Letter February 18, 2011 Cindy A. Townsend to Ms. Jaime Acker, Claims Analyst,
Growth Enterprises, Insured: Marion County, Claimant: Anthony Ortiz-Carballo
- Exhibit 5 Settlement Agreement and General Release, February 2011 Antonio J. Ortiz-Carballo v.
David R. Ellspermann, Case No. 5:08-cv-00165, February 2011
- Exhibit 6 Court clerk settles discrimination lawsuit, Ocala Star-Banner, February 2, 2011
<http://www.ocala.com/article/20110202/ARTICLES/110209928>
- Exhibit 7 Amended Complaint and Demand for Jury Trial, by Cynthia N. Sass for the Plaintiff
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- Exhibit 8 Motion for Leave to Withdrawal as Counsel for Plaintiff by Cynthia N. Sass et al.
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- Exhibit 9 Order by US Magistrate Jones, GRANTED without a hearing, a motion to withdrawal as
counsel, filed by Cynthia N. Sass et al., thereby leaving the Plaintiff unrepresented
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- Exhibit 10 Plaintiff's PRO SE "Motion For A Federal Public Defender", Doc. 24, March 20, 2009
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- Exhibit 11 Order, DENIED counsel appointment, by US Magistrate Gary R. Jones
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- Exhibit 12 US 11th Circuit, Addendum Five, Non-Criminal Act Counsel Appointments (August 2007)
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- Exhibit 13 Plaintiff's PRO SE motion in opposition to Summary Judgment, Doc. 35
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- Exhibit 14 Entry of Appearance by David B. Sacks, Esquire for Plaintiff Antonio J. Ortiz-Carballo
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- Exhibit 15 CIVIL DOCKET FOR CASE #: 5:08-cv-00165-WTH-DAB, Ortiz-Carballo v. Ellspermann
- Exhibit 16 Case Text Summary (incomplete), <https://casetext.com/case/ortiz-carballo-v-ellspermann>
- Exhibit 17 **Mediation documents, Fraxedas Mediation Firm**

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

ANTONIO J. ORTIZ-CARBALLO,

Plaintiff,

-vs-

Case No. 5:08-cv-165-Oc-10DAB

**DAVID R. ELLSPERMANN, IN HIS
INDIVIDUAL AND IN HIS OFFICIAL
CAPACITY AS CLERK OF THE CIRCUIT
COURT, FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA,**

Defendant.

_____ /

ORDER OF DISMISSAL

The Court has been notified that the above-styled cause has been settled, it is **ORDERED** that this cause be and the same is hereby **DISMISSED**, subject to the right of any party to move within 60 days of the date of entry of this Order, to reopen the action, upon good cause shown, or to submit a stipulated form of final order or judgment.

BY ORDER OF THE COURT, this 1st day of February, 2011.

FOR THE COURT,

By: Maurya McSheehy
Maurya McSheehy, Deputy Clerk

Copies to:
Counsel of Record



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ANTONIO J. ORTIZ-CARBALLO,

Plaintiff,

vs.

CASE NO.: 5:08-cv-165-Oc-10GRJ

DAVID R. ELLSPERMANN, IN HIS
INDIVIDUAL AND IN HIS OFFICIAL
CAPACITY AS CLERK OF THE CIRCUIT
COURT, FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA,

Defendant.

**STIPULATION OF DISMISSAL WITH PREJUDICE PURSUANT TO
RULE 41(a)(1)(A)(ii), FEDERAL RULES OF CIVIL PROCEDURE**

Plaintiff, ANTONIO ORTIZ-CARBALLO, and Defendant, DAVID ELLSPERMANN, in his individual capacity and in his official capacity as the Clerk of the Circuit Court, Fifth Judicial Circuit, Marion County, Florida, by and through their undersigned counsel and pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), hereby stipulate to the dismissal of this cause with prejudice as to Defendant, DAVID ELLSPERMANN, in his individual capacity and in his official capacity as the Clerk of the Circuit Court, Fifth Judicial Circuit, Marion County, Florida, with each party to bear its own attorney's fees and costs.

EXHIBIT

2

RESPECTFULLY SUBMITTED THIS 1st day of March, 2011.

/s/ David B. Sacks

DAVID B. SACKS, ESQ.
Florida Bar No. 0964409
david@sackslegal.com
The Law Office of David B. Sacks, P.A.
1017 Lasalle Street
Jacksonville, FL 32207
904-634-1122 - Telephone
904-355-8855
Attorney for Plaintiff

/s/ Cindy A. Townsend

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CINDY A. TOWNSEND, ESQ.
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Bell & Roper, P.A.
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407-897-5150 - Telephone
407-897-3332 - Facsimile
Attorneys for Defendant

DE

BELL & ROPER, P.A.

ATTORNEYS AT LAW

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DAVID B. BLESSING
GAIL C. BRADFORD
ANNA E. ENGELMAN
CHRISTOPHER R. FAY
KATHRYN A. JOHNSON
ESTEBAN F. SCORNIK
DALE A. SCOTT
CINDY A. TOWNSEND
MARY J. WALTER

February 8, 2011

**ATTORNEY CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT
PRIVILEGED - CONFIDENTIAL**

Ms. Jaime Acker
Claims Analyst, Growth Enterprises
Chartis Financial Lines Claims
Post Office Box 25947
Shawnee Mission, KS 66225

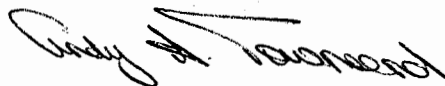
RE: Insured: Marion County
Claimant: Anthony Ortiz-Carballo
Claim No.: EV138237
Date of Loss: June 11, 2007
Our File No.: 026-296

Dear Ms. Acker:

Please find enclosed a copy of the Settlement Agreement and General Release which was signed by the Plaintiff. Once Mr. Ellspermann signs the same I will provide you with a copy. In the interim, pursuant to the Mediation Agreement and the terms outlined in the Settlement Agreement and General Release, the settlement funds are due to Plaintiff on or before **February 28, 2011**. In order to ensure that we comply with that deadline, please forward the settlement check to the attention of the undersigned no later than February 23, 2011 so that I can ensure its timely delivery to Plaintiff's counsel.

Please do not hesitate to contact me if you have any questions regarding the above.

Very truly yours,



Cindy A. Townsend

CAT/em
Enclosure

cc: David Ellspermann
Katherine Glynn, Esq.
Yari Benitez
Henry Peavy
Sara Rothermel

*file
2/22/11*

EXHIBIT
3

BELL & ROPER, P.A.
ATTORNEYS AT LAW

MICHAEL M. BELL
MICHAEL H. BOWLING
HAE J. KIM
MICHAEL J. ROPER
JOSEPH D. TESSITORE

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DAVID B. BLESSING
GAIL C. BRADFORD
ANNA E. ENGELMAN
CHRISTOPHER R. FAY
KATHRYN A. JOHNSON
ESTEBAN F. SCORNIK
DALE A. SCOTT
CINDY A. TOWNSEND
MARY J. WALTER

February 18, 2011

**ATTORNEY CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT
PRIVILEGED - CONFIDENTIAL**

Ms Jaime Acker
Claims Analyst, Growth Enterprises
Chartis Financial Lines Claims
Post Office Box 25947
Shawnee Mission, KS 66225

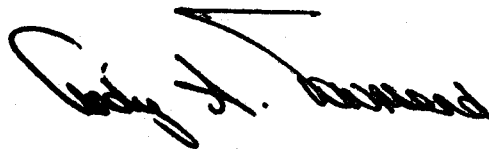
RE: Insured: Marion County
Claimant: Anthony Ortiz-Carballo
Claim No.: EV138237
Date of Loss: June 11, 2007
Our File No.: 026-296

Dear Ms Acker:

Please find enclosed the original, fully executed, Settlement Agreement and General Release in the above matter. As I am sure you are aware, the settlement funds are due to Plaintiff on or before February 28, 2011. Please be sure to have the settlement check in my possession prior to February 28th so I can ensure timely delivery to Plaintiff's counsel.

Thank you for your attention to this matter and if there are any questions or concerns, please do not hesitate to contact me.

Very truly yours,



Cindy A. Townsend

CAT:em



Handwritten note: mpa 2/22/11

Jaime Acker
February 18, 2011
Page 2

cc: Yari Benitez
David Ellspermann
Katie Glynn, Esq.
Henry Peavy
Sara Rothermel

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS Settlement Agreement and General Release (hereinafter "Agreement") is made and entered into by ANTONIO ORTIZ-CARBALLO (hereinafter "PLAINTIFF") and DAVID ELLSPERMANN, in his individual capacity and in his official capacity as the Clerk of the Circuit Court, Fifth Judicial Circuit, Marion County, Florida (hereinafter "Defendant").

DEFINITIONS

A. As used in this Settlement Agreement and General Release the term "PLAINTIFF" shall mean ANTONIO ORTIZ-CARBALLO, as well as his heirs, executors, administrators, personal representatives, successors and assigns, singular or plural, wherever the context so admits or requires.

B. As used in this Settlement Agreement and General Release the term "DEFENDANT" shall mean DAVID ELLSPERMANN, in his individual capacity and in his official capacity as the Clerk of the Circuit Court, Fifth Judicial Circuit, Marion County, Florida and MARION COUNTY BOARD OF COUNTY COMMISSIONERS as well as their past and present officials, commissioners, officers, directors, employees, boards, agents and attorneys, in both their individual and official capacities, jointly or severally, singular or plural, where ever the context so admits or requires.

RECITALS

Whereas PLAINTIFF, who was employed as a Clerk for the DEFENDANT, contends that he was the subject of discrimination, hostile work environment retaliation, and other personal injury, and subsequently filed a civil suit captioned: "*Antonio Ortiz-Carballo, Plaintiff, vs. David Ellspermann*, in his individual capacity and in his official capacity as the Clerk of the Circuit Court, Fifth Judicial Circuit, Marion County, Florida, Defendant; United States District Court, Middle District of Florida, Orlando Division, Case No.: 5:08-CV-00165-OR-10GRJ" (hereinafter "suit"), wherein he alleged violations of his rights protected by Title VII of the Civil Rights Act of 1964, the Florida Civil Rights Act and 42 U.S.C. §§1981 and 1983; and

WHEREAS, DEFENDANT has denied and continues to deny that he violated any of PLAINTIFF's rights protected by either federal or state law and denies the claims and allegations which were set forth in the above referenced "suit" and any other cause of action that has or could arise out of PLAINTIFF's employment relationship with the DEFENDANT, but is desirous of entering into this compromise and settlement of a disputed claim in order to avoid further litigation and attendant costs; and

WHEREAS, PLAINTIFF and DEFENDANT have entered into good faith settlement negotiations resulting in this Agreement and Release. The purpose of this Agreement and Release is to settle and compromise any and all prior and existing disputes, claims and controversies between the parties, without any future costs and expenses of litigation and to bar any and all future disputes claims and controversies between the parties which may arise out of any conflicts or events, known or unknown, that have occurred up to the date of the execution of this Agreement and Release, including but not limited to those which relate directly or indirectly to PLAINTIFF's employment with the DEFENDANT; and

WHEREAS each party believes settlement of this dispute is in their mutual best interest and acknowledge and agree that settlement of this claim does not constitute an admission of liability or responsibility on the part of the DEFENDANT; and

WHEREAS the parties desire to memorialize their Agreement.

NOW THEREFORE, in consideration of the mutual covenants to be performed by each of the parties hereto and set forth in their entirety herein, the parties agree as follows:

1. **Agreement**

A. Release and Discharge

In consideration for the payments and other good and valuable consideration set forth in Paragraph (2) below, PLAINTIFF agrees, upon receipt of the consideration due hereunder to file and serve a Notice of Dismissal with Prejudice of the above referenced "suit", and does further hereby agree to release, acquit, and forever discharge DEFENDANT, its insurers and Preferred Governmental Insurance Trust (PGIT) of and from any and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, claims for attorneys' fees, interest, or costs, executions, claims and demands whatsoever, in law or in equity, of whatever nature, which PLAINTIFF ever had, now has, or which any personal representative, successor, heir or assign of PLAINTIFF, hereafter can, shall or may have against DEFENDANT, its insurers and PGIT by reason of any matter, cause or thing, occurring prior to the date of this Agreement, including but not limited to those claims or demands which arise out of or are related to ANTONIO ORTIZ-CARBALLO's employment with the DEFENDANT. PLAINTIFF acknowledges and agrees that this is a General Release of any and all claims, including but not limited to claims or charges for wages, salary, back pay, front pay, and any an all employment benefits of any nature whatsoever; of breach

of employment agreement or contract; defamation, including slander or libel; battery; assault; employment discrimination, including age, race, sex, religion, or natural origin discrimination; hostile work environment; discrimination based upon actual or perceived disability or other protected characteristics; retaliation; workers' compensation, or the violation of any administrative, local, State or Federal Constitution, statute, rule, regulation, ordinance or law. PLAINTIFF specifically waives, releases, acquits, and forever discharges any claims, actions, right of action whatsoever he may have against the DEFENDANT, its insurers and PGIT, under the United States Constitution, the Florida Constitution, Title VII of the Civil Rights Acts of 1964, the Civil Rights Act of 1991, 42 U.S.C. § 1983, § 1985, § 1988, the Age Discrimination in Employment Act (ADEA), the Florida Human Rights Act, the Florida Civil Rights Act of 1992 (§§ 760.01-760.11 and 509.092, Fla. Stat.), the Americans with Disabilities Act (42 U.S.C. § 12132 et. seq) the Florida Whistle Blower Act (§ 112.3187 et. seq Fla. Statutes), the Florida Workers' Compensation Act, § 119.07, Fla. Stat., including attorneys' fees or costs, or any other state, federal or administrative rule, statute, ordinance or law of any nature relating to employment.

B. PLAINTIFF acknowledges and agrees that the Release and discharge set forth above is a General Release of all claims. PLAINTIFF expressly waives

and assumes the risk of any and all claims, in law or in equity, which exist as of this date, but of which PLAINTIFF does not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise and, which, if known, would materially affect PLAINTIFF's decision to enter this Settlement Agreement. PLAINTIFF further agrees that he has agreed to accept payment of the sum specified herein as a complete compromise of matters involving disputed issues of law and fact. PLAINTIFF assumes the risks that the facts or law may be other than he currently believes or understands.

C. It is understood and agreed by the parties that this settlement is a compromise of a litigated and disputed claim and neither this Agreement, nor any consideration to be paid hereunder shall be construed as an admission by the DEFENDANT, its insurers or PGIT of any unlawful, tortious or wrongful acts whatsoever towards PLAINTIFF, and DEFENDANT, its insurers and PGIT specifically disclaim any liability to PLAINTIFF or the propriety of any and all factual or legal averments made by PLAINTIFF in the above referenced "suit".

D. It is specifically agreed and understood that the terms of this Settlement Agreement and General Release are contingent upon PLAINTIFF's express promise to not apply for employment with the DEENDANT in the future, and that if he makes or submits any such application, it shall be treated as and shall

constitute a nullity.

E. It is specifically agreed and understood that the terms of this Settlement Agreement and General Release require the DEFENDANT to provide a neutral employment reference in response to inquiries received regarding the employment of ANTONIO ORTIZ-CARBALLO. In response to inquiries, DEFENDANT will provide only his dates of employment, position which he held at the time he left DEFENDANT's employ and the salary he was earning at that time. Notwithstanding, DEFENDANT will respond to any and all public records requests made with respect to PLAINTIFF's employment records in accordance with the guidelines established in Chapter 119, Florida Statutes.

F. PLAINTIFF also agrees to indemnify, protect and save harmless DEFENDANT, its insurers and PGIT from all judgments and any and all liens, costs and expenses whatsoever arising from the above described incident, and agrees that PLAINTIFF will satisfy those claims or liens and will hold the DEFENDANT, its insurers and PGIT harmless from such claims or liens, including but not limited to any hospital liens, medical liens, liens held by Medicaid and/or Medicare and any other governmental agency, insurance liens, tax liens or attorneys charging liens.

2. **Consideration**

A. In consideration of the Agreement set forth above, DEFENDANT, through its insurers, agrees to pay to the individual named below, the sum outlined below.

B. Payment due to PLAINTIFF within twenty (20) days following receipt by the DEFENDANT of the signed Settlement Agreement and General Release as follows:

i. The amount of ONE HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS (\$125,000.00) payable to DAVID SACKS, P.A., TRUST ACCOUNT representing complete satisfaction of any and all claims which PLAINTIFF may have against the DEFENDANT, including all attorneys' fees and costs associated with the above referenced "suit."

ii. DEFENDANT will pay half of the mediation fee to J. Joaquin Fraxedas, Esq.

iii. PLAINTIFF will pay half of the mediation fee to J. Joaquin Fraxedas, Esq.

C. Although PLAINTIFF has waived and released all claims he may have for wages or salary, the parties acknowledge and agree that the payments set

forth in subsection (A) above do not constitute wages or salary to PLAINTIFF, and accordingly DEFENDANT will not take payroll deductions, withholding, employee pension, contributions or other deductions from said payments; will not make payment of appropriate payroll taxes, and will not report said income to the Internal Revenue Service as reimbursement for wages of salary. Instead the parties stipulate and agree that said amount represents reimbursement for compensatory damages for personal physical injuries. It is further agreed and understood that future tax liabilities, if any, including penalties and interest, which may be incurred by PLAINTIFF or DEFENDANT in association with said payments will be the sole responsibility and liability of PLAINTIFF, and PLAINTIFF agrees to indemnify and hold harmless DEFENDANT, its insurers and PGIT for any additional tax liability which may arise from said payment. Said tax liability shall not be a ground for avoiding or setting aside this Settlement Agreement.

3. **Age Discrimination in Employment Act**

PLAINTIFF acknowledges and agrees that he has or had no claim of age discrimination under the Age Discrimination in Employment Act (29 U.S.C. §623 et. seq) against the DEFENDANT and hereby releases and waives any and all claims under the ADEA.

PLAINTIFF understands that with respect to an ADEA claim only, that after his execution of this Agreement he has seven days within which to revoke his agreement to resolve such ADEA claim only by delivering written notice of said revocation to counsel for the DEFENDANT at 2707 E. Jefferson Street, Orlando, Florida 32803.

4. **Severability**

If any clause or provision of this Agreement is found to be void, invalid, or unenforceable, it shall be severed from the remaining provisions and clauses which shall remain in full force and effect.

5. **Governing Law**

The parties hereto agree that the law of the State of Florida shall govern this Agreement and all respects in the event any action must be instituted for breach of this Agreement, the parties agree that the sole venue shall be Marion County, Florida.

6. **Miscellaneous**

A. PLAINTIFF expressly agrees and acknowledges and warrants that he has read carefully and fully understands all provisions of this Agreement and that he is entering into this Agreement of his own free will and with the advice of his attorneys. PLAINTIFF represents that he is voluntarily entering into this

Agreement with the intent to be bound thereby and he has not been coerced or induced by anyone to enter into this Agreement. PLAINTIFF acknowledge that he has read and fully understands the Agreement's terms, conditions, meaning and intent, including but not limited to the final binding effect of the General Release.

B. This Agreement constitutes the entire agreement between the parties, and no other promises or agreements shall be binding unless signed by all parties. All prior representations regarding the Agreement are hereby expressly disclaimed by all parties unless incorporated herein.

C. All parties shall take such further action and shall execute and deliver such further documents as may be reasonably requested by the other party in order to carry out the provisions and purposes of this Agreement.

D. PLAINTIFF agrees that the terms, amount and fact of settlement and any facts concerning his claims shall be kept confidential by him. PLAINTIFF further agrees that he will not actively seek out media attention or publicity regarding the terms, the amount or conditions of this Settlement Agreement and General Release and will further not discuss this matter with anyone including past, present or future employees of the DEFENDANT. If contacted, PLAINTIFF agrees simply to indicate that the matter has been resolved and decline from any further discussion concerning the details of his claim or the nature of the

settlement.

E. The parties to this Agreement hereby confirm and agree that each of them will refrain from making derogatory statements about any other party hereto or about the policies and practices of any other party hereto, and that they will make every effort to avoid denigrating each other in any manner. While it is recognized that any party hereto may be required to testify or provide information in response to valid legal process, the parties agree that they will not voluntarily provide information about the other that is derogatory.

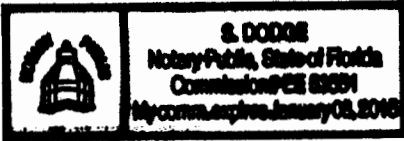
F. In the event one of the parties breaches the terms and conditions of the Settlement Agreement and General Release, the prevailing party shall recover attorney's fees.

G. The recitals are incorporated herein by reference.

Antonio J. Ortiz-Carballo
ANTONIO ORTIZ-CARBALLO

STATE OF FLORIDA
COUNTY OF MARION

The foregoing was acknowledged before me this 7 day of February, 2011, by ANTONIO ORTIZ-CARBALLO, who is personally known to me or who has produced FLDL as identification and who did/did not take an oath.



[Signature]
Notary Public

My Commission Expires: Jan. 6, 2015

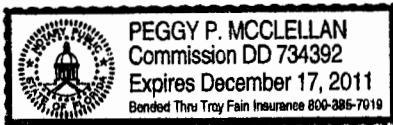
[Signature]
DAVID ELLSPERMANN

STATE OF FLORIDA
COUNTY OF MARION

The foregoing was acknowledged before me this 14 day of February, 2011, by DAVID ELLSPERMANN, who is personally known to me or who has produced _____ as identification and who did/did not take an oath.

Peggy P. McClellan
Notary Public

My Commission Expires:





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Court clerk settles discrimination lawsuit

By Suevon Lee

Staff writer

Published: Wednesday, February 2, 2011 at 5:07 p.m.

A federal lawsuit brought against Marion County Clerk of Court David Ellspermann by a former employee who alleges he was discriminated against because of his race has tentatively settled, according to an attorney involved in the case.

The resolution comes several weeks before a nine-count complaint that had been whittled down to just one claim by a federal magistrate in December was set to go to trial.

Antonio Ortiz-Carballo filed suit against Ellspermann in April 2008 claiming he was fired from his position as a deputy clerk in June 2007 in retaliation for speaking out against what he felt was unfair treatment by a supervisor.

Cindy Ann Townsend, of Bell & Roper PA, the Orlando law firm representing Ellspermann, confirmed there was a monetary amount agreed upon by both parties, but could not disclose the terms until the settlement was finalized.

"Until we get the final order, we're still in litigation," Townsend said Wednesday. "The plaintiff has to execute the settlement agreement, then we have to advise the court it is ready for dismissal."

Ortiz-Carballo, an Ocala resident hired by the Clerk's Office in November 2005, referred to a series of incidents in his complaint, including a remark in which Ellspermann allegedly once told him, "There is to be no Spanish spoken in my office."

Later, in a deposition, Ellspermann clarified that the policy of the Clerk's Office is for all official business to be conducted in English, and that "no Spanish should be spoken in the work environment regardless of whether or not anyone else could hear it."

The clerk, who is responsible for all hiring and firing of staff, denied he terminated Ortiz-Carballo for any reason other than his professional conduct. He claimed the firing resulted from his being "disrespectful and disruptive to the operations of the office and the relationships within the office" after the employee directly approached him about his belief that he felt a direct supervisor was "sabotaging" his career.

It was to this supervisor that Ortiz-Carballo had previously complained concerning insensitive and inappropriate remarks made by two co-workers towards another Hispanic employee in the Domestic Violence division. He also allegedly refused to comply with a request to turn the volume up on his phone ringer, a conflict that required a conference with managers in the Clerk's Office and led to that discussion a month later in which Ellspermann advised the employee of the no-Spanish rule.

Whether any or all of these previous exchanges had any bearing on Ortiz-Carballo's termination is a matter the federal court took into consideration in December.

Orlando-based Magistrate David A. Baker granted Ellpermann's motion for summary judgment on all counts except the one relating to disparate treatment



discrimination. Had there been a trial, the plaintiff would have used three avenues to pursue it: the Florida Civil Rights Act, Title VII of the Civil Rights Act of 1964 and Section 1983.

“Although not addressed by the parties, it is plain that the alleged statements in this case are not direct evidence of racial or national origin discrimination,” the judge wrote. He added, however, that the Clerk “failed to articulate any legitimate reason for terminating Plaintiff without using the progressive discipline policy.”

Immediately after Ortiz-Carballo told Ellspermann he believed his direct supervisor was “sabotaging” him, he was given just two options: resign or be fired. Ortiz-Carballo did not submit a resignation letter; therefore, he was fired.

The Ocala resident, who had received at least one promotion while employed by the Clerk, had never been the subject of any disciplinary action during his two-year employment.

Baker, a magistrate on the federal bench since December 1991, made clear in his 25-page order he felt no evidence demonstrated any historic ill-effect of the no-Spanish policy in the Clerk’s Office: “There is no evidence that Plaintiff had previously been told to stop speaking Spanish; that he (or any other employee) was ever disciplined for speaking Spanish in the workplace; or that the policy created a hostile atmosphere for Hispanics,” he wrote.

Federal court records show that a successful mediation hearing was held this past Monday.

When reached by phone, Ortiz-Carballo denied comment, deferring to his attorneys. Ellspermann, via a staff attorney in his office, also declined to comment.

Contact Suevon Lee at 867-4065 or suevon.lee@starbanner.com.

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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

ANTONIO J. ORTIZ-CARBALLO,

Plaintiff,

v.

CASE NO.: 5:08-CV-00165-OC-10GRJ

DAVID R. ELLSPERMANN,
in his individual and in his official capacity as
Clerk of the Circuit Court, Fifth Judicial
Circuit in and for Marion County, Florida,

Defendant.

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff ANTONIO J. ORTIZ-CARBALLO (“ORTIZ”) hereby sues DAVID R. ELLSPERMANN, individually and in his official capacity as Clerk of Court, Fifth Judicial Circuit in and for Marion County, Florida, (“ELLSPERMANN”), and in support thereof, alleges as follows:

Nature of the Case

1. This is an action to remedy unlawful employment practices and civil rights violations brought pursuant to the Florida Civil Rights Act of 1992, Ch. 760, Fla. Stat. (2007) (“FCRA”), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et. seq.*, (“Title VII”), and 42 U.S.C. §1981 (“§1981”) through 42 U.S.C. §1983 (“§1983”). ORTIZ seeks equitable relief and damages including: declaratory and injunctive relief; back pay and reinstatement or front pay in lieu of reinstatement; compensatory and punitive damages; attorneys’ fees, costs and expenses; and all other relief this Court deems just and proper.

Jurisdiction, Parties and Venue

2. ELLSPERMANN is an individual and, at all material times, was acting in his individual capacity as well as in his official capacity as Clerk of Court, Fifth Judicial Circuit in and for Marion County, Florida.

3. At all material times, when acting in his official capacity, ELLSPERMANN was an employer within the meaning of the FCRA and Title VII.

4. ORTIZ is a citizen of the United States, and a resident of Marion County, Florida.

5. At all material times, ORTIZ was an employee and is an aggrieved person within the meaning of the FCRA and Title VII.

6. The acts complained of herein occurred in Marion County, Florida.

7. ORTIZ has met all conditions precedent and has exhausted all administrative remedies prior to the institution of this action including:

a. ORTIZ filed a timely charge of discrimination with the United States Equal Employment Opportunity Commission and the Florida Commission on Human Relations;

b. ORTIZ received a Notice of Right to Sue from the United States Equal Employment Opportunity Commission within 90 days of filing this action; and

c. ORTIZ waited more than 180 days without any cause determination from the Florida Commission on Human Relations prior to filing this action.

Facts

8. After engaging ORTIZ as a temporary employee, ELLSPERMANN created a position in order to hire ORTIZ as a permanent employee effective on or about November 18, 2005.

9. ORTIZ started as a permanent employee in the position of Clerk I and worked in the domestic violence section of ELLSPERMANN's office.

10. ORTIZ consistently received excellent job evaluations throughout his employment with ELLSPERMANN, received raises, was promoted to Clerk II, was consistently rated outstanding in the areas of Customer Service, Conduct & Attitude and was commended for his professionalism and positive attitude. For instance:

a. After approximately three months of employment, on or about February 20, 2006, ELLSPERMANN completed an Employee Performance Evaluation of ORTIZ in which ELLSPERMANN rated ORTIZ as either meeting or exceeding expectations in every category. In particular, ELLSPERMANN rated ORTIZ as “exceeds expectations” on both “Customer Service” and “Conduct and Attitude” factors, meaning ORTIZ displayed and maintained tact and courtesy; cooperated and was helpful with his co-workers; had a positive attitude; and was willing to accept correction. In fact, in ELLSPERMANN’s handwritten notations on that evaluation, ELLSPERMANN commented that ORTIZ displayed professionalism in performing his job duties.

b. After approximately six months of employment, on or about June 6, 2006, ELLSPERMANN again evaluated ORTIZ. The Employee Performance Evaluation completed again rated ORTIZ as either meeting or exceeding expectations in every category. And, again, ELLSPERMANN rated ORTIZ as “exceeds expectations” on all factors under both “Customer Service” and “Conduct and Attitude”. In addition, ELLSPERMANN commented again on ORTIZ’s professionalism as well as his positive attitude. Moreover, ELLSPERMANN promoted ORTIZ retroactively to the position and salary of Clerk II.

c. After approximately one year of employment, on or about December 5, 2006, ELLSPERMANN again completed an Employee Performance Evaluation. He rated ORTIZ as exceeding expectations in every category with the sole exception of job knowledge. And,

once again, ELLSPERMANN commented on ORTIZ's professionalism as well as his positive attitude. As a result, on or about December 15, 2006, ELLSPERMANN rewarded ORTIZ with a merit increase.

11. In the beginning of 2007, ORTIZ complained to his immediate supervisor, Denise Kingsley, Coordinator, on several occasions about two new co-workers who had been recently hired to work on the domestic violence team.

12. ORTIZ reported that the two new employees were disrespectful towards both ORTIZ and Emilia Torres, a Senior Clerk and a co-worker of ORTIZ in the domestic violence section, and that they displayed a very poor attitude toward their work in general.

13. The two new employees were both Caucasian females.

14. ORTIZ and Mrs. Torres are both Hispanic and, specifically, are Puerto Rican.

15. ORTIZ's verbal complaints to his immediate supervisor, Ms. Kingsley, went unanswered, so he complained to Ms. Kingsley's direct supervisor, Ozietta Landers.

16. ORTIZ's verbal complaints to Ms. Landers also went unanswered. Thus, ORTIZ put his complaint to Ms. Landers in writing on March 5, 2007, and asked for a transfer to a different section.

17. The disrespect and hostility of the two new co-workers was still not addressed or remedied, nor did ELLSPERMANN transfer ORTIZ as he requested.

18. Instead, Ms. Kingsley and her superiors began to treat ORTIZ differently.

19. For instance, a year prior to ORTIZ's complaints, he explained to Ms. Kingsley that he could not sit next to a telephone with a loud ringer because he has a medical condition and is startled by loud noises. As a result, he was permitted to either keep the ringer tone low on his phone, or not sit by a phone. However, just three weeks after his written complaint about the two new co-

workers, Ms. Kingsley suddenly demanded that all employees, including him, keep their ring tones on high.

20. ORTIZ reminded Ms. Kingsley of his condition and inability to sit next to a loud ringer, but she insisted that he do so anyway, and disciplined him as a result on or about April 13, 2007.

21. In response, ORTIZ indicated he would raise the issue to ELLSPERMANN directly if she continued to insist that he sit next to a loud ringer.

22. ORTIZ put his complaint in writing to ELLSPERMANN the following day because Ms. Kingsley continued to insist that he sit next to a loud ringer despite knowing about his medical condition.

23. ORTIZ explained the situation to ELLSPERMANN, including the complaint he made about the co-workers treating Mrs. Torres and him with disrespect and hostility, and told ELLSPERMANN the only reason he knew that Ms. Kingsley was refusing to allow him not to have a loud ringer next to him at that point was in retaliation for his March 5, 2007 written complaint to Ms. Landers.

24. ORTIZ further explained that the situation with the co-workers had still not been resolved and, in fact, was worse. He explained that the situation was adversely affecting his ability to do his work.

25. ORTIZ also explained that Ms. Kingsley was treating him differently and had been ever since he lodged the written complaint about the co-workers.

26. Rather than taking appropriate remedial action to remedy the discriminatory and retaliatory conduct ORTIZ complained of, ELLSPERMANN's two head supervisors, Administrator Jack Seuss and Administrator Jaymi Kudary, responded by reprimanding ORTIZ for refusing to sit

next to a phone with a loud ringer.

27. On or about June 5, 2007, ORTIZ was still experiencing the same problems at work, thus, he spoke with Ms. Kudary about the issues again.

28. Still, no action was taken to remedy the discriminatory or retaliatory conduct.

29. Instead, on or about June 11, 2007, ELLSPERMANN summoned ORTIZ into a meeting with him, Ms. Kudary, Ms. Kingsley and Ms. Landers.

30. During the June 11, 2007 meeting, ELLSPERMANN reprimanded ORTIZ for speaking Spanish with Mrs. Torres.

31. ORTIZ attempted to explain that he and Mrs. Torres only spoke Spanish to one another when no one else was around, and would switch to English when someone else approached them. He also explained that he had been requested by his supervisors to translate Spanish for the office on several occasions.

32. Nonetheless, ELLSPERMANN instructed him not to speak Spanish in the office at all.

33. In addition, during the same meeting, ELLSPERMANN asked for ORTIZ's resignation.

34. ELLSPERMANN's stated reason for asking ORTIZ to resign was due to "differences with his supervisor."

35. ORTIZ responded that he did not have any difference with the supervisor and that he did not wish to resign.

36. All of the forgoing actions interfered with ORTIZ's ability to work, created a hostile and intolerable working environment, and were calculated to force him to resign.

37. Based upon information and belief, ELLSPERMANN also instructed other

employees not to speak Spanish at work.

38. Upon information and belief, out of approximately 200 employees, only five of the employees in ELLSPERMANN's office are Hispanic.

39. In addition, Ms. Kingsley commented directly in relation to ORTIZ that she would never hire another Spanish employee again.

40. On or about June 13, 2007, two days after the meeting in which ELLSPERMANN asked for ORTIZ's resignation, ELLSPERMANN drafted a memorandum terminating ORTIZ for supposedly "disrespectful and disruptive" behavior.

41. Not only was this stated reason for terminating ORTIZ different than the reason ELLSPERMANN stated for wanting ORTIZ to resign, it is also in stark contrast to all of the performance ratings ELLSPERMANN gave ORTIZ as well as ELLSPERMANN's glowing comments about ORTIZ's professionalism and positive attitude.

42. ORTIZ was terminated and replaced with a non-Puerto Rican, non-Hispanic individual.

43. As a result of the above, ORTIZ has suffered lost wages and benefits, emotional distress, loss of enjoyment of life, mental anguish, damage to his professional reputation and ability to obtain gainful employment, and he has had to retain the undersigned law firm to which he is obligated to pay reasonable attorneys' fees, costs and expenses.

COUNT I
Disparate Treatment Discrimination in Violation of the FCRA
(Official Capacity)

44. ORTIZ restates and incorporates herein the allegations in paragraphs numbered 1 through 43 above.

45. The forgoing adverse actions, including without limitation the unwarranted

discipline; refusal to grant a lateral transfer request; imposition of an English speaking only policy; the call for ORTIZ to resign; and/or the termination of ORTIZ's employment were taken because of ORTIZ's national origin and negatively affected the terms, conditions and privileges of ORTIZ's employment in violation of the FCRA.

46. ELLSPERMANN subjected ORTIZ to disparate treatment based upon his national origin in violation of the FCRA.

WHEREFORE, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his official capacity:

- A. Declaring ELLSPERMANN's actions to be an unlawful employment practice in violation of the FCRA;
- B. Permanently enjoining ELLSPERMANN from future violations of the FCRA;
- C. Awarding ORTIZ his lost wages and benefits including interest thereon;
- D. Reinstating ORTIZ or, in the alternative, awarding ORTIZ front pay and benefits in lieu of reinstatement;
- E. Awarding ORTIZ compensatory damages;
- F. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to the FCRA; and
- G. Awarding such other relief as the Court deems just and appropriate.

COUNT II

Disparate Treatment Discrimination and Retaliation in Violation of Title VII (Official Capacity)

47. ORTIZ restates and incorporates herein the allegations in paragraphs numbered 1 through 43 above.

48. The forgoing adverse actions, including without limitation the unwarranted

discipline; refusal to grant a lateral transfer request; imposition of an English speaking only policy; the call for ORTIZ to resign; and/or the termination of ORTIZ's employment were taken because of ORTIZ's national origin, race and/or in retaliation for his protected activity and negatively affected the terms, conditions and privileges of ORTIZ's employment in violation of Title VII.

49. ELLSPERMANN subjected ORTIZ to disparate treatment based upon his national origin, race and/or in retaliation for his protected activity in violation of Title VII.

WHEREFORE, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his official capacity:

- A. Declaring ELLSPERMANN's actions to be an unlawful employment practice in violation of Title VII;
- B. Permanently enjoining ELLSPERMANN from future violations of Title VII;
- C. Awarding ORTIZ his lost wages and benefits including interest thereon;
- D. Reinstating ORTIZ or, in the alternative, awarding ORTIZ front pay and benefits in lieu of reinstatement;
- E. Awarding ORTIZ compensatory damages;
- F. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to Title VII, as amended; and
- G. Awarding such other relief as the Court deems just and appropriate.

COUNT III

Disparate Treatment Discrimination and Retaliation in Violation of §1981 brought via §1983

(Official Capacity and Individually)

50. ORTIZ restates and incorporates herein the allegations in paragraphs numbered 1 through 3, 4, and 6 through 43 above.

51. At all material times, ELLSPERMANN was acting his individual capacity as well as in his official capacity.

52. At all material times, ELLSPERMANN was a “person” within the meaning of §1983.

53. At all material times, ELLSPERMANN was acting under color of state law within the meaning of §1983.

54. At all material times, it was well established that there is a federal right to be free from intentional racial and/or alienage discrimination in public employment. *E.g., Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1321 (11th Cir. 2000).

55. At all material times, ELLSPERMANN knew or should have known it was illegal to discriminate against individuals with regard to the terms, conditions and privileges of their employment because of their race and/or alienage.

56. At all material times, it was well established that there is a federal right to be free from retaliation for opposing race and/or alienage discrimination in public employment. *E.g., Johnson v. City of Fort Lauderdale*, 148 F.3d 1228, 1229 (11th Cir. Fla. 1998) (Civil Rights Act of 1991 did not preempt constitutional claims under § 1983 for retaliation under §1981).

57. At all material times, ELLSPERMANN knew or should have known it was illegal to retaliation against individuals with regard to the terms, conditions and privileges of their employment because of their protected activity.

58. The forgoing adverse actions, including without limitation the unwarranted discipline; refusal to grant a lateral transfer request; imposition of an English speaking only policy; the call for ORTIZ to resign; and/or the termination of ORTIZ’s employment were taken because of ORTIZ’s race and/or alienage and/or ORTIZ’s opposition and objections to and complaints concerning race and/or alienage discrimination and/or because of ORTIZ’s opposition and

objections to and complaints concerning retaliation and negatively affected the terms, conditions and privileges of ORTIZ's employment in violation of §1981.

59. ELLSPERMANN purposefully and intentionally subjected ORTIZ to a disparate treatment based upon his race and/or alienage in violation of §1981 and/or permitted, approved, ratified and/or condoned his subordinates' subjecting ORTIZ to disparate treatment based upon his race and/or alienage in violation of §1981.

60. The foregoing actions were purposeful, arose from an official policy or custom and/or were perpetrated, directed, ratified, approved and/or condoned by the final decision maker, ELLSPERMANN.

61. ELLSPERMANN'S conduct deprived ORTIZ of the rights, privileges or immunities guaranteed him under the Constitution or laws of the United States within the meaning of §1983, including his right not to be discriminated against based upon being of Hispanic descent as guaranteed by §1981.

WHEREFORE, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his official capacity:

- A. Declaring ELLSPERMANN's actions to be an unlawful employment practice in violation of §1981;
- B. Permanently enjoining ELLSPERMANN from future violations of §1981;
- C. Awarding ORTIZ his lost wages and benefits including interest thereon;
- D. Reinstating ORTIZ or, in the alternative, awarding ORTIZ front pay and benefits in lieu of reinstatement;
- E. Awarding ORTIZ compensatory damages;
- F. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this

matter pursuant to 42 U.S.C. §1988; and

G. Awarding such other relief as the Court deems just and appropriate.

Additionally, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his individual capacity:

H. Awarding ORTIZ punitive damages;

I. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to 42 U.S.C. §1988; and

J. Awarding such other relief as the Court deems just and appropriate.

COUNT IV

Hostile Environment Discrimination in Violation of the FCRA (Official Capacity)

62. ORTIZ restates and incorporates herein the allegations in paragraphs numbered 1 through 43 above.

63. The forgoing harassment and other actions were taken because of ORTIZ's national origin and negatively affected the terms, conditions and privileges of ORTIZ's employment in violation of the FCRA.

64. ELLSPERMANN subjected ORTIZ to a hostile environment based upon his national origin in violation of the FCRA.

WHEREFORE, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his official capacity:

- A. Declaring ELLSPERMANN's actions to be an unlawful employment practice in violation of the FCRA;
- B. Permanently enjoining ELLSPERMANN from future violations of the FCRA;
- C. Awarding ORTIZ his lost wages and benefits including interest thereon;

- D. Reinstating ORTIZ or, in the alternative, awarding ORTIZ front pay and benefits in lieu of reinstatement;
- E. Awarding ORTIZ compensatory damages;
- F. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to the FCRA; and
- G. Awarding such other relief as the Court deems just and appropriate.

COUNT V

Hostile Environment Discrimination and Retaliatory Harassment in Violation of Title VII
(Official Capacity)

65. ORTIZ restates and incorporates herein the allegations in paragraphs numbered 1 through 43 above.

66. The forgoing harassment and other actions were taken because of ORTIZ's national origin, race and/or in retaliation for his protected activity and negatively affected the terms, conditions and privileges of ORTIZ's employment in violation of Title VII.

67. ELLSPERMANN subjected ORTIZ to a hostile environment based upon his national origin, race and/or in retaliation for his protected activity in violation of Title VII.

WHEREFORE, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his official capacity:

- A. Declaring ELLSPERMANN's actions to be an unlawful employment practice in violation of Title VII;
- B. Permanently enjoining ELLSPERMANN from future violations of Title VII;
- C. Awarding ORTIZ his lost wages and benefits including interest thereon;
- D. Reinstating ORTIZ or, in the alternative, awarding ORTIZ front pay and benefits in lieu of reinstatement;

- E. Awarding ORTIZ compensatory damages;
- F. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to Title VII, as amended; and
- G. Awarding such other relief as the Court deems just and appropriate.

COUNT VI
Hostile Environment Discrimination and Retaliatory Harassment in Violation of §1981
brought via §1983
(Official Capacity and Individually)

68. ORTIZ restates and incorporates herein the allegations in paragraphs numbered 1 through 3, 4, and 6 through 43 above.

69. At all material times, ELLSPERMANN was acting his individual capacity as well as in his official capacity.

70. At all material times, ELLSPERMANN was a "person" within the meaning of §1983.

71. At all material times, ELLSPERMANN was acting under color of state law within the meaning of §1983.

72. At all material times, it was well established that there is a federal right to be free from intentional racial and/or alienage discrimination in public employment. *E.g., Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1321 (11th Cir. 2000).

73. At all material times, ELLSPERMANN knew or should have known it was illegal to discriminate against individuals with regard to the terms, conditions and privileges of their employment because of their race and/or alienage.

74. At all material times, it was well established that there is a federal right to be free from retaliation for opposing race and/or alienage discrimination in public employment. *E.g., Johnson v. City of Fort Lauderdale*, 148 F.3d 1228, 1229 (11th Cir. Fla. 1998) (Civil Rights Act of

1991 did not preempt constitutional claims under § 1983 for retaliation under §1981).

75. At all material times, ELLSPERMANN knew or should have known it was illegal to retaliation against individuals with regard to the terms, conditions and privileges of their employment because of their protected activity.

76. The forgoing harassment and other actions were taken because of ORTIZ's race and/or alienage and/or ORTIZ's opposition and objections to and complaints concerning race and/or alienage discrimination and/or because of ORTIZ's opposition and objections to and complaints concerning retaliation and negatively affected the terms, conditions and privileges of ORTIZ's employment in violation of §1981.

77. ELLSPERMANN purposefully and intentionally subjected ORTIZ to a hostile environment based upon his race and/or alienage in violation of §1981 and/or permitted, approved, condoned and/or ratified his subordinates' subjecting ORTIZ to a hostile environment based upon his race and/or alienage in violation of §1981.

78. The foregoing actions were purposeful, arose from an official policy or custom and/or were perpetrated, directed, ratified, approved and/or condoned by the final decision maker, ELLSPERMANN.

79. ELLSPERMANN'S conduct deprived ORTIZ of the rights, privileges or immunities guaranteed him under the Constitution or laws of the United States within the meaning of §1983, including his right not to be discriminated against based upon being of Hispanic descent as guaranteed by §1981.

WHEREFORE, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his official capacity:

A. Declaring ELLSPERMANN's actions to be an unlawful employment practice in

violation of §1981;

- B. Permanently enjoining ELLSPERMANN from future violations of §1981;
- C. Awarding ORTIZ his lost wages and benefits including interest thereon;
- D. Reinstating ORTIZ, or in the alternative, awarding ORTIZ front pay and benefits in lieu of reinstatement;
- E. Awarding ORTIZ compensatory damages;
- F. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to 42 U.S.C. §1988; and
- G. Awarding such other relief as the Court deems just and appropriate.

Additionally, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his individual capacity:

- H. Awarding ORTIZ punitive damages;
- I. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to 42 U.S.C. §1988; and
- J. Awarding such other relief as the Court deems just and appropriate.

COUNT VII

Disparate Impact Discrimination in Violation of the FCRA (Official Capacity)

80. ORTIZ restates and incorporates herein the allegations in paragraphs numbered 1 through 43 above.

81. The forgoing harassment and other actions including the institution of a policy of not permitting Spanish to be spoken, has a disparate impact based upon national origin and/or was intended to and did have a negative impact based upon national origin and negatively affected the terms, conditions and privileges of ORTIZ's employment in violation of the FCRA.

WHEREFORE, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his official capacity:

- A. Declaring ELLSPERMANN's actions to be an unlawful employment practice in violation of Title VII;
- B. Permanently enjoining ELLSPERMANN from future violations of the FCRA;
- C. Awarding ORTIZ his lost wages and benefits including interest thereon;
- D. Reinstating ORTIZ or, in the alternative, awarding ORTIZ front pay and benefits in lieu of reinstatement;
- E. Awarding ORTIZ compensatory damages;
- F. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to the FCRA, as amended; and
- H. Awarding such other relief as the Court deems just and appropriate.

COUNT VIII
Disparate Impact Discrimination in Violation of Title VII
(Official Capacity)

82. ORTIZ restates and incorporates herein the allegations in paragraphs numbered 1 through 43 above.

83. The forgoing harassment and other actions including the institution of a policy of not permitting Spanish to be spoken, has a disparate impact based upon national origin and/or race and/or was intended to and did have a negative impact based upon national origin and/or race and negatively affected the terms, conditions and privileges of ORTIZ's employment in violation of Title VII.

WHEREFORE, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his official capacity:

- A. Declaring ELLSPERMANN's actions to be an unlawful employment practice in violation of Title VII;
- B. Permanently enjoining ELLSPERMANN from future violations of Title VII;
- C. Awarding ORTIZ his lost wages and benefits including interest thereon;
- D. Reinstating ORTIZ or, in the alternative, awarding ORTIZ front pay and benefits in lieu of reinstatement;
- E. Awarding ORTIZ compensatory damages;
- F. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to Title VII, as amended; and
- G. Awarding such other relief as the Court deems just and appropriate.

COUNT IX
Disparate Impact Discrimination
in Violation of §1981 brought via §1983
(Official Capacity and Individually)

84. ORTIZ restates and incorporates herein the allegations in paragraphs numbered 1 through 3, 4, and 6 through 43 above.

85. At all material times, ELLSPERMANN was acting his individual capacity as well as in his official capacity.

86. At all material times, ELLSPERMANN was a "person" within the meaning of §1983.

87. At all material times, ELLSPERMANN was acting under color of state law within the meaning of §1983.

88. At all material times, it was well established that there is a federal right to be free from racial and/or alienage discrimination in public employment. *E.g., Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1321 (11th Cir. 2000).

89. At all material times, ELLSPERMANN knew or should have known it was illegal to discriminate against individuals with regard to the terms, conditions and privileges of their employment because of their race and/or alienage.

90. The forgoing harassment and/or other actions, including the institution of a policy of not permitting Spanish to be spoken, has a disparate impact based upon race and/or alienage and/or was intended to and did have a negative impact based upon race and/or alienage and negatively affected the terms, conditions and privileges of ORTIZ's employment in violation of §1981.

91. ELLSPERMANN'S conduct deprived ORTIZ of the rights, privileges or immunities guaranteed him under the Constitution or laws of the United States within the meaning of §1983, including his right not to be discriminated against based upon being of Hispanic descent as guaranteed by §1981.

92. The foregoing actions were purposeful, arose from an official policy or custom and/or were perpetrated, directed, ratified, approved and/or condoned by the final decision maker, ELLSPERMANN.

93. ELLSPERMANN purposefully and intentionally subjected ORTIZ to a policy that had a disparate impact based upon his race and/or alienage in violation of §1981 and did so for the purpose of discriminating against ORTIZ based upon his race and/or alienage in violation of §1981.

WHEREFORE, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his official capacity:

- A. Declaring ELLSPERMANN's actions to be an unlawful employment practice in violation of §1981;
- B. Permanently enjoining ELLSPERMANN from future violations of §1981;
- C. Awarding ORTIZ his lost wages and benefits including interest thereon;

- D. Reinstating ORTIZ, or in the alternative, awarding ORTIZ front pay and benefits in lieu of reinstatement;
- E. Awarding ORTIZ compensatory damages;
- F. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to 42 U.S.C. §1988; and
- G. Awarding such other relief as the Court deems just and appropriate.

Additionally, ORTIZ requests that this Honorable Court enter judgment in his favor and against ELLSPERMANN in his individual capacity:

- H. Awarding ORTIZ punitive damages;
- I. Awarding ORTIZ the reasonable attorneys' fees, costs and expenses incurred in this matter pursuant to 42 U.S.C. §1988; and
- J. Awarding such other relief as the Court deems just and appropriate.

Demand for Jury Trial

- 94. ORTIZ demands a trial by jury on all issues so triable.

Respectfully submitted,

s/ Cynthia N. Sass
Cynthia N. Sass, Esquire
Florida Bar No. 0691320
Kendra D. Presswood, Esquire
Florida Bar No. 0935001
Law Offices of Cynthia N. Sass, P.A.
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 11, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to Michael J. Roper, Esquire, at MRoper@BellRoperlaw.com.

s/ Cynthia N. Sass
Cynthia N. Sass, Esquire

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

ANTONIO J. ORTIZ-CARBALLO,

Plaintiff,

v.

CASE NO.: 5:08-CV-00165-OC-10GRJ

**DAVID R. ELLSPERMANN,
CLERK OF THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA,**

Defendant.

_____ /

MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR PLAINTIFF

Cynthia N. Sass, Esquire, and Kendra D. Presswood, Esquire, of the Law Offices of Cynthia N. Sass., P.A., hereby move to withdraw as counsel for Plaintiff, Antonio J. Ortiz-Carballo (“Plaintiff”), and in support thereof, states as follows:

1. Cynthia N. Sass and Kendra D. Presswood, of the Law Offices of Cynthia N. Sass., P.A., hereby move to withdraw as counsel for Plaintiff.
2. Plaintiff was notified on or about February 18, 2009, by telephone and by letter (sent via e-mail and U.S. Mail), of counsel’s intention to withdraw. Plaintiff does not oppose this motion to withdraw.
3. Plaintiff and his counsel have an irreconcilable conflict which requires the undersigned to seek removal from their obligation of representation in this case. Plaintiff is unable to fulfill an obligation regarding counsel’s services and continued representation would result in an unreasonable burden on counsel.

4. As trial is not set to begin in this matter until November 2009, counsel's withdrawal should not require a continuance or cause undue delay.

5. In accordance with Rules 2.03(b) and 3.01(g) of the Middle District of Florida, the undersigned notified opposing counsel in writing (by letter sent on February 18, 2009 via e-mail and U.S. Mail) of counsel's intention to withdraw. Opposing counsel notified the undersigned on February 19, 2009, that Defendant does not oppose this motion to withdraw.

MEMORANDUM

Local Rule 2.03(b) of the Middle District of Florida requires counsel to seek leave of court prior to withdrawing as the attorney of record in a case. If such withdrawal would likely result in delay or continuance, counsel must establish a compelling ethical consideration such as an "irreconcilable conflict" between herself and the client. Rule 2.03(c); Mekdeci v. Merrell Nat. Laboratories, a Div of Richardson-Merrell, Inc., 711 F.2d 1510, 1520-1521 (11th Cir. 1983)(indicating that a severe "irreconcilable conflict" between counsel and client could constitute they type of "compelling ethical considerations" necessary); Vanhorn v. Behavioral Support Services, Inc., 2008 U.S. Dist. LEXIS 14763 (M.D. Fla. 2008)(denying defense counsel's motion to withdraw where the consequences of withdrawal were "severe."). Where withdrawal would not result in delay or continuance, no such showing would be required.

In this case, it is unlikely that counsels' withdrawal will result in delay or continuance. The jury trial in this matter is not scheduled to begin until November, 2009—more than eight months from the date of this motion. Therefore, there should be more than enough time for Plaintiff to secure substitute counsel prior to trial or, otherwise

be prepared for trial. Counsel's withdrawal should also not cause delay of any of the other deadlines, as there is more than sufficient time to complete discovery before its close on May 8, 2009, and to complete dispositive motions by August 4, 2009. Compare, Energy Lighting Management, LLC, et. al. v. Kinder, 363 F. Supp. 2d 1331 (M.D. Fla. 2005)(granting motion to withdraw where motion was filed more than a year after the filing of the initial complaint, but presumably in sufficient time for plaintiff to proceed pro se) to Quinn v. Island Fitness, Inc., 2008 US Dist. LEXIS 101289 (M.D. Fla. 2008)(denying motion to withdraw where motion was filed just three months before trial).

Moreover, the Florida Bar Rules of Professional Conduct permit counsel to withdraw where, as here, the client is unable to fulfill an obligation regarding counsel's services and continued representation would result in an unreasonable financial burden on counsel. Rule 4-1.16(b)(4) and (5).¹ In such instances, courts within the Middle District of Florida have permitted plaintiff's counsel to withdraw. See, e.g., Energy Lighting Management, LLC, at 1332 (permitting plaintiffs' counsel to withdrawal from representation of individual plaintiff where plaintiff was unable to fulfill obligations of counsels' services).

Because Plaintiff and the undersigned counsel have an irreconcilable conflict and because neither Plaintiff nor counsel for the Defendant objects to the relief requested herein, the undersigned hereby respectfully request that they be permitted to withdraw as counsel for Plaintiff.

¹To the extent necessary, Plaintiff is willing to provide the Court the specific reasons behind his inability to fulfill his obligations regarding counsel's services. However, because Plaintiff may ultimately be prejudiced by Defendant's knowledge of such information, he respectfully requests to provide such information *ex parte*, if possible.

To the extent this motion is granted, the Plaintiff has provided the undersigned permission to include the following contact information in this motion:

Antonio Ortiz-Carballo
1748 NE 60th Street
Ocala, FL 34479-1741
Phone: (352) 875-6241

Respectfully submitted,

s/ Cynthia N. Sass
Cynthia N. Sass, Esquire
Florida Bar No. 0691320
Kendra D. Presswood, Esquire
Florida Bar No. 0935001
Law Offices of Cynthia N. Sass, P.A.
601 West Dr. Martin Luther King Jr. Blvd
Tampa, Florida 33603
Phone: (813) 251-5599
Fax: (813) 259-9797
E-mail: csass@sasslawfirm.com
kpresswood@sasslawfirm.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to Michel J. Roper, Esquire, at MRoper@BellRoperlaw.com.

s/ Cynthia N. Sass
Cynthia N. Sass, Esquire

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ANTONIO J. ORTIZ-CARBALLO,

Plaintiff,

v.

Case No. 5:08-cv-165-Oc-10GRJ

DAVID R. ELLSPERMANN, IN HIS
INDIVIDUAL AND IN HIS OFFICIAL
CAPACITY AS CLERK OF THE CIRCUIT
COURT, FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA,

Defendant.

_____ /

ORDER

Pending before the Court is the Motion For Leave To Withdraw As Counsel For Plaintiff. (Doc. 22.) Plaintiff's counsel, Cynthia N. Sass and Kendra D. Presswood represent that neither Plaintiff nor opposing counsel have any objection to the instant motion.

Upon due consideration, the Motion For Leave To Withdraw As Counsel For Plaintiff (Doc. 22) is **GRANTED**. Cynthia N. Sass and Kendra D. Presswood are hereby relieved of further responsibility for the representation of Plaintiff, Antonio J. Ortiz-Carballo in this cause. On or before **March 20, 2009**, Plaintiff shall advise the Court in writing that he intends to proceed *pro se* or if he chooses to retain counsel such counsel shall file a notice of appearance. Until such time as Plaintiff retains substitute counsel all

further pleadings, motions and notices shall be served on Plaintiff at: 1748 NE 60th Street, Ocala, Florida 34479-1741.

IT IS SO ORDERED.

DONE AND ORDERED in Ocala, Florida, on February 24, 2009.



GARY R. JONES
United States Magistrate Judge

Copies to:
All Counsel
Plaintiff
1748 NE 60th Street,
Ocala, Florida 34479-1741

FILED

ANTONIO J. ORTIZ-CARBALLO

Plaintiff

2009 MAR 20 AM 10:13

Case No. 5:08-CV-165-OC-10GRJCT COURT
CLERK, U.S. DISTRICT COURT
OCALA, FLORIDA

v.

DAVID R. ELLSPERMANN, IN HIS
INDIVIDUAL AND IN HIS OFFICIAL
CAPACITY AS CLERK OF THE CIRCUIT
COURT, FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA


Defendant

MOTION FOR A FEDERAL PUBLIC DEFENDER

I, Antonio J. Ortiz-Carballo, Plaintiff, request the Court the assignment of a Federal Public Defender.

1. Previous Counsel, Cynthia N. Sass, requested to withdraw as Counsel, February 23, 2009, which was granted, February 24, 2009, due to, and I quote from request, "irreconcilable conflict", meaning that I could not issue payments.
2. To this date I have not been able to obtain an attorney whom would be interested in continuing the case Pro Bono or under a contingency basis.
3. I am indigent. I have not been employed since I was terminated on June 11, 2007.

Today, March 18, 2009, I hereby respectfully request the previous to the Court.


 Antonio J. Ortiz-Carballo
 1748 NE 60th Street
 Ocala, Florida 34479-1741
 352-875-6241

I certify that a copy of the foregoing has been via US Mail to:
Michael J. Roper 2707 East Jefferson Street Orlando, FL 32803

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ANTONIO J. ORTIZ-CARBALLO,

Plaintiff,

v.

Case No. 5:08-cv-165-Oc-10GRJ

DAVID R. ELLSPERMANN, IN HIS
INDIVIDUAL AND IN HIS OFFICIAL
CAPACITY AS CLERK OF THE CIRCUIT
COURT, FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA,

Defendant.

_____ /

ORDER

Pending before the Court is Plaintiff's Motion For A Federal Public Defender (Doc. 24.) For the following reasons, Plaintiff's motion is due to be **DENIED**.

Unlike criminal defendants, a civil litigant has no absolute constitutional right to the appointment of counsel.¹ Instead the appointment of counsel for a civil litigant is a privilege that is justified only by exceptional circumstances, such as where the facts and legal issues are so novel or complex as to require the assistance of a trained practitioner.² Moreover, the right to the appointment of the Federal Public Defender only applies to cases covered by the Criminal Justice Act, 18 U.S.C. § 3006A. As such the Court has no authority to appoint the Federal Public Defender to represent a client, indigent or otherwise, in a civil case.

With regard to the right to appointed private counsel in a civil case, although there is no precise definition of what constitutes exceptional circumstances, courts have

¹ Poole v. Lambert, 819 F.2d 1025, 1028 (11th Cir. 1987).

² Id.

considered various factors including: (1) the type and complexity of the case, (2) whether the indigent is capable of adequately presenting his case, (3) whether the indigent is in a position to investigate adequately the case, and (4) whether the evidence will consist in large part of conflicting evidence and in cross examination.³ The key to whether counsel should be appointed is whether the *pro se* litigant needs help in presenting the essential merits of his or her position to the court.⁴ “ Where the facts and issues are simple, he or she usually will not need such help.”⁵

Here, Plaintiff offers no argument as to why he is unable to deal with the legal requirements of his case and a review of the Complaint discloses that the legal issues involved in Plaintiff’s discrimination claims are neither complex nor novel. The Court, therefore, concludes that this case does not involve any exceptional circumstances sufficient for this Court to exercise its discretion and appoint counsel.⁶ Accordingly, Plaintiff’s Motion For A Federal Public Defender (Doc. 24) is due to be **DENIED**.

IT IS SO ORDERED.

DONE AND ORDERED in Ocala, Florida, on March 23, 2009.



GARY R. JONES
United States Magistrate Judge

Copies to:
All Counsel
Pro Se Plaintiff

³ Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982)

⁴ Kilgo v. Ricks, 983 F.2d 189, 193 (11th Cir. 1993).

⁵ Id.

⁶ Even in cases where exceptional circumstances are present for appointment of counsel the Court only has the authority to *request* an attorney to represent an indigent civil litigant and not the authority to *require* an attorney to represent an indigent litigant. See Mallard v. United States District Court for the S. Dist. of Iowa, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989).

ADDENDUM FIVE

NON-CRIMINAL JUSTICE ACT COUNSEL APPOINTMENTS

The court adopts these provisions for furnishing representation for persons financially unable to obtain adequate representation in cases and situations which do not fall within the scope of 18 U.S.C. § 3006A, as amended – but in which the court believes that the interests of justice will be served by the presence of counsel.

(a) Determination of Need.

In determining need for appointment of counsel, the court shall generally be governed by the guidelines outlined in 18 U.S.C. § 3006A.

(b) Appointment of Counsel.

(1) Counsel shall be selected from the same panels of attorneys designated or approved by the district courts of the Eleventh Circuit as described in Addendum Four, which are hereby approved by this court, or from a bar association, legal aid agency, or other approved organization. In addition, any judge of this court may appoint competent counsel not otherwise included in the preceding categories.

(2) Any person seeking relief under 29 U.S.C. § 621, 42 U.S.C. § 1981, 42 U.S.C. § 1982, 42 U.S.C. § 1983, 42 U.S.C. § 1985, 42 U.S.C. § 1986, 42 U.S.C. § 2000a, 42 U.S.C. § 2000d, and 42 U.S.C. § 2000e or in such other cases as the court shall determine to be appropriate may be eligible for representation. The court may approve such representation on a determination that the interests of justice so require and that the person is financially unable to obtain representation.

(3) The court may at its discretion and in the interest of justice substitute one appointed counsel for another at any stage of the proceedings on appeal.

(4) The court may at its discretion and where circumstances warrant make appointments of counsel retroactive so as to include representation furnished prior to appointment.

(c) Withdrawal or Release of Appointed Counsel.

Counsel appointed under this rule to represent a party shall continue such representation until relieved by order of the court of appeals.

(d) Duties of Appointed Counsel.

(1) Appointed counsel shall furnish the party represented, upon written request, with a copy of motion papers and briefs filed for the party on the appeal, and shall send the party a copy of the

court's decision when issued; the clerk will send appointed counsel an extra copy of the decision for this purpose.

(2) Appointed counsel shall appear for oral argument only when directed by the court.

(3) In the event of affirmance or other decision adverse to the party represented appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court.

(4) Appointed counsel shall advise the party represented in each case that, if the party wishes to file a petition for a writ of certiorari with the Supreme Court, the party may have the right to do so without prepayment of fees and costs or giving security therefor.

(5) No appointed representative under this rule shall accept a payment from or on behalf of the person represented in this court without prior authorization by a United States circuit judge.

(e) Payment of Claims for Expenses.

(1) In all appeals covered by this rule, the court of appeals may authorize reimbursement of necessary expenses reasonably incurred in representing a party on appeal, consistent with the limitations contained in the Criminal Justice Act, by any private attorney, bar association, legal aid agency, or other approved organization appointed by the court for the purpose of representing a party on appeal pursuant to this addendum. Compensation for attorney services as a fee for either in-court or out-of-court time is not authorized.

(2) Travel expenses and other expenses reasonably incurred and necessary for adequate representation on appeal may be claimed by an appointed attorney or other legal representative. The clerk of court shall furnish each attorney or other representative at the time of appointment with information as to expenses currently allowable and in accordance with rules, regulations and guidelines promulgated by the Judicial Conference of the United States. Per diem may not be claimed in lieu of actual travel and subsistence expenses. Meal and lodging expenses incurred incident to representation on appeal, necessary long distance telephone calls or telegrams, and the cost of photocopying (but not printing), are reimbursable expenses within the guidelines established by the court. Expenses of general office overhead, personal items, filing fees and expenses of printing of briefs are not reimbursable. Expenses of travel by private automobile may be claimed on a straight mileage basis at the authorized rate. See § (6) of the guidelines, below. Parking fees and toll expenses are allowable. Transportation other than by private automobile may be claimed on an actual cost basis, but first class fare is not permitted unless absolutely necessary and documentation is provided that tourist or economy fares were not available.

(3) Unless otherwise ordered by the court for good cause shown, travel expenses other than those incurred in connection with attending oral argument will not be reimbursed without a prior *ex parte* application to and approval by the court.

(4) All claims for reimbursement of expenses for representation on appeal shall be itemized in detail and filed with the clerk of court on officially approved forms that the clerk's office will provide. Claims should be filed as promptly as possible and in no event later than 60 days after issuance of the mandate.

(5) After approval of allowable reimbursable expenses by the court, the claim form will be forwarded to the circuit executive for payment.

(6) Reimbursable Expenses.

(a) Travel and transportation expenses. Travel and transportation must be accomplished by the most economical means available. Only actual expenses may be claimed.

(i) Air transportation. Tourist or economy accommodations must be used except where unavailable. A copy of the ticket must be attached to the claim form. If travel by first class air transportation is claimed a detailed explanation of the reasons therefor must be provided with the ticket copy.

(ii) Automobile transportation. The total mileage cost shall not exceed the fare authorized for travel by tourist or economy air transport except in an emergency or for other compelling reasons. Travel by privately owned automobile shall not exceed the current government authorized rate for official travel per mile on a straight mileage basis, plus parking fees, ferry, bridge, road, and tunnel fares.

(iii) Local transportation. Local travel will be accomplished by the most economical means available and only actual expenses may be claimed. Transportation to and from an airport should be by airport shuttle, if available.

(iv) Meals and lodging. Reasonable compensation for hotel or motel accommodations and meals will be allowed on an actual expense basis subject to the limitations governing compensation for federal employees traveling to the same destination. Counsel will be notified by the clerk prior to the scheduled oral argument session of the current limitations. A copy of the hotel or motel bill shall be attached to the claim form.

(b) Photocopying. Actual costs not to exceed 25 cents per page will be paid if copy bill is submitted. For in-house copying, actual costs not to exceed 15 cents per page will be paid.

(c) Express mail and other special arrangements. For delivery of items that could have been mailed via U.S. Postal Service first class mail, additional expenses will be reimbursed only if a satisfactory explanation is given why first class mail service was not utilized. In non-emergency cases routine documents such as briefs and motions should be prepared early enough to permit use of first class mail.

(d) Computer Assisted Legal Research.

(i) By Court Appointed Counsel. The cost of use, by appointed counsel, of computer assisted legal research services, may be allowed as a reimbursable out-of-pocket expense, provided that the amount claimed is reasonable. Whenever appointed counsel incurs charges for computer assisted legal research, counsel should attach to the claim form a copy of the bill and receipt for the use of the legal research services or an explanation of the precise basis of the charge (e.g., indicating the extent to which it was derived by proration of monthly charges, or by charges identifiable to the specific research). If the amount claimed is in excess of \$500 or if it includes costs for downloading or printing, counsel should include a brief statement of justification.

(ii) By Commercial Computer Assisted Legal Research Services. The court may in advance authorize counsel to obtain computer assisted legal research services, where the research is performed by employees of a commercial legal research firm or organization rather than by appointed counsel, provided that the total amount charged for computer assisted legal research services is reasonable. Requests by counsel for authority to obtain such computer assisted legal research services should include the following:

- a - a brief explanation of the need for the research services; and
- b - an estimate of the charges.

(e) Miscellaneous Expenses. The lowest possible cost for expenses such as postage, telephone calls, brief supplies, and parking, shall be incurred.

(f) Briefs.

Reimbursement will be provided only for the number of copies of briefs and record excerpts required by the rules to be filed and served, plus two copies for each party signing the brief. The number of copies and number of pages must be itemized on the claim form.

(g) Funding.

By resolution the court may allocate from time to time certain monies from its nonappropriated fund account to support this program of non-CJA counsel appointments.

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

2009 AUG 14 PM 2: 10

CLERK, U.S. DISTRICT COURT
OCALA, FLORIDA

ANTONIO J. ORTIZ-CARBALLO
Plaintiff

v.

DAVID R. ELLSPERMANN
Defendant

CASE NO.: 5:08-CV-00165-WTH-GRJ

**PLAINTIFF'S, ANTONIO J. ORTIZ-CARBALLO, OPPOSITION FOR
SUMMARY JUDGMENT MOTION**

I, Plaintiff, ANTONIO J. ORTIZ-CARBALLO, oppose to Defendant's, DAVID R. ELLSPERMANN, in his official capacity as the Clerk of the Court and in his individual capacity, Motion for Summary Judgment, and as grounds therefore state:

-On August 15, 2005 I was hired under contract with Temporary Job Agency, "Spherion", to cover the maternity leave of Mrs. Emila Torres in the Domestic Violence Division, of the Clerk of the Court's Office. I was then asked to stay in the Division when an additional position was added and I was hired on November 18, 2005. On August 15, 2005, I was assigned to Mrs. Torres' desk in the division and I informed Mrs. Denise Kingsley that a high ringer tone volume of the assigned telephone startled me. She indicated that if I was capable of properly answering the telephone I could keep it as low as I needed. This was a verbal agreement between she and I.

-On March 29, 2007 Mrs. Kingsley sent an email indicating that the ringer tone volume on the telephones was to be kept on level 4 because calls being transferred from the Family Civil Division were going unanswered. While I was sitting at my desk my ringer continued to be low for I would always answer it usually before the second ring. I did not have anything to do with any other telephones.

-On April 3, 2007, Mrs. Kingsley asked me why the ringer tone volume of the telephone I was assigned to was low and I reminded her of her verbal agreement of August 15, 2005, indicating that she had authorized that I could keep the ringer at any level due to being startled with loud noises. After this she reprimanded me with a memorandum. She had never brought up this subject of my low ringer tone volume of the telephone assigned to me, in any way, nor was there any mention of it in any of my excellent evaluations, for the calls I answered were usually picked up on the first or second ring.

EXHIBIT
13

35

-On April 4, 2007, I sent Mr. David R. Ellspermann a letter indicating that the action taken by Mrs. Kingsley was in retaliation to letter of March 5, 2007.

-On April 23, 2007, I was asked to meet with Mr. Jack Seuss and Mrs. Jaymi Kudary and they stated that I was to follow any instructions received by Mrs. Kingsley indicating that I was to follow instructions which were not immoral or illegal and then if necessary I should have spoken with them. I told them that this was a clear act of retaliation from Mrs. Kingsley's part due to my indications of improper conduct of my immediate co-workers but they did not acknowledge this information in the memorandum. Mr. Seuss said that he was aware of the issues involving the Domestic Violence co-workers and Mrs. Kudary said that she was dealing with them. I made it clear that I had followed what I thought was the correct chain of command, first with at least four verbal communications with Mrs. Kingsley, than the meeting with Mrs. Landers after giving her a letter indicating the co-workers' misconduct and then the letter to Mr. Ellspermann.

-On May 1, 2007, I met with Mr. Seuss and Mrs. Kudary and I was given two choices of which I chose to lower the ringer volume tone of the telephone assigned to me and that when I would need to leave the desk I was to increase the volume of the ringer tone. I clearly stated that I had no control over what happened when I was not present.

-On June 11, 2007, I was asked to step in to Mr. Ellspermann's office. His very first question was if I spoke Spanish in the office and I said yes, that I translated from Spanish to English for the customers who needed so and that I would speak Spanish to co-worker and then "Senior Clerk", Mrs. Torres when there was no other co-worker present. If I was aware that another co-worker was present we would automatically continue to speak in English. He then said, and I quote, "There is to be "NO" Spanish spoken in my office.", end of quote.

I was employed in the Clerk's office as a Clerk II and I never asked to speak Spanish. It was Mrs. Kingsley whom asked me why I was not on the list of translators provided by the Clerk's internal website, "Intranet", to which I asked her, Do you want me to be?, and she said yes. She then said that she would immediately request that my name be placed on that list. I never had access to update any information on that internal Website, the request was only made by her.

-At this moment there were no administrative issues between Mrs. Kingsley and myself. She would now be physically observing me, meeting discreetly with Mrs. Roseanne Anderson and Mrs. Jennifer Rodriguez and would log everything in her computer which was openly available to see because we had the need to use her office to scan items related to our work. At this moment I indicated to all present that Mrs. Kingsley was trying to sabotage my work, in retaliation of my verbal observations of my co-workers, to which she did not say a word.

-It was at this moment of the brief meeting that Mr. Ellspermann asked that I resign. He asked if I had vacation time, I said yes, he said to write a resignation letter making it effective at the conclusion of that time, to do so right then. He indicated that it was to state that it was due to differences with the Supervisor.

I was shocked and I asked him if this was his final decision and he said yes. I asked if I could please leave the office at that moment and he agreed. Then I shook everyone's hand and left the office.

-The next day, June 12, 2007, I called Mr. Ellspermann and was transferred to Mrs. Kudary. I told her that I had no reason to resign to please tell Mr. Ellspermann that I would not. She responded and I quote, "I am so sorry for what happened."

-I then received a letter from Mr. Ellspermann indicating that I was terminated due to being disrespectful and disruptive. The reason I was terminated was changed. In response to my unemployment request he was asked to respond why I was terminated and then indicated that it was insubordination to which the Agency requested written proof of such and he never responded to.

-Mrs. Kingsley indeed referred to Mrs. Torres as, and I quote, "that little Hispanic girl", and I quote again, "I will never hire another Hispanic person again". She did discriminate in this way.

-Mrs. Jennifer Rodriguez, whom maiden's name is Mrs. Jennifer Basciano, indeed said in a negative way and I quote, "just like my mother-in law, all Hispanics are the same".

-Mrs. Torres, did not clarify the nature of the discriminatory acts against her because she was intimidated by Mr. Ellspermann whom, through his counsel, reminded Mrs. Torres the day of her deposition that he had organized a money and food collection in the Clerk's office to help her family. This statement was a clear manipulation that he was and is a big factor on her receiving any future promotion or positive reference in her career. She resigned from the Senior Clerk position. She accepted a position of less income.

-Mr. Ellspermann did indeed make the comment and I again quote, "there is to be "No" Spanish spoken in my office" He has and continuous to discriminate. He has not been fair with other employees as well.

He did so with two previous employees, Mrs. Jan Cox, African-American, terminated in in June 2006 and Mrs. Melba Garay, Hispanic, terminated in January 2008 both due to being related to partners with criminal backgrounds, and not doing the same with Mrs. Jennifer (Basciano) Rodriguez, Caucasian and one of the Domestic Violence co-workers who's husband was incarcerated during the beginning of her employment in the court and having her own active misdemeanor and felonies cases.

CONCLUSION

-Based on the foregoing, I Plaintiff, Antonio J. Ortiz-Carballo, respectfully request the Defendant's Motion for Summary Judgment be denied.

CERTIFICATE OF SERVICE



Antonio J. Ortiz-Carballo
1748 NE 60th Street
Ocala, Florida 34479-1741
352-875-6241

I certify that August 13, 2009, a copy of the foregoing has been via US Mail to:
Michael J. Roper 2707 East Jefferson Street Orlando, FL 32803

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

ANTONIO J. ORTIZ-CARBALLO,
Plaintiff,

Case No.: 5:08-CV-165-Oc-10GRJ

vs.

DAVID R. ELLSPERMANN, IN HIS
INDIVIDUAL AND IN HIS OFFICIAL
CAPACITY AS CLERK OF THE CIRCUIT
COURT, FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA,
Defendant.

NOTICE OF APPEARANCE

DAVID B. SACKS, ESQUIRE, hereby files his Notice of Appearance as counsel of record
on behalf of the Plaintiff in this case.

RESPECTFULLY SUBMITTED,

/s/ David B. Sacks

DAVID B. SACKS, ESQUIRE

Florida Bar No.: 964409

THE LAW OFFICE OF DAVID B. SACKS, P.A.

1017 Lasalle Street

Jacksonville, FL 32207

Tele: (904) 634-1122

Fax: (904) 355-8855

Emails: david@sackslegal.com

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on October 16, 2009, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system which will send a notice of electronic filing to the following: Michael J. Roper, Esq., Bell, Roper & Kohlmyer, P.A., 2707 East Jefferson Street, Orlando, FL 32803. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail and to the following non-CM/ECF participants: None.

/s/ David B. Sacks
DAVID B. SACKS, ESQUIRE
Florida Bar No.: 964409

CLOSED

**U.S. District Court
Middle District of Florida (Ocala)
CIVIL DOCKET FOR CASE #: 5:08-cv-00165-WTH-DAB**

Ortiz-Carballo v. Ellspermann
Assigned to: Senior Judge Wm. Terrell Hodges
Referred to: Magistrate Judge David A. Baker
Case in other court: State Court - 3/6/08, 08-1109-CAB
Cause: 42:1983 Civil Rights (Employment Discrimination)

Date Filed: 04/30/2008
Date Terminated: 02/02/2011
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

Plaintiff

Antonio J. Ortiz-Carballo

represented by **Cynthia N Sass**
Law Offices of Cynthia N. Sass, PA
601 W Dr MLK Jr Blvd
Tampa, FL 33603-3449
813/251-5599
Fax: 813/259-9797
Email: csass@sasslawfirm.com
TERMINATED: 02/25/2009
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David B. Sacks
David B. Sacks, Esq.
4494 Southside Blvd., Suite 101
Jacksonville, FL 32216
904/634-1122
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kendra D. Presswood
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V.

Defendant



David R. Ellspermann
 Clerk of Circuit Court, Fifth Judicial
 Circuit in and for Marion County, Florida

represented by **Michael J. Roper**
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Date Filed	#	Docket Text
04/30/2008	<u>1</u>	NOTICE OF REMOVAL from 5th Judicial Circuit, Marion County, Florida, case number 08-1109-CAB and filed in State Court on 3/6/08. Filing fee \$ 350.00, receipt number C-6638 filed by David R. Ellspermann. (Attachments: # <u>1</u> State Record, # <u>2</u> Civil Cover Sheet)(LMF) (Entered: 04/30/2008)
04/30/2008	<u>2</u>	MEMORANDUM in support re <u>1</u> Notice of removal filed by David R. Ellspermann. (LMF) (Entered: 04/30/2008)
04/30/2008	<u>3</u>	COMPLAINT against David R. Ellspermann with jury demand filed by Antonio J. Ortiz-Carballo. (filed in state court on 3/6/08)(LMF) (Entered: 04/30/2008)
05/02/2008	<u>4</u>	ANSWER and Affirmative Defenses to <u>3</u> Complaint by David R. Ellspermann.(Roper, Michael) Modified on 5/5/2008 (LMF). (Entered: 05/02/2008)
05/05/2008	<u>5</u>	NOTICE of Designation under Local Rule 3.05-Track Two. (Attachments: # <u>1</u> consent forms)(MAM) (Entered: 05/05/2008)
05/13/2008	<u>6</u>	CERTIFICATE of compliance (service) re <u>5</u> Notice of Designation <i>with Local Rule 3.05</i> by Antonio J. Ortiz-Carballo. (Sass, Cynthia) Modified on 5/14/2008 (LMF). (Entered: 05/13/2008)
05/30/2008	<u>7</u>	MOTION to amend/correct <i>Complaint and Memorandum of Law in Support</i> by Antonio J. Ortiz-Carballo. (Attachments: # <u>1</u> Exhibit A - Amended Complaint and Demand for Jury Trial)(Sass, Cynthia) (Entered: 05/30/2008)
06/09/2008	<u>8</u>	ORDER granting <u>7</u> Plaintiff's Motion To Amend Complaint. Signed by Magistrate Judge Gary R. Jones on 6/9/2008. (grj) (Entered: 06/09/2008)
06/11/2008	<u>9</u>	AMENDED COMPLAINT <i>and Demand for Jury Trial</i> against David R. Ellspermann with Jury Demand filed by Antonio J. Ortiz-Carballo.(Sass, Cynthia) (Entered: 06/11/2008)

06/20/2008	10	ANSWER and affirmative defenses to 9 Amended complaint by David R. Ellspermann. (Roper, Michael) Modified on 6/23/2008 (LMF). (Entered: 06/20/2008)
06/27/2008	11	CASE MANAGEMENT REPORT. (Presswood, Kendra) (Entered: 06/27/2008)
07/18/2008	12	MOTION for protective order <i>from Deposition Scheduled for August 5, 2008 and Memorandum of Law in Support</i> by Antonio J. Ortiz-Carballo. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G)(Sass, Cynthia) Motions referred to Magistrate Judge Gary R. Jones. (Entered: 07/18/2008)
07/20/2008	13	CASE MANAGEMENT AND SCHEDULING ORDER: Discovery due by 5/8/2009, Dispositive motions due by 8/4/2009, Pretrial Conference set for 10/21/2009 at 09:00 AM in Courtroom 1 before Judge Wm. Terrell Hodges, Jury Trial set for weeks of 11/2, 11/9, and 11/16/2009 in Courtroom 1 before Judge Wm. Terrell Hodges. Signed by Deputy Clerk on 7/20/2008. (MAM) (Entered: 07/20/2008)
07/25/2008	14	RESPONSE to motion re 12 MOTION for protective order <i>from Deposition Scheduled for August 5, 2008 and Memorandum of Law in Support</i> filed by David R. Ellspermann. (Roper, Michael) (Entered: 07/25/2008)
07/31/2008	15	ORDER granting in part and denying in part 12 Plaintiff's Motion for Protective Order From Deposition For August 5, 2008. Signed by Magistrate Judge Gary R. Jones on 7/31/2008. (grj) (Entered: 07/31/2008)
09/22/2008	16	NOTICE of mediation conference to be held on 9/25/08 at 9:30 a.m. before Dudley D. Birder, Jr., Mediator. (LMF) (Entered: 09/23/2008)
10/01/2008	17	MEDIATION REPORT: Hearing held on 9/25/08. Hearing outcome: impasse. Dudley D. Birder, Jr., Mediator.(LMF) (Entered: 10/01/2008)
01/07/2009	18	MOTION to compel <i>Production of Documents from Non-Parties</i> by David R. Ellspermann. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Townsend, Cindy) Motions referred to Magistrate Judge Gary R. Jones. (Entered: 01/07/2009)
01/13/2009	19	Amended MOTION to compel <i>Production of Documents from Non-Parties</i> by David R. Ellspermann. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Townsend, Cindy) Motions referred to Magistrate Judge Gary R. Jones. Modified on 1/14/2009 (LMF). (Entered: 01/13/2009)
01/14/2009	20	Second Amended MOTION to compel <i>Production of Documents from Non-Parties</i> by David R. Ellspermann. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Townsend, Cindy) Motions referred to Magistrate Judge Gary R. Jones. Modified on 1/15/2009 (LMF). (Entered: 01/14/2009)
02/02/2009	21	MEMORANDUM in opposition re 20 Motion to compel <i>Production of Documents from Non-Parties</i> filed by Antonio J. Ortiz-Carballo. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Supplement Lexis Case Law)(Sass, Cynthia) Modified on 2/3/2009 (LMF). (Entered: 02/02/2009)
02/23/2009	22	MOTION for Cynthia N. Sass and Kendra D. Presswood to withdraw as attorney by Antonio J. Ortiz-Carballo. (Sass, Cynthia) Motions referred to Magistrate Judge Gary R. Jones. Modified on 2/24/2009 (LMF). (Entered: 02/23/2009)
02/24/2009	23	ORDER granting 22 Motion For Leave To Withdraw As Counsel for Plaintiff. Signed by Magistrate Judge Gary R. Jones on 2/24/2009. (grj) (Entered: 02/24/2009)

03/20/2009	24	MOTION to appoint counsel - Federal Public Defender - by Antonio J. Ortiz-Carballo. (AIQ) Motions referred to Magistrate Judge Gary R. Jones. (Entered: 03/20/2009)
03/23/2009	25	ORDER denying 24 Plaintiff's Motion For A Federal Public Defender. Signed by Magistrate Judge Gary R. Jones on 3/23/2009. (grj) (Entered: 03/23/2009)
03/25/2009	26	MOTION to compel <i>Plaintiff to Respond to Defendant's Third Request to Produce</i> by David R. Ellspermann. (Attachments: # 1 Exhibit A)(Townsend, Cindy) Motions referred to Magistrate Judge Gary R. Jones. (Entered: 03/25/2009)
04/07/2009	27	ORDER granting in part and denying in part 20 Defendant's Second Amended Motion To Compel Production of Documents From Non-Parties; granting 26 Defendant's Motion To Compel Plaintiff To Respond To Defendant's Third Request To Produce. Signed by Magistrate Judge Gary R. Jones on 4/7/2009. (grj) (Entered: 04/07/2009)
04/20/2009	28	RESPONSE re 26 MOTION to compel <i>Plaintiff to Respond to Defendant's Third Request to Produce</i> and response to third request to produce filed by Antonio J. Ortiz-Carballo. (LMF) (Entered: 04/21/2009)
06/09/2009	29	NOTICE OF RESCHEDULING HEARING: The pretrial conference hearing previously scheduled for 10/21/09 is rescheduled. New scheduling date and time: Pretrial Conference set for 10/19/2009 at 09:00 AM in Ocala Courtroom 1 before Senior Judge Wm. Terrell Hodges.(MAM) (Entered: 06/09/2009)
06/19/2009	30	MOTION for leave to file Motion for summary judgment in Excess of Twenty-Five (25) Pages by David R. Ellspermann. (Townsend, Cindy) Modified on 6/22/2009 (LMF). (Entered: 06/19/2009)
06/23/2009	31	ORDER granting 30 Defendant's Motion For Leave To File Motion In Excess of Twenty-Five Pages. Signed by Magistrate Judge Gary R. Jones on 6/23/2009. (grj) (Entered: 06/23/2009)
07/31/2009	32	MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann in his official capacity as Clerk of Court</i> by David R. Ellspermann. (Attachments: # 1 Appendix Exhibits filed in support of Motion for Summary Judgment, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12, # 14 Exhibit 13, # 15 Exhibit 14, # 16 Exhibit 15, # 17 Exhibit 16, # 18 Exhibit 17)(Townsend, Cindy) (Entered: 07/31/2009)
07/31/2009	33	MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann, in his individual capacity,</i> by David R. Ellspermann. (Townsend, Cindy) (Entered: 07/31/2009)
08/03/2009	34	SUMMARY JUDGMENT NOTICE: Re 32 MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann in his official capacity as Clerk of Court</i> and 33 MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann, in his individual capacity,</i> . Responses due within 14 days. (LMF) (Entered: 08/03/2009)
08/14/2009	35	RESPONSE in opposition re 32 MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann in his official capacity as Clerk of Court</i> and 33 MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann, in his individual capacity,</i> filed by Antonio J. Ortiz-Carballo. (LMF) (MJT). (Entered: 08/14/2009)

10/02/2009	36	WITNESS LIST by David R. Ellspermann. (Roper, Michael) (Entered: 10/02/2009)
10/02/2009	37	EXHIBIT LIST by David R. Ellspermann.. (Roper, Michael) (Entered: 10/02/2009)
10/02/2009	38	NOTICE of filing <i>Deposition Designations</i> by David R. Ellspermann (Roper, Michael) Modified on 10/5/2009 (MJT). (Entered: 10/02/2009)
10/13/2009	39	PRETRIAL STATEMENT by David R. Ellspermann. (Roper, Michael) (Entered: 10/13/2009)
10/14/2009	40	AMENDED Pretrial Statement. Related document 39 Pretrial Statement by David R. Ellspermann. (Roper, Michael) Modified on 10/15/2009 (LMF). (Entered: 10/14/2009)
10/14/2009	41	MOTION to strike 40 Amended Pretrial Statement by David R. Ellspermann. (Townsend, Cindy) Motions referred to Magistrate Judge Gary R. Jones. Modified on 10/15/2009 (LMF). (Entered: 10/14/2009)
10/14/2009	42	MOTION for leave to file Amended Final Pretrial Statement by David R. Ellspermann. (Townsend, Cindy) (Entered: 10/14/2009)
10/15/2009	43	ORDER denying 41 Defendant's Motion to Strike Docket Entry 40; granting 42 Defendant's Motion For Leave To File Amended Pretrial Statement. The Amended Pretrial Statement 40 shall remain as filed. Signed by Magistrate Judge Gary R. Jones on 10/15/2009. (grj) (Entered: 10/15/2009)
10/15/2009	44	NOTICE by David R. Ellspermann <i>Trial Conflict</i> (Roper, Michael) (Entered: 10/15/2009)
10/16/2009	45	NOTICE of Appearance by David B. Sacks on behalf of Antonio J. Ortiz-Carballo (Sacks, David) (Entered: 10/16/2009)
10/16/2009	46	MOTION for extension of time to file <i>Pretrial Statement</i> by Antonio J. Ortiz-Carballo. (Sacks, David) Modified on 10/19/2009 (LMF). (Entered: 10/16/2009)
10/16/2009	47	MOTION for extension of time to complete discovery / <i>Reopen Discovery and Stay Ruling on Pending Summary Judgment Motions</i> by Antonio J. Ortiz-Carballo. (Sacks, David) Motions referred to Magistrate Judge Gary R. Jones. (Entered: 10/16/2009)
10/16/2009	48	MOTION to continue <i>Trial</i> by Antonio J. Ortiz-Carballo. (Sacks, David) (Entered: 10/16/2009)
10/16/2009	49	MEMORANDUM in opposition re 48 Motion to continue <i>trial</i> filed by David R. Ellspermann. (Townsend, Cindy) (Entered: 10/16/2009)
10/16/2009	50	MEMORANDUM in opposition re 47 Motion for extension of time to complete discovery filed by David R. Ellspermann. (Townsend, Cindy) (Entered: 10/16/2009)
10/18/2009	51	MEMORANDUM in opposition re 46 Motion for extension of time to file <i>Pretrial Statement</i> filed by David R. Ellspermann. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Townsend, Cindy) Modified on 10/19/2009 (LMF). (Entered: 10/18/2009)
10/19/2009	52	Minute Entry. Proceedings held before Senior Judge Wm. Terrell Hodges: PRETRIAL CONFERENCE held on 10/19/2009. Court Reporter: Dennis Miracle (MAM) (Entered: 10/19/2009)
10/19/2009	53	NOTICE of Hearing: Pretrial Conference set for 1/20/2010 at 10:00 AM in Ocala Courtroom 1 before Senior Judge Wm. Terrell Hodges. Jury Trial set for trial term

		commencing 2/1/2010 in Ocala Courtroom 1 before Senior Judge Wm. Terrell Hodges. (MAM) (Entered: 10/19/2009)
10/19/2009	54	NOTICE canceling pretrial conference scheduled for 1/20/10 and jury trial hearing scheduled for trial term commencing 2/1/10. (MAM) (Entered: 10/19/2009)
10/19/2009	55	ORDER granting 46 Motion for extension of time to file joint pretrial statement; granting 47 Motion for extension of time to complete discovery and to stay ruling on pending summary judgment motions; granting 48 Motion to continue trial. The Clerk is directed to remove this case from the trial term commencing November 2, 2009, and to reschedule this case for final pretrial conference and trial as set forth in this Order. Signed by Senior Judge Wm. Terrell Hodges on 10/19/2009. (LRH) (Entered: 10/19/2009)
10/20/2009	56	NOTICE of Hearing: Pretrial Conference set for 2/17/2010 at 11:30 AM in Ocala Courtroom 1 before Senior Judge Wm. Terrell Hodges. Jury Trial set for trial term commencing 3/1/2010 at 09:30 AM in Ocala Courtroom 1 before Senior Judge Wm. Terrell Hodges. (MAM) (Entered: 10/20/2009)
10/29/2009	57	NOTICE of <i>Filing Itemization of Fees and Costs</i> re 55 Order by David R. Ellspermann. (Roper, Michael) Modified on 10/29/2009 (LMF) (Entered: 10/29/2009)
11/06/2009	58	RESPONSE re 57 Notice of <i>Itemization of Fees and Costs</i> filed by Antonio J. Ortiz-Carballo. (Sacks, David) (Entered: 11/06/2009)
11/19/2009	59	MOTION for miscellaneous relief, specifically Leave to take Updated Deposition of Plaintiff by David R. Ellspermann. (Townsend, Cindy) (Entered: 11/19/2009)
11/30/2009	60	NOTICE of withdrawal of motion by David R. Ellspermann re 59 MOTION for miscellaneous relief, specifically Leave to take Updated Deposition of Plaintiff filed by David R. Ellspermann (Townsend, Cindy) (Entered: 11/30/2009)
12/30/2009	61	MEMORANDUM in opposition re 32 Motion for summary judgment <i>filed by Defendant, David Ellspermann, in his Official Capacity as Clerk of the Court</i> filed by Antonio J. Ortiz-Carballo. (Attachments: # 1 Appendix Listing Attachments, # 2 Exhibit One, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6 (a), # 8 Exhibit 6 (b), # 9 Exhibit 7, # 10 Errata 8, # 11 Exhibit 9, # 12 Exhibit 10, # 13 Exhibit 11, # 14 Exhibit 12, # 15 Exhibit 13, # 16 Exhibit 14, # 17 Exhibit 15, # 18 Exhibit 16, # 19 Exhibit 17, # 20 Errata 18, # 21 Exhibit 19, # 22 Exhibit 20, # 23 Exhibit 21, # 24 Exhibit 22)(Sacks, David) (Entered: 12/30/2009)
12/30/2009	62	MEMORANDUM in opposition re 61 Memorandum in opposition <i>corrected as to Certificate of Service only</i> filed by Antonio J. Ortiz-Carballo. (Sacks, David) (Entered: 12/30/2009)
12/31/2009	63	MEMORANDUM in opposition re 33 Motion for summary judgment <i>by David Ellspermann in his individual capacity</i> filed by Antonio J. Ortiz-Carballo. (Sacks, David) (Entered: 12/31/2009)
01/19/2010	64	REPLY to response to motion re 33 MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann, in his individual capacity</i> , filed by David R. Ellspermann. (Townsend, Cindy) (Entered: 01/19/2010)
01/19/2010	65	REPLY to response to motion re 32 MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann in his official capacity as</i>

		<i>Clerk of Court</i> filed by David R. Ellspermann. (Townsend, Cindy) (Entered: 01/19/2010)
01/26/2010	66	MOTION to strike <i>Defendants' Reply memorandum (Doc. #'s 32 and 33) and incorporated Memorandum in Support</i> by Antonio J. Ortiz-Carballo. (Sacks, David) Motions referred to Magistrate Judge Gary R. Jones. Attorney notified re blank pages, will refile. Modified on 1/27/2010 (LMF). (Entered: 01/26/2010)
01/27/2010	67	MOTION to strike <i>Defendants' Reply Memorandum (DKT NO.'s 32 and 33) and Incorporated Memorandum in Support</i> by Antonio J. Ortiz-Carballo. (Sacks, David) Motions referred to Magistrate Judge Gary R. Jones. (Entered: 01/27/2010)
01/27/2010	68	MEMORANDUM in opposition re 67 Motion to strike filed by David R. Ellspermann. (Townsend, Cindy) (Entered: 01/27/2010)
01/28/2010	69	ORDER denying 67 Plaintiff's Motion to strike Defendants' Reply Memorandum. Signed by Senior Judge Wm. Terrell Hodges on 1/27/2010. (LRH) (Entered: 01/28/2010)
02/02/2010	70	Joint MOTION for miscellaneous relief, specifically Joint Motion to Remove Case from March 1, 2010 Trial Docket by David R. Ellspermann, Antonio J. Ortiz-Carballo. (Townsend, Cindy) (Entered: 02/02/2010)
02/04/2010	71	ORDER granting 70 Joint Motion to Remove Case from March 1, 2010 Trial Docket. Signed by Senior Judge Wm. Terrell Hodges on 2/3/2010. (LRH) (Entered: 02/04/2010)
06/16/2010	72	Joint MOTION for miscellaneous relief, specifically to Schedule a Status Conference by David R. Ellspermann, Antonio J. Ortiz-Carballo. (Townsend, Cindy) (Entered: 06/16/2010)
09/24/2010	73	Case reassigned to Magistrate Judge David A. Baker. New case number: 5:08-cv-165-Oc-10DAB. Magistrate Judge Gary R. Jones no longer assigned to the case. (LMF) Modified on 9/27/2010 (DFD). (Entered: 09/24/2010)
09/27/2010	74	NOTICE <i>to the Court</i> by David R. Ellspermann (Townsend, Cindy) Modified on 9/28/2010 (MJT). (Entered: 09/27/2010)
10/06/2010	75	ORDER referring motion for report and recommendation: 32 MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann in his official capacity as Clerk of Court</i> filed by David R. Ellspermann, 33 MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann, in his individual capacity</i> , filed by David R. Ellspermann Signed by Senior Judge Wm. Terrell Hodges on 10/6/2010. (LRH) Motions referred to Magistrate Judge David A. Baker. (Entered: 10/06/2010)
11/01/2010	76	ORDER granting 72 Motion to schedule a status conference. The Court will conduct a status conference and hear oral argument on the Motions for Summary Judgment on 11/16/10 at 10:30 a.m. at Orlando Courthouse, Courtroom # 6D. Signed by Magistrate Judge David A. Baker on 11/1/2010. (LMF) (Entered: 11/01/2010)
11/16/2010	77	Minute Entry. Proceedings held before Magistrate Judge David A. Baker: Status Conference and Oral Argument on Motion for Summary Judgment held on 11/16/2010. (digital) (HSL) (Entered: 11/16/2010)

11/22/2010	78	ORDER that this case should be put back on the trial calendar. This matter is set for the trial term commencing 2/28/11 with a final pretrial conference on 2/16/11, time to be set by Clerk by separate notice. Signed by Magistrate Judge David A. Baker on 11/22/2010. (LMF) (Entered: 11/22/2010)
11/23/2010	79	NOTICE of Hearing: Pretrial Conference set for 2/16/2011 at 10:00 AM in Ocala Courtroom 3A before Senior Judge Wm. Terrell Hodges; Jury Trial set for trial term commencing 2/28/2011 in Ocala Courtroom 3A before Senior Judge Wm. Terrell Hodges. (MAM) (Entered: 11/23/2010)
12/14/2010	80	REPORT AND RECOMMENDATION re 32 MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann in his official capacity as Clerk of Court</i> and 33 MOTION for summary judgment <i>and Incorporated Memorandum of Law filed on behalf of David Ellspermann, in his individual capacity</i> , recommending that the motions be granted in part and denied in part. Signed by Magistrate Judge David A. Baker on 12/14/2010. (LMF) (Entered: 12/14/2010)
12/28/2010	81	OBJECTION to 80 Report and Recommendations by Antonio J. Ortiz-Carballo. (Attachments: # 1 Appendix, # 2 Exhibit 1: Deposition of David Ellspermann, # 3 Exhibit 2(a): Deposition of Antonio Ortiz-Carballo, # 4 Exhibit 2(b): Deposition of Antonio Ortiz-Carballo (continue), # 5 Exhibit 3: Deposition of Ozieta Landers Reid, # 6 Exhibit 4: Deposition of Jennifer Rodriguez, # 7 Exhibit 5: Deposition of Denise Kingsley, # 8 Exhibit 6: Letter dated March 5, 2007, to Reid from Carballo, # 9 Exhibit 7: E-Mail re: ringer volume, dated March 29, 2007, # 10 Exhibit 8: Employee-Supervisor Conference form, dated April 3, 2007, # 11 Exhibit 9: Letter dated April 4, 2007, to Ellspermann from Carballo)(Sacks, David) Modified on 12/28/2010 (MJT). (Entered: 12/28/2010)
12/28/2010	82	OBJECTION re 80 REPORT AND RECOMMENDATION filed by David R. Ellspermann. (Attachments: # 1 Exhibit 1)(Townsend, Cindy) Modified on 12/28/2010 (MJT). (Entered: 12/28/2010)
01/10/2011	83	RESPONSE to objections to 80 Report and Recommendations by Antonio J. Ortiz-Carballo. (Attachments: # 1 Appendix, # 2 Exhibit 1: Employee-Supervisor Conference form, dated April 3, 2007, # 3 Exhibit Personnel File of Tamela McIntyre, # 4 Exhibit Termination Memo of Sandra Pruitt, Dated January 30, 2007, # 5 Exhibit Carballo Termination Memo dated June 13, 2007, # 6 Exhibit Excerpts from Deposition of David Ellspermann)(Sacks, David) (Entered: 01/10/2011)
01/11/2011	84	RESPONSE re 81 Objection to Report and Recommendations filed by David R. Ellspermann. (Townsend, Cindy) (Entered: 01/11/2011)
01/14/2011	85	ORDER granting in part and denying in part 32 Motion for summary judgment; granting in part and denying in part 33 Motion for summary judgment; adopting 80 Report and Recommendations. Signed by Senior Judge Wm. Terrell Hodges on 1/14/2011. (LRH) (Entered: 01/14/2011)
01/31/2011	86	MEDIATION REPORT: Hearing held on 1/31/11. Hearing outcome: completely settled. J. Joaquin Frazedas, Mediator. (Fraxedas, J.) Modified on 2/1/2011 (LMF). (Entered: 01/31/2011)
02/01/2011	87	60 day ORDER dismissing case. Signed by Deputy Clerk on 2/1/2011. (MAM) (Entered: 02/01/2011)

03/01/2011	88	STIPULATION of Dismissal by David R. Ellspermann. (Townsend, Cindy) (Entered: 03/01/2011)
03/02/2011	89	ORDER dismissing this case with prejudice re 88 Stipulation of Dismissal filed by David R. Ellspermann. Signed by Senior Judge Wm. Terrell Hodges on 3/2/2011. (LRH) (Entered: 03/02/2011)
03/03/2011	90	JUDGMENT entered. Civil appeals checklist attached. (Signed by Deputy Clerk) (LMF) (Entered: 03/03/2011)

PACER Service Center			
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PACER Login:		Client Code:	
Description:	Docket Report	Search Criteria:	5:08-cv-00165-WTH-DAB
Billable Pages:	7	Cost:	0.70

United States District Court, M.D. Florida, Ocala Division.

ORTIZ-CARBALLO v. ELLSPERMANN

Case No. 5:08-cv-165-Oc-10GRJ. (M.D. Fla. Apr 07, 2009)

ANTONIO J. ORTIZ-CARBALLO,
Plaintiff, v. DAVID R. ELLSPERMANN,
IN HIS INDIVIDUAL AND IN HIS
OFFICIAL CAPACITY AS CLERK OF
THE CIRCUIT COURT, FIFTH
JUDICIAL CIRCUIT IN AND FOR
MARION COUNTY, FLORIDA,
Defendant.

Case No. 5:08-cv-165-Oc-10GRJ.

United States District Court, M.D. Florida,
Ocala Division.

April 7, 2009

ORDER

GARY JONES, Magistrate Judge

Pending before the Court is Defendant, David R. Ellspermann, Clerk Of The Circuit Court, Fifth Judicial Circuit In And For Marion County, Florida's, Second Amended Motion To Compel Production Of Documents From Non-Parties (Doc. 20) to which Plaintiff filed a response in opposition (Doc. 21) and Defendant, David Ellspermann, Clerk Of The Circuit Court, Fifth Judicial Circuit In And For Marion County, Florida's Motion To Compel Plaintiff To Respond To Defendant's Third Request To Produce (Doc. 26) to which Plaintiff has not filed a response.

A. Second Amended Motion To Compel Production Of Documents From Non-Parties

Defendant seeks to subpoena medical records from three of Plaintiff's treating physicians — Violet D. Poetter, M.D. ("Dr. Poetter"), Poornam Warman, M.D. ("Dr. Warman") and Nidza Gomez, M.D. ("Dr. Gomez.") Plaintiff has objected. As a result Defendant has filed the instant motion requesting the Court to enter an order compelling ² the production of medical records from these three doctors, all of whom are non-parties to this action.¹

1. The parties agree that the other issues raised in the earlier versions of this motion have been resolved.

Pursuant to Rule 26, Fed.R.Civ.P. parties may obtain discovery regarding any non-privileged matter, if the information sought "is relevant to any party's claim or defense."² Relevant information is not limited to that which would be admissible at the trial. Rather, information is relevant if the discovery sought is "reasonably calculated to lead to the discovery of admissible evidence."³ Rule 45, Fed.R.Civ.P. governs discovery of non-parties by subpoena and the scope of permissible discovery is that set forth in Rule 26. Pursuant to Rule 45(c)(3)(A), "on timely motion," the issuing court must "quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter, if no exception or waiver applies."⁴ Accordingly, if the medical records requested by Plaintiff are privileged, this Court must quash or modify the subpoenas served by Plaintiff on the non-party doctors. Where as

here, the Court's jurisdiction is premised upon a federal question, the federal law of privilege governs the Court's determination of whether the requested medical records are privileged.⁵ *3

2. Fed.R.Civ.P. 26(b)(1).

3. Id.

4. "Paragraph (c)(3) explicitly authorizes the quashing of a subpoena as a means of protecting a witness from misuse of the subpoena power." Fed.R.Civ.P. 45 advisory committee notes, 1991 amendment.

5. See Hancock v. Hobbs, [967 F.2d 462, 466-47](#) (11th Cir. 1992.)

(1) Dr. Poetter

Dr. Poetter is a psychologist. Federal law recognize a privilege between psychotherapists and their patients.⁶ As an initial matter in determining the application of the psychotherapist-patient privilege, the Court must find that the relationship between Dr. Poetter and Plaintiff was a confidential relationship between a patient and a psychotherapist. Because Dr. Poetter is a psychologist who treated or evaluated Plaintiff, the Court concludes that she qualifies as a psychotherapist such that the privilege would cover her confidential communications with Plaintiff. Further, the Court finds that any psychological and medical records created by Dr. Poetter are presumably the result of confidential communications between a patient, Plaintiff, and his psychotherapist. Therefore, the Court finds that Dr. Poetter's records are covered by the psychotherapist-patient privilege, unless it has been waived.⁷

6. See Jaffee v. Redmond, [518 U.S. 1, 15](#) (1996) (holding that "confidential communications between a licensed psychotherapist and her

patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.").

7. Defendant incorrectly refers to the "doctor/patient privilege" throughout his Motion. However, Plaintiff acknowledges that there is no doctor-patient privilege and that he only seeks application of the psychotherapist-patient privilege to those records related to counseling he received from Dr. Poetter. See Doc. 21 at page 3, n. 2.

Generally, in order to obtain psychiatric records, the party requesting the records must show that the plaintiff has placed her mental condition "in controversy" and there is "good cause" for production of the records.⁸ The majority of federal courts that have addressed the issue have held that a party does not place his mental condition in controversy merely by requesting damages for mental anguish or "garden variety" *4 emotional distress.⁹ In order to place a party's mental condition in controversy the party must allege a specific mental or psychiatric disorder or intend to offer expert testimony to support their claim of emotional distress.¹⁰

8. See, e.g., Turner v. Imperial Stores, [161 F.R.D. 89](#) (S.D. Cal. 1995).

9. Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 553 (N.D. Ga. 2001) (applying the same analysis regarding medical examinations under Fed.R.Civ.P. 35(a) to the issue of when a patient waives the psychotherapist-patient privilege).

10. E.g. Turner, [161 F.R.D. at 95](#) (reviewing several cases and concluding that in addition to a claim of emotional distress, a plaintiff usually must do one or more of the following to put his mental condition "in controversy": (1) a cause of action for intentional or negligent

infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff's offer of expert testimony to support a claim of emotional distress; and/or (5) plaintiff's concession that his or her mental condition is "in controversy" within the meaning of the rule).

Defendant argues that Plaintiff put his mental state "at issue" because he "is asserting a claim for depression" and because he identified Dr. Poetter as a potential witness in his Rule 26(a) Initial Disclosures. However, in paragraph 43 of his Amended Complaint, Plaintiff merely alleges that he "has suffered lost wages and benefits, emotional distress, loss of enjoyment of life, mental anguish, damage to his professional reputation and ability to obtain gainful employment . . ." ¹¹ Plaintiff does not allege in his Amended Complaint that Defendant's actions caused him to suffer from depression or any other psychological condition. Nor does his Amended Complaint include a claim where emotional distress is an element of the cause of action. Moreover, in his response to the instant motion, Plaintiff clarifies that he has not asserted a claim for depression and that he does not intend to rely upon the testimony of Dr. Poetter to support his claim for damages. ¹² Accordingly, Plaintiff has not placed his mental state "at issue." *5

11. Doc. 9, ¶ 43.

12. See Doc. 21, pages 5-6.

Nevertheless, Defendant argues that Plaintiff waived the privilege because he put "at issue" his hearing condition which causes him to be startled by loud noises. There is no question that Plaintiff's alleged hearing issue is a central issue in this case. Plaintiff, who is Hispanic, *inter alia* alleges that his supervisor retaliated against him for making complaints regarding two Caucasian co-workers. ¹³ Specifically, Plaintiff alleges that for a year prior to his complaints, Plaintiff's su-

ervisor allowed him to keep his telephone's ringer volume low to accommodate a hearing condition which caused him to be startled by loud noises. ¹⁴ However, Plaintiff alleges that after making complaints about his co-workers, Plaintiff's supervisor suddenly demanded that Plaintiff keep his ring tone on high. ¹⁵ While Plaintiff alleges that this is evidence of retaliation, Defendant is entitled to challenge the legitimacy of this alleged medical condition and offer other reasons as to why Plaintiff was directed to keep his ring tone on high. ¹⁶ Accordingly, medical records related to Plaintiff's hearing condition are relevant to the claims in this case.

13. See Doc. 9 at ¶¶ 11-18.

14. See id. at ¶ 19.

15. See id. at ¶¶ 19-22.

16. Based on Defendant's Answer and Affirmative Defenses to the Amended Complaint, it is difficult to determine what defenses Defendant intends to raise. Indeed, while Defendant raises more than twenty affirmative defenses, they are generic boilerplate defenses without any suggestion as to how these defenses might apply to this action. See Doc. 10.

However, in determining whether Plaintiff has waived the psychotherapist-patient privilege, the proper inquiry is not whether the medical records are relevant, but rather, whether Plaintiff has put his mental condition "at issue." Plaintiff testified that he sought *6 counseling from Dr. Poetter "because of an incident in the office where I was reprimanded because of the tone of the telephones that I was using." ¹⁷ Thus, Plaintiff went to Dr. Poetter to discuss the psychological impact of the reprimand — not, the hearing condition itself. That Plaintiff has put this physical condition "at issue" does not change the Court's conclusion that Plaintiff has not put his mental state "at issue."

17. Doc. 20, Exhibit C at page 191.

Therefore, based on the foregoing, Dr. Poetter's records are subject to the psychotherapist-patient privilege and are protected from disclosure. Accordingly, Defendant's Motion To Compel the records of Dr. Poetter (Doc. 21) is due to be **DENIED**.

(2) Dr. Warman

Dr. Warman is Plaintiff's internal medicine doctor. Under federal law, there is no doctor-patient privilege.¹⁸ Accordingly, because there is no privilege that applies to Dr. Warman's records,¹⁹ the Court need not determine whether Plaintiff has placed his mental and physical condition at issue. Instead, the Court need only determine whether Dr. Warman's records are relevant to the claims in this case.

18. See Taylor v. Dean, 2006 U.S. Dist. LEXIS 77849, *5-6 (M.D. Fla. 2006.)

19. See Stevenson, 201 F.R.D. 551, 558 (N.D. Ga. 2001).

As discussed above, the medical records related to Plaintiff's alleged hearing condition are relevant to this case. Moreover, Plaintiff has testified that as a result of the actions alleged in the Amended Complaint he suffers from medical conditions, including high blood pressure. As such, Dr. Warman's medical records from the period during which Plaintiff was employed by the Clerk of Court are relevant to this action.^{*7}

Accordingly, Defendant's Motion To Compel the records of Dr. Warman (Doc. 21) is due to be **GRANTED** to the extent that any subpoena served upon Dr. Warman shall be limited to records related to the period during which Plaintiff was employed by the Clerk of Court until present.

(3) Dr. Gomez

Defendant seeks "[a]ny and all records" Dr. Gomez has in his "possession, custody or control" for Plaintiff. Dr. Gomez was Plaintiff's family physician over 10 years ago, when Plaintiff lived in Puerto Rico.²⁰ Dr. Gomez prescribed Plaintiff medication for depression following a break up of a long-term relationship. Dr. Gomez did not provide counseling and discontinued the medications after only six months because according to Plaintiff they were no longer "necessary."

20. See Doc. 20, Exhibit C, (Plaintiff's Deposition) at pages 11-13.

As discussed above, because federal law does not recognize a doctor-patient privilege, the requested records are subject to discovery under the Federal Rules of Civil Procedure if the records are "relevant to a claim or defense of any party." Here, Dr. Gomez' records reflect treatment more than 10 years ago for a six-month bout of depression. These records are not relevant or reasonably calculated to lead to the discovery of relevant evidence in this action. Accordingly, Defendant's Motion To Compel the records of Dr. Gomez (Doc. 21) is due to be **DENIED**.

B. Motion To Compel Plaintiff To Respond To Defendant's Third Request To Produce

On February 4, 2009, Defendant served Plaintiff with his Third Request to Produce. Defendant represents that Plaintiff has not provided responses to the *8 discovery. The deadline for doing so has long since passed. Counsel for Defendant represents that despite good faith efforts to resolve this matter with Plaintiff, he has failed to produce the discovery.

Accordingly, Defendant, David R. Ellspermann, Clerk Of the Circuit Court, Fifth Judicial Circuit In And For Marion County, Florida's Motion To Compel Plaintiff To Respond To Defendant's Third Request To Pro-

duce (Doc. 26) is **GRANTED**. Plaintiff shall serve responses to Defendant's Third Request to Produce on or before **April 20, 2009**. Failure to comply with this Order could result in the imposition of sanctions, including the award of attorney's fees.

IT IS SO ORDERED.

DONE AND ORDERED.

BELL & ROPER, P.A.
ATTORNEYS AT LAW

BR

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CINDY A. TOWNSEND
MARY J. WALTER

February 7, 2011

**ATTORNEY CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT
PRIVILEGED – CONFIDENTIAL**

Ms. Yari Benitez
Liability Specialist
Preferred Governmental Claims Solutions
P.O. Box 958456
Lake Mary, FL 32795-8456

RE: Insured: Marion County
Claimant: Anthony Ortiz-Carballo
Claim No.: EV138237

Dear Ms. Benitez:

Please find enclosed a Mediation Invoice in the above-captioned matter in the amount of \$937.50 which represents our portion of the bill for mediation services. Kindly place this invoice in line for payment. Once you receive the check you can send it directly to Fraxedas Mediation Firm or send it to us for forwarding.

Please do not hesitate to contact me if there area any questions or concerns relating to this matter.

Very truly yours,

Cindy A. Townsend

Cindy A. Townsend

CAT:em
cc: Katherine Glynn, Esq.
David Ellspermann

EXHIBIT
17

*mm
2/16/11*

FRAXEDAS MEDIATION FIRM

2450 Maitland Center Pkwy, Suite 202
 MAITLAND, FLORIDA 32751

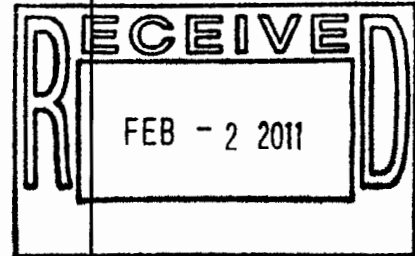
Bill To
Michael J. Roper, Esquire Bell & Roper P.A. 2707 East Jefferson Street ORLANDO, FL 32803

Mediation Invoice

Date	Invoice #
1/31/2011	11JF25B

Fed. Tax I.D.# 59-3561979

Description	Amount
ORTIZ-CARBALLO v. MARION COUNTY CLERK OF THE CIVIL COURT Date of Mediation: January 31, 2011 Mediation services rendered by J. Joaquin Fraxedas, including review of mediation summaries and materials; conduct mediation conference; and any travel. THE AMOUNT SHOWN BELOW IS YOUR SHARE OF THE FEES AND COSTS (1/2). 5 hrs. x \$375/hr. ***PLEASE DO NOT DIVIDE THE AMOUNT SHOWN***	937.50



PAYMENT FOR SERVICES IS DUE UPON RECEIPT. PLEASE MAKE CHECKS PAYABLE TO FRAXEDAS MEDIATION FIRM

***** PLEASE RETURN A COPY OF THIS INVOICE WITH YOUR PAYMENT AND INDICATE THE INVOICE NUMBER ON YOUR CHECK***.**

Total	\$937.50
Payments/Credits	\$0.00
Balance Due	\$937.50

Phone #	Fax #	E-mail	Web Site
407-661-5757	407-661-9006	rfraxedas@fraxedas.com	www.fraxedas.com

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ANTONIO J. ORTIZ-CARBALLO

Plaintiff,

v.

CASE NO.: 5:08-CV-00165-WTH-GRJ

DAVID R. ELLSPERMANN,
CLERK OF THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA

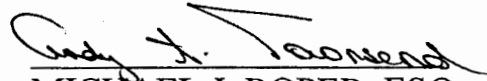
Defendant.

NOTICE OF MEDIATION

PLEASE TAKE NOTICE that, upon agreement of the parties, the Mediation Conference has been scheduled and will now take place on Monday, January 31, 2011 at 10:00 a.m. The Mediator will be Jay Fraxedas, Esquire and the Mediation Conference will be held at the Offices of Fraxedas Mediation, 2450 Maitland Center Parkway, Suite 202, Maitland, Florida 32751.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the within and foregoing has been sent by U. S. Mail on January 20th, 2011, to David Sacks, Esquire, 1017 LaSalle Street, Jacksonville, Florida 32201.



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MARY J. WALTER

January 21, 2011

**ATTORNEY CLIENT COMMUNICATION
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Ms. Jaime Acker
Claims Analyst, Growth Enterprises
Chartis Financial Lines Claims
Post Office Box 25947
Shawnee Mission, KS 66225

RE: Insured: Marion County
 Claimant: Anthony Ortiz-Carballo
 Claim No.: EV138237
 Date of Loss: June 11, 2007
 Our File No.: 026-296

Dear Ms. Acker:

We take this opportunity to provide you with our interim status and mediation report in accordance with PGIT's litigation guidelines.

PRESENT STATUS

This action arises from Plaintiff's employment with the Clerk. Plaintiff has brought suit against the Clerk in his official capacity pursuant to 42 U.S.C. §§1981 and 1983, Title VII of the Civil Rights Act of 1964 and the Florida Civil Rights Act of 1992. Plaintiff alleges he was subjected to (1) disparate treatment discrimination (Counts I, II and III); (2) a hostile work environment (Counts IV, V and VI); (3) retaliation (Counts II, III, V and VI); and (4) disparate impact discrimination (Counts VII, VIII and IX).

*7/5/11
1/25/11*

Ms. Jaime Acker

January 21, 2011

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Plaintiff has brought suit against Ellspermann in his individual capacity pursuant to 42 U.S.C. §§1981 and 1983 for disparate treatment (Count III); hostile work environment (Count VI); disparate impact discrimination (Count IX); and retaliation (Counts III and VI). Plaintiff also seeks punitive damages against Ellspermann.

This action is pending in the United States District Court Middle District of Florida, Ocala Division before Judge W.M. Terrell Hodges. The Court recently entered an Order partially granting and partially denying Ellspermann's Motions for Summary Judgment. The Court granted summary judgment in favor of Ellspermann with respect to the claims of retaliation set forth in Counts II and III, the hostile work environment and retaliatory harassment claims set forth in Counts IV, V and VI and the claims of disparate impact discrimination set forth in Counts VII, VIII and IX. Therefore, the only remaining claims are the claims of disparate treatment set forth in Counts I, II and Count III.

This case is set for jury trial on the Court's three week trial docket commencing February 28, 2011.

BASIC FACTS

Plaintiff was hired on November 18, 2005 as an at-will employee whose employment could be terminated at any time with or without notice. On the date Plaintiff was hired as a Clerk I, he signed a statement acknowledging the same. He was promoted to the position of Clerk II on June 7, 2006. Plaintiff's direct supervisor during the entire course of his employment was Denise Kingsley. Kingsley's supervisor was Ozieta Landers Reid, Supervisor for Family Civil Division. Landers' supervisor was Jaymi Kudary, Civil Courts Manager. During the course of Plaintiff's employment he consistently received good evaluations which were performed by Kingsley then reviewed and approved by the Clerk. Indeed, Kingsley recommended Plaintiff for the promotion to the position of Clerk II which was subsequently approved by the Clerk.

On March 5, 2007, Landers received a written memorandum from Plaintiff alleging that two other Clerks, Jennifer Rodriguez and Roseanne Anderson, were not performing their job functions, acted in an unprofessional manner and needed to be more closely supervised. He also requested to be reassigned to another division because he did "not want to deal with this immature behavior." The

Memorandum did not contain any allegations or complaints of harassment, discrimination or disparate treatment. After receiving the Memorandum, Landers met with Plaintiff and Kingsley to discuss the complaints. During that meeting, Plaintiff reiterated the allegations contained in the Memorandum, but not once did he complain about any improper treatment he was experiencing nor did he complain of discrimination directed towards him or any other employee. Plaintiff's request to be reassigned was also discussed and he ultimately agreed to withdraw same. Landers informed Plaintiff she would meet with all the employees involved and encourage them to do a better job of getting along

In late March of 2007, an issue arose concerning the volume of the ringer on Plaintiff's telephone. At that time Plaintiff was one of four Deputy Clerks working in the Domestic Violence Division. He routinely reduced the volume of the ringer on his phone to a "low" level because he is allegedly startled by loud noises such as the ringing of a telephone. On March 29, 2007, Kingsley advised all staff, including Plaintiff, that the ring volume for all telephones was to remain at level 4 because calls transferred from the Family Civil Division were going unanswered. Kingsley indicated she had personally raised the ring volume on two telephones, but later that same day discovered the ring level had been reduced.

On April 3, 2007, Kingsley met with Plaintiff to discuss this issue during which Plaintiff advised Kingsley he would not comply with her request because having the ring volume at that level startled him. Kingsley advised Plaintiff the directive in question was not just hers, but had been approved by her supervisor, Landers. Plaintiff responded he still would not comply, and was then disciplined for his refusal to comply with a direct request by his supervisor and provided with an opportunity to respond to the discipline. Although he provided a written response, his response is devoid of any complaint about harassment, discrimination, or retaliation.

On April 4, 2007, Plaintiff directed a Memorandum to the Clerk complaining of the discipline and accused Kingsley of abusing her authority. This memorandum was also devoid of any allegations of race or national origin discrimination. In response, on April 23, 2007, the Chief Deputy Clerk of Administrative Services, Jack Suess, and Kudary met with Plaintiff to discuss the issues raised in the memorandum. Suess advised Plaintiff that any direction from his supervisor, which was not immoral or illegal, was to be complied with and

Ms. Jaime Acker

January 21, 2011

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considered to be a direct instruction from the Clerk. Again, no issue of discrimination or retaliation was raised during this meeting.

On May 1, 2007, another meeting was held between Plaintiff, Suess and Kudary during which Plaintiff was presented with various options to deal with the issue regarding the ring volume on his telephone. Plaintiff elected to keep the ringer lowered while he was present at his desk, but agreed to increase the ring volume on the telephone every time he stepped away from his desk.

As a result of the continuing administrative issues between Plaintiff and Kingsley related to his work assignments and desk location, on June 11, 2007, the Clerk met with Plaintiff, Kingsley, Kudary and Landers. During the meeting Plaintiff, without any justification, accused Kingsley of trying to sabotage him and set him up for termination. The Clerk concluded this unsubstantiated, disrespectful, and insubordinate accusation against Plaintiff's direct supervisor, in the Clerk's presence, evidenced an irretrievable breakdown of the employee-supervisor relationship and Plaintiff's employment with the Clerk's Office.

The Clerk ended the conference and afforded Plaintiff the opportunity to resign in lieu of termination, which Plaintiff accepted. At no point during this meeting did Plaintiff complain about discrimination or retaliation based on a prior complaint of discrimination. However, on June 12, 2007, Plaintiff called the Clerk's Office to verbally rescind his resignation and was thereafter terminated.

On June 13, 2007, the Clerk sent a memorandum to Plaintiff confirming the retraction of his resignation and summarizing the June 11, 2007 meeting. On June 25, 2007, Plaintiff responded to that memorandum and disputed he had been disrespectful and disruptive to the operations of the office and the relationships within the office. Yet again, Plaintiff never mentioned any complaint about discrimination, harassment, or disparate treatment.

In support of his disparate treatment claim, Plaintiff has identified Sandra Pruitt and Tammy McIntyre, both Caucasians, as comparators. Like, Plaintiff, Pruitt and McIntyre were terminated for insubordination. Plaintiff asserts that although Pruitt and McIntyre engaged in similar behavior they were disciplined less harshly, in that, they were afforded multiple opportunities to correct and improve their behavior while he was not and which he contends violates the Clerk's progressive discipline policy. In support of his argument that Ellspermann

harbored discriminatory animus towards Hispanics, Plaintiff has identified Wanda Cryer, a probationary Hispanic employee, who also terminated without the use of the progressive discipline policy.

LEGAL ISSUES AND ANALYSIS

The only remaining claim is for disparate treatment regarding whether Ellspermann treated Plaintiff differently than Pruitt and McIntyre by not following his progressive discipline policy with regard to Plaintiff's behavior.

I. DISPARATE TREATMENT:

When a plaintiff alleges discriminatory discipline, to determine whether employees are similarly situated, the Eleventh Circuit evaluates whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways. *Burke-Fowler*, 447 F.3d 1319, 1323 (11th Cir. 2006); *Thomas v. Dept. of Corrections*, 377 Fed.Appx. 873 (11th Cir. 2010). When making that determination, the Eleventh Circuit requires that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999). Thus, there is a high bar in the Eleventh Circuit for comparator evidence to be viable.

The Middle District of Florida has specifically stated that in order to be similarly situated, the individuals with whom the plaintiff seeks to compare his treatment must have dealt with the same supervisor, have been subject to the same standards, and must have also engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment. *See Patterson v. Wal-Mart Stores, Inc.*, 1999 WL 1427751 (M.D. Fla. 1999) (citing *Williams v. Publix Warehouse*, 1995 WL 224423, 4 (M.D. Fla. 1995)).

Here, Plaintiff has identified Sandra Pruitt and Tammy McIntyre as comparators. Specifically, Plaintiff alleges that Pruitt and McIntyre engaged in similar behavior but were disciplined less harshly. However, the record is replete with evidence that Pruitt and McIntyre are not appropriate comparators because they did not engage in "nearly identical" misconduct as Plaintiff, were not overseen by the same supervisors, worked in different departments than Plaintiff,

did not engage in multiple acts of insubordination prior to their termination and agreed to improve their behavior after meeting with Ellspermann. (Plaintiff's Exhibits 20, 21). Importantly, the quality of the misconduct by both Pruitt and McIntyre are different from Plaintiff's misconduct, in that, neither of them committed the misconduct in Ellspermann's presence, unlike Plaintiff.

A. SANDRA PRUITT:

Plaintiff claims that Pruitt is a proper comparator because she engaged in the same misconduct but was treated more favorably than he was. This is simply not true.

Pruitt was employed as a Clerk I in the Traffic Department. Her immediate supervisor was Karen Rodgers. Prior to her termination, Ellspermann met with Pruitt to discuss her profane language and aggressive behavior towards her co-workers. (Plaintiff's Exhibit 21) During that meeting, Pruitt acknowledged her behavior and agreed to improve her attitude. Insubordination was never the subject of any prior warnings to Pruitt.

On January 30, 2007, Ellspermann was advised that Pruitt had engaged in two incidents of inappropriate behavior towards her supervisor. The first incident involved Pruitt giving her supervisor, Rodgers, the finger and mouthing an expletive behind Rodgers' back. The second incident involved Pruitt telling a co-worker that she "hated her f---ing job." Ellspermann determined that Pruitt's actions towards her supervisor were both disrespectful and unacceptable and immediately terminated her employment.

Based on the above, it is clear that Pruitt and Plaintiff did not engage in "nearly identical" misconduct. While Ellspermann did give Pruitt a warning before her termination, that warning was based on Pruitt's behavior towards her co-workers and not an act of insubordination. Conversely, the purpose of Ellspermann's meeting with Plaintiff was to discuss his two prior incidents of insubordination towards his supervisor which began when he refused to follow her specific instructions regarding the volume of his telephone. Moreover, during Plaintiff's meeting with Ellspermann, Plaintiff challenged and opposed his supervisor's authority in Ellspermann's presence by accusing his supervisor of sabotaging his career and trying to get him fired. Pruitt never engaged in any such behavior during her meeting with Ellspermann, but instead admitted that she needed to improve her behavior and committed to doing so. Contrary to Plaintiff's

allegations, it is clear that Pruitt was not disciplined less harshly for committing the same or similar misconduct. Indeed, once Pruitt's behavior escalated to insubordination towards her supervisor she, like Plaintiff, was immediately terminated.

B. TAMMY MCINTYRE:

Plaintiff has also identified McIntyre as a comparator. However, like Pruitt, McIntyre is not a proper comparator. McIntyre was a Clerk II in the Marriage License/Passport Department. Her supervisor was Nicole Kendrick. On January 10, 2006, Ellspermann met with McIntyre to discuss her inappropriate behavior (rudeness, belittling and disrespect) towards her co-workers and supervisor. (Plaintiff's Exhibit 20) McIntyre had received a prior warning for inappropriate behavior towards her co-workers, not insubordination towards her supervisor. During the meeting with Ellspermann, McIntyre, like Pruitt and unlike Plaintiff, took responsibility for her actions and expressed a desire to improve her behavior. In fact, McIntyre even apologized for her behavior. Conversely, Plaintiff, during his meeting with Ellspermann, did not express any desire to correct his insubordinate behavior, but instead, directed accusations at his supervisor which clearly indicated his complete lack of respect for her authority.

The incident which ultimately led to McIntyre's termination occurred on September 12, 2006, when McIntyre was directed by her supervisor not to accept any customers at 4:45 p.m. Instead, McIntyre was instructed to count her cash drawer. On that date, Kendrick asked another clerk, Betty Schenck, to perform a civil ceremony. However, McIntyre completely disregarded her supervisor's instructions to count out her cash drawer and informed Schenck that she would perform the civil ceremony. This was a direct violation of her supervisor's instruction. As such, on September 18, 2006, Ellspermann met with McIntyre and immediately terminated her employment based on her failure to follow her supervisor's instructions. Unlike Plaintiff, McIntyre's misconduct was not committed in Ellspermann's presence and did not involve a direct confrontation with her supervisor. Notwithstanding, McIntyre was not treated more favorably than Plaintiff since, like Plaintiff, she was immediately terminated once she did engage in insubordination. Based on the above, McIntyre is not an appropriate comparator.

C. WANDA CRYER:

Plaintiff alleges that Cryer, a Hispanic female, was also treated less favorably by Ellspermann when he terminated her at the end of her probationary period. However, Cryer, did not engage in similar or nearly identical misconduct as either Pruitt or McIntyre. Cryer was not terminated for insubordination; instead, she was terminated due to excessive absenteeism, tardiness and poor work performance. Moreover, Cryer was a probationary employee while Pruitt and McIntyre were full time employees. *See Bricknell v. City of St. Petersburg*, F.Supp.2d *10 (M.D. Fla. 2006) (finding that probationary officer was not similarly situated to officers who had completed their probationary period). Further, Cryer's supervisor recommended her termination whereas Pruitt and McIntyre's supervisors did not. Clearly, Cryer is not similarly situated to either Pruitt and McIntyre and any evidence relating to her termination would not be insufficient to rebut the legitimate non-discriminatory reasons proffered for Plaintiff's termination.

D. PRUITT, MCINTYRE AND PLAINTIFF'S MISCONDUCT WERE NOT NEARLY IDENTICAL:

While it is true that Pruitt, McIntyre and Plaintiff were all terminated for insubordination, neither Pruitt nor McIntyre made any accusations against or engaged in insubordinate behavior towards their supervisors in the presence of Ellspermann. Additionally, it is abundantly clear that the warnings given to Pruitt and McIntyre prior to their terminations were not for insubordination. Instead it was for impatient, rude or angry behavior primarily towards their co-workers and not for refusing to obey a directive from their supervisor on more than one occasion. Like Pruitt and McIntyre, it was Ellspermann's intention to utilize the progressive discipline policy with Plaintiff. Thus, at the time Ellspermann held the June 11, 2007 meeting there was no intent to terminate Plaintiff's employment. Instead the meeting was held to try and resolve Plaintiff's complaints and issues with his supervisor. This is supported by the termination memorandum sent to Plaintiff on June 13, 2007 which clearly states that Ellspermann's decision to terminate Plaintiff was based on the two previous incidents of insubordination as well as Plaintiff's conduct during the June 11, 2007 meeting wherein he confronted and accused his supervisor of sabotaging his career and trying to get him fired.

Unlike Pruitt and McIntyre, during his meeting with Ellspermann, Plaintiff confronted and challenged his supervisor in Ellspermann's presence. Further, unlike Pruitt and McIntyre, whose actions were observed by their supervisors and then reported to Ellspermann, here, Ellspermann was able to personally observe Plaintiff's insubordinate behavior. That in and of itself is sufficient to distinguish Plaintiff's misconduct from that of Pruitt and McIntyre.

The courts have recognized that there are clearly different degrees of insubordination and uncooperative work conduct, and different types and degrees of misconduct may warrant different types and degrees of discipline. *Burke-Fowler*, 447 F.3d at 1325; *Seldon v. Total System Services, Inc.*, 653 F.Supp. 1349, 1372 (M.D. Ga. 2009). Here, Plaintiff has failed to meet his burden of producing evidence of a comparator who engaged in two prior incidents of insubordination towards a supervisor, who was insubordinate to his supervisor in Ellspermann's presence and who was afforded more favorable treatment. Since neither Pruitt nor McIntyre are appropriate comparators, Plaintiff cannot establish a *prima facie* case of disparate treatment.

II. TERMINATING PLAINTIFF WITHOUT USING THE PROGRESSIVE DISCIPLINE POLICY IS NOT EVIDENCE OF PRETEXT.

As an initial matter, Ellspermann did not violate the progressive discipline policy as this policy provides that levels of discipline may be skipped for serious offenses. Specifically, Section 12.01 of the Personnel Rules and Regulations provides as follows:

- B. Different situations may require different treatment in terms of disciplinary action. The Clerk retains the right to treat situations differently based on extenuating circumstances. The decision to impose discipline or to forego the imposition of discipline in an individual case does not necessarily create a precedent for future cases if the surrounding circumstances differ.

- C. The following guidelines are not to be construed as limitations upon the rights of the Clerk. The policies provide *recommended* penalties to apply to specific offenses. This

means that a more severe or less severe penalty may be issued than that which appears in the guidelines, if it is justified.

Here, the discipline policy allows Ellspermann to immediately terminate Plaintiff without using progressive discipline. Thus, Plaintiff's termination was not a violation of the progressive discipline policy since Ellspermann specifically reserved the right to forego progressive discipline when extenuating circumstances such as in the instant case exist. *See also, Slater v. Progress Energy Serv. Co.*, 2010 WL 3788824 (M.D. Fla. Sept. 24, 2010) (holding that mere allegation that progressive discipline policy was violated is insufficient to establish pretext when policy provides that levels of discipline may be skipped); *Kaufman v. AutoNation, Inc.*, F. Supp. 2d *12 (S.D. Fla. 2000) (holding that failure to follow progressive discipline policy was not evidence of pretext in light of fact that discipline policy also allowed for immediate termination without counseling sessions).

Even assuming *arguendo* that Ellspermann failed to follow the progressive discipline policy, the Eleventh Circuit has clearly stated that deviation from company policy, standing alone, does not raise an inference of discrimination. *Mitchell*, 186 F.3d at 1355; *see also Saunders v. Emory Healthcare, Inc.*, 360 Fed.Appx. 110, 115 (11th Cir. 2010) (holding that Emory's failure to follow its hiring policies did not demonstrate that its proffered reason was pretextual); *EEOC v. Texas Instruments Inc.*, 100 F.3d 1173, 1182 (5th Cir. 1996) (deviation from company policy not evidence of discrimination, absent a nexus between deviation and employee's protected status); *Friedel v. City of Madison*, 832 F.2d 965, 973 (7th Cir. 1987) (inaccurate application of departmental policy not enough to prove discrimination).

The law is clearly established that a defendant's proffered reason is not pretext for discrimination "unless it is shown both that the reason was false, and that discrimination was the real reason." *Brooks v. County Com'n of Jefferson County*, 446 F.3d 1160, 1163 (11th Cir. 2006); *Springer v. Convergys Customer Mgmt. Group, Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007). Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that burden head on and rebut it. *Chapman v. AI Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000).

Here, Ellspermann has proffered several legitimate non-discriminatory reasons for Plaintiff's termination, to wit: Plaintiff's admittedly outright refusal to

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comply with Kingsley's directive regarding the ring volume of his telephone; his unfounded accusations against Kingsley during the June 11, 2007 meeting; his utter lack of respect for his supervisor which demonstrated their relationship was irretrievably broken; and his insubordinate behavior towards his supervisor in Ellspermann's presence. Nothing in the record establishes the falsity of Ellspermann's proffered reasons for terminating Plaintiff or that said reasons were pretextual. Moreover, all the proffered reasons are ones that would motivate a reasonable employer to take the same action as Ellspermann.

There is nothing to suggest that confrontational, challenging, insubordinate and utterly disrespectful behavior committed in Ellspermann's presence is the type of infraction that warrants the use of progressive discipline. Moreover, common sense tells us that progressive discipline in this situation would be pointless since the relationship between Plaintiff and his supervisor was irretrievably broken and beyond repair. Thus, any argument that Ellspermann did not impose progressive discipline on the Plaintiff is insufficient to permit a reasonable fact finder to conclude that pretext exists especially in light of the fact that the discipline policy specifically provides that Ellspermann can impose more severe discipline such as immediate termination. Even assuming *arguendo* that Ellspermann failed to use progressive discipline, it is merely a scintilla of evidence which does not show that the proffered reasons for terminating Plaintiff were pretexts for discrimination.

DAMAGES

Plaintiff is seeking damages for emotional distress, mental anguish, loss wages, front pay and punitive damages. He is also seeking an award of attorneys' fees and costs.

ATTORNEY'S FEES

In this case, perhaps the most significant source of potential damages is actually in attorney's fees. Pursuant to Title VII, a prevailing plaintiff is entitled to attorney's fees, based upon time expended multiplied by a reasonable hourly rate. That recovery is not tied to the damage award secured by Plaintiff. It is possible that Plaintiff's attorney's fees through trial, regarding the claims against the Clerk, may amount to at least \$100,000.00.

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In the event we prevail on the claim for disparate treatment, Plaintiff would not be entitled to recover attorney's fees.

EVALUATION

Mediation is tentatively scheduled for January 31, 2011.

In light of our prior agreement with Plaintiff's counsel, Plaintiff's opening demand will be \$250,000 to which the Defendant will respond with an offer of \$50,000. Based on the high/low presented by Plaintiff, it appears that he is hoping to recover at least \$150,000. We can try and get this resolved at mediation for closer to \$100,000. We hope that Plaintiff's counsel will negotiate in good faith to significantly reduce the distance between our respective positions and that we are able to reach a settlement that is acceptable to both parties.

FUTURE ANTICIPATED DEFENSE COST

This case will likely be moderately expensive to defend through trial. The depositions of Plaintiff, the Clerk and several of his employees have already been taken. We have currently scheduled meetings to prepare the Clerk and his staff for the trial and continue to prepare for trial in the event this matter is not resolved at mediation.

If you have any questions regarding the above, please do not hesitate to contact me.

Very truly yours,



Cindy A. Townsend

CAT/em

cc: David Ellspermann
Katherine Glynn, Esq.
Yari Benitez