STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VICTORIA CARTER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-1182
	)	
AT AND T CORP.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case before Administrative Law Judge W. David Watkins of the Division of Administrative Hearings, on October 24, 2012, in Jacksonville, Florida.

APPEARANCES

For Petitioner: Neil L. Henrichsen, Esquire
Henrichsen Siegel, P.L.L.C.
1648 Osceola Street
Jacksonville, Florida 32204

For Respondent: Anthony Hall, Esquire
Melanie Zaharias, Esquire
Littler Mendelson, PC
Suite 1250
111 North Magnolia Avenue
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner was subjected to discrimination by retaliation in violation of the Florida

Civil Rights Act (FCRA), sections 760.01-760.11, Florida Statutes.[1/]

PRELIMINARY STATEMENT

On September 20, 2011, Petitioner filed an employment complaint of discrimination with the Florida Commission on Human Relations (FCHR), alleging that Respondent had retaliated against Petitioner because she filed an Equal Employment Opportunity Commission (EEOC) Charge and internal complaints with Respondent alleging sex discrimination. Thereafter, FCHR conducted an investigation, and on February 27, 2012, issued its determination of "no cause." Dissatisfied with the outcome of the FCHR investigation, Petitioner timely filed a Petition for Relief, alleging that she was the victim of unlawful retaliation committed by Respondent, and requesting an administrative hearing. On April 2, 2012, FCHR forwarded the petition to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal administrative proceeding.

Pursuant to notice, the formal administrative hearing was held on October 24, 2012. At the hearing, Petitioner testified on her own behalf and presented the testimony of Diane Smith, Marty E. Snipes, James Morris, and Amy Topnick. Petitioner's Exhibits 2-8, 11-14, 16-23, 26-28, and 30 were received into evidence. Respondent presented the testimony of Albert Miller.

Respondent's Exhibits 5, 12, 14, 22, 25-29, 31, 33, and 34 were received into evidence.

At the conclusion of the final hearing, the parties stipulated that proposed recommended orders would be filed within 20 days of the filing of the one-volume official transcript with the Division, which occurred on December 17, 2012. However, Petitioner subsequently filed a request for extension of time for the parties to file their proposed recommended orders, and that request was granted, without objection. Thereafter Petitioner and Respondent timely filed Proposed Recommended Orders, both of which have been carefully considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the testimony and documentary evidence presented at hearing, the demeanor and credibility of the witnesses, and on the entire record of this proceeding, the following findings of fact are made:

Background

1. Petitioner, Victoria Carter (Petitioner or Ms. Carter), began her employment with AT&T on July 28, 2008, as a Directory Advertising Sales Representative (DASR). As a DASR, it was Ms. Carter's responsibility to grow advertisement sales to AT&T's current customer base as well as sell advertising to new

customers. Prior to the DASR position, Petitioner's 20-year employment career had been entirely in sales.

2. Petitioner's initial training with AT&T consisted of a three-month program in Atlanta, Georgia, called the University of Excellence. Petitioner successfully completed this training.

3. AT&T holds four advertising sales "campaigns" per year. The objective of each campaign is to sell advertisements and create new business in a specified geographic area. Each campaign has three to four teams, which consist of six to eleven DASRs. Each team is led by an area sales manager (ASM).

4. Following her completion of training in Atlanta, Petitioner went to work in sales campaigns from October 2008, through the summer of 2009. These campaigns focused on advertising sales to customers in the Gainesville, Jacksonville, Jacksonville Beach, and Palatka, Florida, markets.

5. Petitioner was successful as a DASR early on in her career with AT&T. She landed a large account, Emergency Dental, which elevated her into the President's Club, in recognition of outstanding sales.

6. Petitioner received congratulatory letters from the Southeast Regional Vice President of Sales for AT&T in August 2009, for exceeding her sales objectives on the Jacksonville and Jacksonville Beach campaigns.

7. Also in 2009, Petitioner was awarded a Perfect Customer Quality Award (Silver Ranking) which was signed by several high-ranking AT&T executives, including Regional Sales Manager Matt Currey.

Petitioner's Employment Under ASM Morris

8. In November 2009, Petitioner was switched to the Jacksonville campaign, which was led by James "Al" Morris. Mr. Morris selected Petitioner to be on his team because of her successful sales record. Mr. Morris was Petitioner's direct supervisor from November 2009, until the end of the Jacksonville campaign in June 2010.

9. In November 2009, Mr. Morris advised Petitioner (and the other DASRs) that due to the rollout of new computer software and the attendant training they would not be permitted to go into the field to sell to existing customers until late January 2010. Instead, the team sales reps were only to sell to non-billing (new) accounts from November 2009, through January 2010.

10. From the outset of their relationship, Mr. Morris observed that Petitioner did not want to follow AT&T policies and procedures. Moreover, Petitioner did not demonstrate a willingness to be self-sufficient, or a desire to learn the information systems to effectively do her job.

11. Mr. Morris observed that Ms. Carter wanted other DASRs to do her work for her, including Elliott Hartman. Mr. Hartman, who was on an entirely different team than Petitioner and did not report to Mr. Morris, would on occasion enter Petitioner's work into the system for her. This was a clear violation of AT&T policy as DASRs were required to process their own paperwork. Consistent with this policy Mr. Morris did not permit any of his team members, much less someone not on his team, to key in information for other DASRs. Accordingly, Mr. Morris instructed Mr. Hartman not to enter in Petitioner's work for her.

12. In December 2009, Petitioner sought and obtained a restraining order against Terry Hartman, Elliott Hartman's wife. As stated by Petitioner in the Charge of Discrimination she filed with the FCHR/EEOC on December 31, 2009, the restraining order was necessary because:

> In approximately May 2009, a coworker's wife began stalking me and making delusional and completely false accusations pertaining to my having more than a working relationship with her husband. In late November or early December of 2009, the situation had become so stressful and frightening that I was forced to seek a restraining order against the woman.
>
> (Petitioner's Ex. 3)

13. Notwithstanding the above statement, made under penalty of perjury, Petitioner admitted at hearing to having had a sexual relationship with Mr. Hartman that lasted approximately one year.

14. Prior to the issuance of the restraining order Petitioner had informed the AT&T human relations department that she was being stalked by Mrs. Hartman. On the day the restraining order was issued, December 3, 2009, Petitioner also spoke with the General Manager, Matt Currey, and Mr. Morris about the situation with the co-workers wife.

15. Following her conversation with Mr. Morris and Mr. Currey on December 3, 2009, Petitioner perceived that she was suddenly treated very differently by Mr. Morris. For example, during the campaign review held that same day, Mr. Morris "was basically yelling" at Petitioner, and a co-worker was instructed not to assist Petitioner with entering information into the new computer system.

16. According to Petitioner, in the middle of December 2009, Mr. Morris and Mr. Currey also yelled at Petitioner over the telephone. During this communication, she was directed to immediately return to the office for the “YP Connect” training test that she had previously scheduled to take after her Christmas vacation. Petitioner informed them that she could not immediately return to the office because her automobile had a flat tire. In response, Mr. Morris and Mr. Currey directed Petitioner to take a picture of the flat tire to corroborate her story. However, since Petitioner did not have a camera, upon her return to the office she presented a receipt for the tire repair as proof.

17. Petitioner ultimately completed the YP Connect test on January 4, 2010, and received a score of D+. Of the 31 DASR's who had taken the test as of January 4, 2010, 15 (nearly 50%) received scores of D+ or lower. Of the 15 DASRs who received a score of D+ or lower, 11 were males. There is no credible evidence in this record that Petitioner's test was graded in an unfair or discriminatory manner.

18. As part of the Jacksonville campaign, Emergency Dental, the large account that helped put Petitioner in the President's Club, became one of Ms. Carter's assigned accounts. According to the testimony of Mr. Morris, which is credible, Petitioner provided Emergency Dental terrible customer service. As a result, the client became very upset with Petitioner because she failed to meet his requests or follow-up with him. Emergency Dental even requested that Ms. Carter not handle their account, and accordingly, Petitioner's ASM, Mr. Morris, had to service the account. Emergency Dental ultimately received a very large adjustment for Petitioner's failure to process their paperwork properly and for errors in its ads.

19. Petitioner also had issues using General Manager Overrides (GMOs) as a sales tool. GMOs are discounts on advertising pricing that can only be offered with manager approval, and were to be used sparingly. DASRs are not permitted to offer discounts prior to manager approval.

20. Mr. Morris approved all but two of Petitioner's GMOs. The first involved Concrete Advantage, wherein Ms. Carter called Mr. Morris to approve a specific discount, which he did. However, when Petitioner arrived back at the office, it became apparent that Ms. Carter had offered Concrete Advantage a larger, unapproved discount, which was outside of Mr. Morris's approval authority. The second GMO denial occurred with Anderson Insurance, wherein Petitioner took it upon herself to offer an 81 percent discount off of the display ad and a total discount of 65 percent. Again, this discount was beyond Mr. Morris' authority and required vice president approval before a DASR could offer it. However, Petitioner nonetheless offered the discounts before receiving the necessary approval. Notwithstanding Petitioner's unauthorized discount offers, both of these GMOs were eventually approved by Mr. Currey in order to maintain good client relations.

21. Petitioner's Charge of Discrimination dated December 31, 2009, was mailed to AT&T on January 14, 2010. In her Charge, Petitioner alleged that she was treated differently after telling Mr. Morris about the restraining order against Ms. Hartman. Specifically, Petitioner alleged: (1) Mr. Morris would not allow Mr. Hartman to assist with closing accounts; (2) her requested GMOs were not approved; and (3) Mr. Morris requested that Carter return to the office to take the YP Connect test, but Petitioner had a flat tire and Mr. Morris asked that she take a picture of

the flat tire. All three of these allegations relate to incidents that occurred prior to December 31, 2009.

22. On January 7, 2010, Petitioner lodged an internal complaint with AT&T's ethics hot line. In the complaint Petitioner alleged that she was being "subjected to constant criticism, micro-management and intense scrutiny of sales contracts by managers." Petitioner also alleged that she was being treated differently from her male co-workers, including that she was "the only person required to take the YP Connect test immediately, even though there were other team members, including Premise Representative Scott Trimbull, and Elliot Hartman, who had not yet completed the test."[2/] Mr. Morris and Mr. Currey were specifically named in Petitioner's internal ethics complaint. Notably, this complaint also included the statement that Petitioner was being stalked by Mrs. Hartman, who was making "delusional statements" about a perceived relationship between Petitioner and Mr. Hartman.

23. The internal complaint was investigated by AT&T and closed as unsubstantiated. The report found that the managers charged in the complaint (Morris and Currey) were "performing job responsibilities ensuring policies and procedures are not being violated." (Petitioner's Ex. 2)

24. According to Petitioner, following her FCHR/EEOC charge and her internal ethics complaint, Petitioner's work continued to

be micromanaged and scrutinized. In addition, Mr. Morris would speak with Petitioner in a very hostile tone of voice, and she would sometimes walk out of his office shaking, distraught and taken aback by his behavior. According to Petitioner, Mr. Morris' demeanor was very angry and "very, very hostile, talking down to [Petitioner]." On one occasion Diane Smith, who worked with Petitioner and Mr. Morris in the same office, observed Mr. Morris calling Petitioner into his office and being vocal and condescending with her. Ms. Smith also observed that Petitioner exited the office and appeared "pretty shaken up."

25. On February 19, 2010, Petitioner filed a grievance with her union, Communications Workers of America (CWA) Local 3106, alleging she was being subjected to a hostile work environment. No specific factual allegations were included with the grievance, just that Petitioner was being subjected to "discrimination, harassment and inequity of treatment." However, at hearing Petitioner testified that she filed the grievance because she disagreed with Mr. Morris' decision not to approve a GMO for two accounts, Concrete Advantage and Anderson Insurance. The grievance was later retracted by Petitioner "per agreement between Matt Currey, GM and Elliott Hartman, CWA."

26. On May 12, 2010, Petitioner filed another grievance with her union because she had received a written warning for failing to follow Respondent's "reporting out" policy.

27. Petitioner filed a final grievance to receive pay for attending a prior grievance meeting. In response to this grievance Mr. Miller agreed to pay Petitioner and all other affected DASRs for their time at the meeting.

28. After the conclusion of the Jacksonville campaign in June 2010, Petitioner was not supervised by Mr. Morris again.

Petitioner's Employment Under ASM Amy Topnick

29. Following the Jacksonville campaign Petitioner's next assignment was the Palatka campaign. ASM Amy Topnick selected Petitioner for the Palatka campaign because Petitioner was a former peer and friend. Ms. Topnick and Petitioner started as DASRs at approximately the same time in 2008. Ms. Topnick did not speak with Mr. Morris about Petitioner before selecting her for the campaign, and Ms. Topnick was unaware of Petitioner's December 31, 2009, Charge of Discrimination.

30. After the Palatka campaign began, Ms. Topnick spoke with Mr. Morris about her team's composition, including Petitioner. Mr. Morris told Ms. Topnick that Petitioner had struggled in her position during the Jacksonville campaign and needed to be monitored for accuracy. Following this conversation with Mr. Morris, Ms. Topnick explained to Petitioner that this campaign would be Petitioner's chance to "redeem herself" from her past problems with the computer system and with her sales.

31. The Palatka campaign lasted from June 18, 2010, until August 3, 2010. According to Ms. Topnick's testimony, which is credible, Petitioner's performance during the Palatka campaign was "dismal, at best." Specifically, Petitioner did not handle her accounts; she did not keep track with the pacing of her accounts; and she did not follow-up with her clients. In addition, Ms. Topnick discovered that Petitioner did not know the pricing plan; was unable to maneuver through Respondent's computer applications in order to perform her job; failed to prepare for her accounts; failed to set appointments on a timely basis; and failed to properly answer customer queries. As a result of these serious shortcomings, Ms. Topnick had to handle a majority of Petitioner's accounts.

32. Although Petitioner received the credit for her accounts during the Palatka campaign, Ms. Topnick credibly testified that she, not Ms. Carter, actually handled the accounts. In August 2010, Albert Miller replaced Mr. Currey as Petitioner's General Manager. Petitioner does not allege that Mr. Miller discriminated or retaliated against her.

33. Following the Palatka campaign, Petitioner worked on the Gainesville campaign and continued to report to Ms. Topnick. The Gainesville campaign lasted until September 2010. In September 2010, Ms. Topnick had issues with Petitioner calling out without following the proper procedures.

34. Consistent with AT&T procedure, Ms. Topnick advised the Human Relations department of the problem she was having with Petitioner not complying with company procedure. In response, Petitioner claimed she was never told of the policy. No discipline was imposed on Petitioner as a result of this incident.

35. Ms. Topnick did not treat Petitioner differently than anyone else on her team. Ms. Topnick simply expected Ms. Carter to follow company procedures. Petitioner did not file an ethics complaint against Ms. Topnick during the time Ms. Topnick supervised her.

36. During the Palatka and Gainesville campaigns, Ms. Topnick was not aware that Petitioner had filed a Charge of Discrimination against Respondent. Furthermore, Ms. Topnick was unaware that Petitioner had filed several grievances involving Mr. Currey and Mr. Morris. Ms. Topnick credibly testified that no one, including Mr. Morris, Mr. Currey, or Mr. Miller ever suggested to her that she should retaliate against Petitioner in any way.

37. The credible evidence of record does not support a finding that Petitioner was targeted for retaliation, or that she was otherwise discriminated against. There is no credible evidence that Petitioner received unfavorable treatment based upon her gender or any other prohibited basis, or that other employees received more favorable treatment. To the contrary, the evidence

established that Petitioner's behavior and poor work performance merited the sometimes harsh and directly critical treatment and intense scrutiny she received from her managers.

Petitioner's Leave of Absence and Failure to Return to Work.

38. Beginning in May 2010, Petitioner developed health issues that progressively worsened. Specifically, Petitioner experienced migraine headaches and backaches that Petitioner attributed to stress at work. In an attempt to address these health issues, Petitioner sought counseling through Respondent's Employee Assistance Program.

39. Petitioner's last day at work was October 6, 2010. Due to the health problems she was experiencing, Petitioner was placed on short-term disability effective October 8, 2010.

40. On January 7, 2011, Petitioner filed a second complaint with the AT&T Human Relations Department, this time alleging that Ms. Topnick had made inappropriate comments about Carter's disability leave. At hearing, Ms. Topnick credibly denied ever making such comments.

41. Petitioner's short-term disability leave request was denied in January 2011, and Petitioner was given notice that she would have to reapply. On January 26, 2011, Petitioner filed her application for short-term disability appeal leave of absence, and on February 11, 2011, Petitioner was granted a 250-day

administrative leave of absence, also known as short-term disability appeal leave.

42. On July 28, 2011, Stacy Korzekwa, leave of absence administrator, extended Carter's short-term disability leave of absence through September 15, 2011. See Respondent's Ex. 27. In an email to Carter, Ms. Korzeka explained:

> Vickie:
>
> Per our conversation this afternoon, I have extended the STD Appeal Leave of Absence (LOA) through 9/15/11 to allow additional time for the decision of your 1st appeal with the AT&T Integrated Disability Service Center (IDSC). As I explained, this leave will continue to protect your absence while you go through the appeal process. The leave has a maximum duration of 450 days. I typically grant 250 days to allow the employee to complete their 1st appeal. The additional 200 days is granted when the employee requests an extension of the LOA while they complete the 2nd appeal (if necessary).
>
> Since the IDSC may not be able to render a decision on the 1st appeal for another 45 days, I'm extending the end date of your leave from 8/30/11 to 9/15/11 (approval email attached). Please note that the end date is just an estimate. You have a responsibility to mail a new LOA Application to me once the appeal decision is made.
>
> Once the IDSC renders a decision about your disability claim, they will mail you a letter regarding the decision. If any portion of your disability benefit is still denied, they will include another LOA application titled *Exhibit A2: Application for Extension of STD Appeal Leave of Absence.* You have 20 days from the date of that letter to mail me the new LOA Application if you want to remain on

> the STD Appeal LOA while you complete your 2nd appeal. I would process the application and give you the remaining balance (up to 450 days) for the leave.
>
> Please let me know if you have any questions.
>
> Stacy Korzekwa
> Leaves of Absence Administrator

At hearing, Petitioner acknowledged that she received this email.

43. Petitioner also acknowledged that she missed the deadline to file an application for a second leave of absence. Despite knowing she had missed the deadline, Petitioner nonetheless applied for a short-term disability leave of absence on September 7, 2011, stating: "I would like to request an extension on my Leave of Absence from AT&T at this time. I understand I have missed the deadline of 20 days from 8/5/11 when my attorney and I received the Exhibit A2 notice."

44. On September 16, 2011, Ms. Korzekwa sent Petitioner an email notifying her of the denial of her leave of absence appeal stating:

> Victoria:
>
> Attached is the determination email for the request for an extension of the STD Appeal LOA. One of the requirements for the leave is that the LOA application must be postmarked within 20 days of the denial letter date at the top of the form. Your form was postmarked effective 9/07/2011 and the denial uphold letter date was 8/05/2011.

45. Since Petitioner missed the leave of absence extension request deadline, General Manager Miller notified Petitioner on September 14, 2011, by letter that she would need to return to work not later than September 19, 2011, or face "disciplinary action up to and including termination." Despite the opportunity to return to work, Petitioner informed Mr. Miller that she was not able to return to work full-time. Inasmuch as Petitioner did not return to work, Respondent terminated Petitioner's employment on September 19, 2011.

46. As of the date of the hearing, Petitioner had not been employed since being terminated by AT&T. Petitioner explained that she had not yet been released by her doctors to return to work full-time, although her doctors "may have released me to work on a part-time basis."

47. Mr. Morris never had any discussions with Ms. Korzekwa about Petitioner or her Charge of Discrimination. One day after her termination from Respondent, on September 20, 2011, Petitioner filed the Charge of Discrimination at issue herein. The only allegation in this Charge was retaliation.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1) and 760.01, et seq., Fla. Stat.

49. Petitioner's case is based upon her allegation that Respondent discriminated against her by retaliation during her employment, in violation of the Florida Civil Rights Act, sections 760.01-760.11.

50. The retaliation charge at issue herein was filed on September 20, 2011. Alleged acts of discrimination which occurred more than 365 days from September 20, 2011, are time-barred and are not properly before the Division. To assert a claim under the Florida Civil Rights Act, a petitioner must first file a charge of discrimination with the FCHR within 365 days of the alleged violation. See § 760.11(1) Fla. Stat. A "past act of discrimination for which a party did not file a charge with the [FCHR] within the limitations period is legally equivalent to a discriminatory act that occurred before enactment of [the Florida Civil Rights Act]." Paldano v. Althin Medical, 974 F. Supp. 1441, 1444 (S.D. Fla. 1996). In National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), the United States Supreme Court held that a plaintiff must raise claims of discrete discriminatory and retaliatory acts through the filing of an EEOC charge within the applicable limitations period. Id. at 122. This holding is equally binding on parties asserting violations of the Florida Civil Rights Act. See City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008) (providing that federal case law interpreting Title VII is applicable to cases arising

under the FCRA). The Supreme Court explained that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." National Railroad, 536 U.S. at 113.

51. Ms. Carter's Petition for Relief alleges a pattern of harassing, condescending and disparaging treatment, and unfair criticism and scrutiny by management from the period of May 2009, through September 28, 2010, until shortly before she left AT&T on medical leave. (Petition for Relief, paragraphs 5 through 21). The vast majority of the allegations of discrimination found in paragraphs 5 through 21 of Ms. Carter's Petition occurred prior to September 20, 2010, and accordingly are time-barred and cannot form the basis of Ms. Carter's claim of retaliation.[3/] However, even were those allegations not time-barred, the facts adduced at hearing do not support a finding of discriminatory treatment of Petitioner by Respondent.

52. Petitioner claims that Respondent retaliated against her after she filed her 2010 Charge and that she was unlawfully terminated as a result. Under Title VII, "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because . . . [h]e has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter. 42 U.S.C. § 2000e-3(a).

53. In order to prevail, Ms. Carter has the ultimate burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice by discriminating against her. Fla. Dep't of Transp. v. J.W.C. Co. 396 So. 2d 778 (Fla. 1st DCA 1981).

54. No direct or statistical evidence of discrimination exists in this case. Therefore, a finding of discrimination, if any, must be based on circumstantial evidence.

55. The burden and order of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

56. To demonstrate discrimination under McDonnell Douglas Corp., Ms. Carter must first establish a prima facie case of discrimination. Thereafter, the employer may offer legitimate, nondiscriminatory reasons for its employment action. If the employer does that, in order to prevail, Ms. Carter must establish that the employer's articulated legitimate, nondiscriminatory reasons were a pretext to mask unlawful discrimination. Smith v. J. Smith Lanier & Co., 352 F.3d 1342 (11th Cir. 2000).

57. To establish a prima facie case of retaliation, Petitioner must show that: 1) she was engaged in an activity protected under Title VII; 2) she suffered an adverse employment action; and 3) there was a causal connection between the protected

activity and the adverse employment action. See Pennington v. City of Huntsville, 261 F.3d 1262 (11th Cir. 2001). To satisfy the causal connection requirement, Petitioner must establish that the protected activity and the alleged retaliatory action are not completely unrelated. Wideman v. Wal-Mart Store, Inc., 141 F.3d 1453 (11th Cir. 1998). Notably, the person who engaged in the alleged conduct must be aware of the protected activity. Gupta v. Fla. Bd. of Regents, 12 F.3d 571 (11th Cir. 2000).

58. It is undisputed that Petitioner's filing of her 2010 Charge of Discrimination is protected activity. However, Ms. Carter failed to establish the remaining elements of a prima facie case of retaliation.

59. Petitioner's allegations of unlawful termination are unfounded. On or about September 19, 2011, Petitioner refused to return to work. In essence, Petitioner abandoned her job that was open and waiting for her. An employee who voluntarily resigns cannot claim that she suffered an adverse employment action under Title VII. See Fannin v. Lemcko Florida, 2007 U.S. Dist Lexis 1267 (M.D. Fla. Jan. 5, 2007); Hammon v. DHL Airways, Inc., 165 F.3d 441 (6th Cir. 1999).

60. Furthermore, Petitioner cannot include any allegations that occurred before the protected activity (the filing of her December 31, 2009 Charge) as a retaliatory adverse employment action. Thus, Petitioner's complaints regarding GMO approvals and

the flat tire incident, which occurred before Petitioner's December 31, 2009 Charge, cannot be considered retaliatory as they occurred before Petitioner's protected activity, the filing of the December 31, 2009, Charge.

61. Even assuming Petitioner suffered an adverse employment action, there is no causal connection between her 2010 Charge and her September 2011 termination. Petitioner failed to make even a minimum showing to establish a causal element of a prima facie claim of retaliation, i.e. that the employer was actually aware of the protected expression at the time it took adverse employment action. A court will not presume that a decision-maker was motivated to retaliate by something unknown to him or her. Brungart v. BellSouth Telecommunications, Inc., 231 F.3d 791 (11th Cir. 2000); Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997). Indeed, Petitioner has presented no evidence that Ms. Korzekwa, the Leave of Absence Administrator who denied Petitioner's second appeal leave as untimely, had any knowledge whatsoever that Petitioner had previously filed an EEOC Charge in 2010. Furthermore, Petitioner presented no evidence that Ms. Korzekwa had knowledge of Petitioner's union grievances or her complaints through the Human Resources department. In fact, Mr. Morris, Ms. Topnick and Mr. Miller all credibly testified that they never discussed any such issues with Ms. Korzekwa.

62. Importantly, Petitioner acknowledged that she missed the deadline for her leave of absence appeal and that she did not return to work on September 19, 2011, as required. Consequently, there is no evidence of a causal link between Ms. Carter's termination and her 2010 Charge, and, under the facts found herein; no inference of a causal link arises. Since Petitioner cannot overcome the first hurdle of establishing a prima facie case of discrimination, her claim must fail.

63. Even if one assumes arguendo that Ms. Carter proved a prima facie case, Respondent provided a nondiscriminatory reason for terminating Petitioner. Specifically, Ms. Carter did not return to work on September 19, 2011, after being expressly notified in writing that her failure to return would result in "disciplinary action up to and including termination."

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition of Victoria Carter.

DONE AND ENTERED this 13th day of February, 2013, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of February, 2013.

ENDNOTES

[1/] All references to the Florida Statutes are to the 2012 version, unless otherwise noted.

[2/] Petitioner's assertion that Mssrs. Trimble and Hartman had not taken the YP Connect test as of the date of her complaint is inaccurate. According to an e-mail from Ted Kokkinos (the AT&T employee in charge of administering the test), which is credible, both took the test on January 4, 2010, the same day it was taken by Petitioner. (Respondent's Ex. 14)

[3/] Only two of Petitioner's allegations of discrimination arguably occurred on or after September 20, 2010. They are:

> 21. Through the month of September 2010, Topnick continued to threaten Ms. Carter with unwarranted discipline and potential termination for issues regarding her report submittals and Ms. Carter's alleged failure to properly communicate with management. Topnick also continued with criticism and condescending emails that were not legitimate.

> 22. Eventually, on September 28, 2010, Ms. Carter spoke with General Manager Miller, only to be met with more condescending speech. He responded, "guess you're in a bit of a pickle . . . You can't work with Al Morris and now Amy Topnick." The pattern of unfair criticism and scrutiny by management was a hostile work environment that caused Ms. Carter to be in a constant state of anxiety and uneasiness, resulting also in more back pain.
>
> (Victoria Carter's Petition for Relief, p.4,5)

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
Suite 100
2009 Apalachee Parkway
Tallahassee, Florida 32301

Neil L. Henrichsen, Esquire
Henrichsen Siegel, P.L.L.C.
1648 Osceola Street
Jacksonville, Florida 32204

Maureen Hernandez Sutton, Esquire
BellSouth Advertising and Publishing Corporation
d/b/a AT&T Advertising Solutions
10th Floor
2247 Northlake Parkway
Tucker, Georgia 30084

Anthony J. Hall, Esquire
Littler Mendelson PC
Suite 1250
111 North Magnolia Avenue
Orlando, Florida 32801

Melanie Zaharias, Esquire
Littler Mendelson, P.C.
Suite 1250
111 North Magnolia Avenue
Orlando, Florida 32801-2366

Cheyanne Costilla, Interim General Counsel
Florida Commission on Human Relations
Suite 100
2009 Apalachee Parkway
Tallahassee, Florida 32301

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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