STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

VICTORIA CARTER,

Petitioner,

v.

AT AND T CORP.,

Respondent.
_____/

EEOC Case No. NONE

FCHR Case No. 2011-02563

DOAH Case No. 12-1182

FCHR Order No. 13-036

FINAL ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

Petitioner Victoria Carter filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2010), alleging that Respondent AT and T Corp. committed unlawful employment practices on the basis of retaliation against Petitioner for filing an earlier discrimination complaint.

The allegations set forth in the complaint were investigated, and, on February 27, 2012, the Executive Director issued a determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held in Jacksonville, Florida, on October 24, 2012, before Administrative Law Judge W. David Watkins.

Judge Watkins issued a Recommended Order of dismissal, dated February 13, 2013.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact.

Filed May 8, 2013 10:35 AM Division of Administrative Hearings

Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner's Exceptions to Recommended Order," received by the Commission on February 28, 2013.

Petitioner's exception document contains 11 numbered paragraphs. Paragraphs 1 through 6 of the exceptions document take exception to the following Recommended Order findings of fact paragraphs: 9, 11, 32, 34 through 37, and 43 through 46. In each instance the exception presented takes issue with facts found, facts not found and / or inferences drawn from the evidence presented.

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999). Accord, Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005) and Eaves v. IMT-LB Central Florida Portfolio, LLC, FCHR Order No. 11-029 (March 17, 2011).

In addition, it has been stated, "The ultimate question of the existence of discrimination is a question of fact." Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, at 1209 (Fla. 1st DCA 1991). Accord, Coley v. Bay County Board of County Commissioners, FCHR Order No. 10-027 (March 17, 2010) and Eaves, supra.

Based on the foregoing, and noting that we have above adopted the Administrative Law Judge's findings of fact, Petitioner's exceptions to the indicated findings of fact are rejected.

Paragraphs 7 through 11 of Petitioner's exceptions document take exception to indicated Recommended Order conclusion of law paragraphs.

Having above adopted the Administrative Law Judge's conclusions of law, indicating that the Administrative Law Judge's application of the law to the facts results in a correct disposition of the matter, Petitioner's exceptions to the indicated conclusions of law are rejected.

Dismissal

The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 8th day of May, 2013.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Michell Long; and
Commissioner Mario M. Valle

Filed this 8th day of May, 2013,
in Tallahassee, Florida.

_____/s/_____
Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
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W. David Watkins, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 8th day of May, 2013.

By: _____/s/_____
Clerk of the Commission
Florida Commission on Human Relations

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VICTORIA CARTER,

Petitioner,

v.

AT&T CORP.,

Respondent.

_____/

Case No. 12-1182
FCHR No. 201102563

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

COME NOW the Petitioner, and makes the following exceptions to the Recommended Order of The Honorable W. David Watkins, the Administrative Law Judge of the Division of Administrative Hearings:

1. Paragraph 9 of the Recommended Order is erroneous as there is no record evidence that Mr. Al Morris observed regarding Petitioner "[f]rom the outset of their relationship that Petitioner did not want to follow AT&T policies and procedures. Tr. [1] 35.

2. Paragraph 11 of the Recommended Order is erroneous in that Mr. Morris did not allegedly observe that Petitioner wanted to have others do her work until after her protected activity. *Id.*

3. In the beginning of December 2009 things "went south" with Petitioner's relationship with Mr. Morris and Mr. Currey. *Id.* 35. At that time, Petitioner had filed for an order of protection against a co-worker's wife, and from the onset of that act

[1] "Tr." is the Transcript of Proceedings dated October 24, 2012 filed by agreement of the parties by overnight mail to the court.

Petitioner was subjected to intense scrutiny and micromanagement by Messrs. Morris and Currey. *Id.* Petitioner was also forced to file another grievance against Mr. Morris for his unreasonable actions regarding billing adjustments on sales contracts. *Id.* 55-56; Petitioner's Ex. 18. Two of the grievances were resolved in Petitioner's favor. *Id.* 56.During the time Mr. Morris supervised Petitioner following her EEOC Charge and internal complaints, Mr. Morris would commit to accompanying Petitioner on sales calls and then cancel at the last minute. *Id.* 58.Petitioner completed her work under Mr. Morris for the Jacksonville campaign, but received no formal discipline from him regarding her sales numbers. *Id.* 57.Mr. Morris admitted that he complained about Petitioner's General Manager Overrides ("GMOs) being excessive without having the full data he needed to make that determination. *Id.* 227-228, 206.Following Petitioner's notification of Messrs. Morris and Currey regarding the situation, Petitioner was suddenly subjected to different treatment by Mr. Morris. *Id.* 38. There was a campaign review during which Mr. Morris was basically yelling at Petitioner, and a co-worker was instructed not to assist Petitioner with entering information into a new computer system. *Id.*

4. The second sentence of Paragraph 32 of the Recommended Order is erroneous in that Ms. Topnick admitted that she was supervising Petitioner as late as September 2010. *Id.* 250-25

5. Paragraphs 34-37 of the Recommended Order are erroneous findings of fact. These facts are inconsistent with the facts of the record evidence. Mr. Morris spoke regularly with Ms. Topnick about the sales teams, and various individual sales representatives were always a subject of conversation. *Id.* 234-235. After Petitioner

learned she would be working with Ms. Topnick, Ms. Topnick told Petitioner that she was going to have a chance to redeem herself. *Id.* 63. After the Palatka campaign began, Petitioner was constantly threatened with termination by Ms. Topnick. *Id.* 64 (testimony of V. Carter). Petitioner worked with Ms. Topnick daily, five days a week. *Id.* 65-66. Early on during the Palatka campaign, Ms. Topnick would not go on ride-alongs with Petitioner and was condescending toward Petitioner. *Id.* 65-66. Later during the Palatka campaign, Petitioner started suffering physical symptoms of backaches, migraines and anxiety. *Id.* 64-65. When calling out for illness, Petitioner would make multiple attempts to contact Ms. Topnick, but she could not be reached. *Id.*Petitioner did not feel as if Ms. Topnick was treating her fairly in the workplace. *Id.* 73. Ms. Topnick was always threatening Petitioner with termination. *Id.* 138. Petitioner had personal paid time ("PPT") that had accumulated, but despite complying with the provisions of the union contract for taking such time, Ms. Topnick would not accommodate Petitioner's reasonable requests to take PPT. *Id.*66-68; Petitioner's Ex. 22. Petitioner had health issues that progressively worsened, which started in May 2010. *Id.* 68-69. Petitioner had migraines and backaches that were stress related, and there was nothing outside of work that caused these issues. *Id.* 69. Petitioner also sought counseling through the Respondent's EAP program. *Id.* 70. Even after the Palatka campaign, Ms. Topnick had a supervisory role over Petitioner. *Id.*70; 249 (testimony of A. Topnick). In September 2010, Petitioner emailed Ms. Topnick regarding Petitioner's attempt to contact Ms. Topnick three (3) times to advise her of Petitioner's absence from work with no response. *Id.* 250; Petitioner's Ex. 21. Ms. Topnick, however, then called Petitioner and left a message

that Petitioner had a half hour to call or the absence would be an unauthorized absence subject to discipline, but Topnick did not otherwise respond to Petitioner's email. *Id.* 250-25. Ms. Topnick also had to send Petitioner an email, in consultation with Respondent's HR, on September 10, 2010, stating that her threatened discipline would not materialize. *Id.*251; Petitioner's Ex. 20.For the time period of April 1, 2009 through September 30, 2010 as well as July 1, 2010 through September 30, 2010, Petitioner performed sales work within Respondent's first or second quartiles, which is a high sales ranking within Respondent's sales organization. *Id.* 61-62; Petitioner's Ex. 8.In fact, for the period of April 1, 2009 through September 30, 2010, Petitioner ranked 11th out of 26 sales employees, and Petitioner's performance was satisfactory. *Id.* 253-254 (testimony of A. Topnick); Petitioner's Ex. 8.Petitioner's sales performance was consistent over the Palatka campaign and at no time did Ms. Topnick take over Petitioner's sales. *Id.* 270 (testimony of V. Carter).

6. Paragraphs 43-46 of the Recommended Order fail to address the fact that while Petitioner was still on leave, in September 2011 Respondent required Petitioner to return to work at "full capacity." *Id.*79-80; Petitioner's Ex. 26. However, the 450 days of short-term disability Petitioner had been on was without pay. *Id.* 80. Petitioner attempted to seek an accommodation to return to work at some capacity, but was told that she would only be permitted to return to work at full capacity; otherwise she would be terminated. *Id.* 80, 139; 279-281, 288 (testimony of A. Miller). As of this time, Petitioner had not exhausted the 450 days of unpaid leave. *Id.* By letter dated September 19, 2011 from Mr. Albert Miller, Petitioner was officially notified of her termination and enclosed therewith was a B-form which was

placed in Petitioner's personnel file. *Id.* 81; Petitioner's Ex. 27. When Petitioner did not show up at work on September 19, 2011 she was terminated and a B-Form was filled out by Mr. Miller's assistant that stated: "Terminated, Victoria Carter, for misconduct consisting of unexcused absences, i.e., failure to substantiate or provide medical information regarding her absence, and failure to return to work." *Id.* 289-290; Petitioner's Ex. 27.However, prior to Mr. Miller's September 19, 2011 letter, Petitioner had informed Mr. Miller that she could not return to work because of her doctor's orders. Thus, the reason for Petitioner's termination as listed in the B-form was inconsistent with the known reason for Petitioner's inability to return to work at full capacity. *Id.* 292-294, 298-299; Respondent's Ex. 26.

7. Paragraph 50 of the Recommended Order contains erroneous statements of law as Petitioner has alleged continuing acts of retaliation and constructive discharge. The United States Supreme Court has recognized that the term "discriminate" in Title VII retaliation cases is not limited to "discriminatory actions that affect the terms and conditions of employment." *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2412-13 (2006). An employer can retaliate against an employee "by taking actions not directly related to his employment or by causing him harm outside the workplace." *Id*. at 2412. Thus, the anti-retaliation provision of Title VII extends "beyond workplace-related or employment-related retaliatory acts and harm." *Id*. at 2414. Further, the significance of an act of retaliation depends on the particular circumstances, thus "[c]ontext matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships.'" *Id*. at 2415 quoting *Oncale v. Sundowner Offshore Svcs, Inc*.,

523 U.S. 75, 81-82 (1998). A plaintiff must show that a reasonable employee would have found the challenged action materially adverse, meaning the action would have had the effect of dissuading another employee from making a charge of discrimination. *Id*. (citations omitted). Hostile work environment may also be shown by retaliatory harassment in the workplace: "The weight of authority supports the view that, under Title VII, the creation and perpetuation of a hostile work environment can comprise a retaliatory adverse employment action under 42 U.S.C. § 2000e-3(a)." *Noviello v. City of Boston*, 398 F.3d 76, 89 (2005 1st Cir.), citing, *Wideman*, 141 F.3d at 1456. Retaliatory harassment, like other discriminatory harassment, requires a showing of whether the bad acts, taken in the aggregate, are sufficiently severe or pervasive to constitute actionable harassment. *Id*. at 93. Thus, where a retaliatory act rises to the level of substantiality, the hostile work environment doctrine as developed under the anti-discrimination jurisprudence of Title VII, is "readily transferable to the retaliatory harassment context." *Id.*

All of the acts described in Petitioner's charge were ongoing acts of retaliatory harassment creating a hostile work environment for her leading to her forced departure from the workplace in October 2010. The United States Supreme Court rejected the application of "discrete acts" to hostile environment claims. *Nat'l R.R. Passenger Co. v. Morgan*, 536 U.S. 101, 115-116 (2002). Hostile environment claims by their very nature are "composed of a series of separate acts." *Id*. A "hostile work environment claim should be reviewed in its entirety so long as one of the events comprising it fell within the statute of limitations." *Shields v. Fort James Corp*, 305 F.3d 1280, 1281-1282 (11th Cir. 2002). *See Watson v. Blue Circle, Inc*.,

305 F.3d 1252, 1258-1259 (11th Cir. 2003) ("so long as one act contributing to the claim occurs within the filing period, 'the entire time period of the hostile environment may be considered by a court for the purposes of determining liability'").

8. Paragraphs 59 and 61 of the Recommended Order are erroneous in that Petitioner has claimed constructive discharge from her position in October 2010 when she was forced to leave the workplace. The Recommended Order ignores that allegation. *See* Petition at paragraphs 21-24.

9. Petitioner's charge of discrimination in this matter, *see* Petitioner's Ex. 30, alleges retaliatory harassment as continuous and ongoing action leading to her being forced from the workplace in October 2010, and formally terminated in September 2011. These allegations were ignored and/or improperly disregarded by the Recommended Order.

10. Petitioner having to flee the workplace in early October 2010, due to the retaliatory hostile work environment, fell within the applicable time frame under the Florida Civil Rights Act. Her formal termination by letter dated September 19, 2011 was also within the Act's limitations. The actions against Petitioner by Mr. Morris and Ms. Topnick were part of a series of adverse actions taken against Petitioner resulting in a retaliatory hostile environment. Accordingly, evidence of the on-going retaliatory hostile environment is properly admissible and considered as long as one of the events comprising the retaliatory environment fell within the statute of limitations. *Shields,* 305 F.3d at 1281-1282.

11. Petitioner has made out a prima facie case of unlawful retaliation. Petitioner has

established that she engaged in statutorily protected activity, she suffered a materially adverse action, and there was a causal relation between the two events. A causal relationship is shown by "temporal proximity" and a showing that the plaintiff's statutorily protected activity and the adverse employment action are not "wholly unrelated." *See Wideman*, 141 F.3d at 1457. In this case, Petitioner was one of Respondent's top sales representatives until she filed an EEOC charge, internal grievances and ethics complaints. Almost immediately after making these complaints, her supervisors' attitude and treatment toward her diametrically changed and became hostile. Thus, Petitioner has shown a temporal proximity and that the retaliation she suffered and her protected activity were not unrelated.

WHEREFORE, Petitioner respectfully requests that the Florida Commission on Human Relations accept her exceptions to the Recommended Order and substitute Petitioner's Proposed Recommended Order[2] in lieu of the Administrative Judge's Recommended Order.

Dated: February 28, 2013

Respectfully submitted,

__/s/ Neil L. Henrichsen____
Neil L. Henrichsen
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[2] Petitioner's Proposed Recommended Order is filed as Exhibit A herewith and incorporated in ull herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished this 28th day of February, 2013 via email to Anthony Hall, Esq. (email: sjhall@littler.com) and to Melanie Zaharias (mzaharias@littler.com) at Littler Mendelson PC, 111 North Magnolia Avenue, Suite 1250, Orlando, FL 32801; and filed with Denise Crawford, Agency Clerk, Florida Commission on Human Relations, Suite 100, 2009 Apalachee Parkway, Tallahassee, Florida 32301; Email: violet.crawford@fchr.myflorida.com .

/s/ Neil L. Henrichsen
Neil L. Henrichsen

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VICTORIA CARTER,

Petitioner,

v.

Case No. 12-1182
FCHR No. 201102563

AT&T CORP.,

Respondent.

_____/

PETITIONER'S PROPOSED RECOMMENDED ORDER

Pursuant to notice, this cause was heard by The Honorable W. David Watkins, the Administrative Law Judge of the Division of Administrative Hearings, on October 24, 2012, in the City of Jacksonville, Florida.

APPEARANCES

For Petitioner: Neil L. Henrichsen, Esquire
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For Respondent: Anthony Hall, Esquire
Melanie Zaharias, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in a campaign of retaliatory harassment against Petitioner based upon her protected activity, forcing her from the workplace in October 2010 and formally terminating Petitioner's employment in September 2011.

PRELIMINARY STATEMENT

In December 2009, Petitioner filed a Charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC") and in early January 2010, Petitioner submitted an internal complaint of sex discrimination against supervisors Al Morris and Matthew Currey. Thereafter, Petitioner was subjected to a campaign of retaliatory harassment, ultimately forcing her from the workplace in October 2010. Petitioner was out on unpaid leave until she was formally terminated by Respondent as of September 19, 2011.

On September 20, 2011, Petitioner filed an employment complaint of retaliation with the Florida Commission on Human Relations ("FCHR"), alleging that Respondent had retaliated against Petitioner because she filed an 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 Allen ("Al") 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 hearing, proposed recommended orders were requested and per the granting of a consent motion for extension of time, the proposed recommended orders were ordered due on December 14, 2012. A court reporter was present at the final hearing, and accordingly, a transcript of the hearing is being filed herewith.

References to statutes are to Florida Statutes (2011) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner started working for Respondent AT&T on July 28, 2008. Tr. 22 (testimony of Petitioner Victoria Carter).[1]

2. Petitioner's position with Respondent was as a Directory Advertising Sales Rep ("DASR"). *Id.* 23.

3. The DASR position entails selling and maintaining the current advertiser customer base and going out and obtaining new business, i.e., businesses that never advertised with AT&T before. *Id.*

4. Prior to the DASR position, Petitioner had worked her entire career in sales for approximately 20 years. *Id.*

5. Petitioner successfully completed initial training from Respondent at the start of her employment with a three (3) month training program in Atlanta, Georgia called the University of Excellence. *Id.* 26-27.

6. Following completion of her training, Petitioner went to work for Respondent on sales campaigns from October 2008 through the summer of 2009. Petitioner worked on the Gainesville campaign, Jacksonville campaign, Fernandina, Palatka campaigns and then the Gainesville campaign. *Id.* 27-28.

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7. Petitioner was very successful in her work for Respondent, making the President's Club and was in the top three percent (3%) in her region. *Id.*28. The President's Club is a top honor for sales work. *Id.* 184 (testimony of James (Al) Morris).

8. Petitioner received congratulatory letters from the Southeast Regional Vice President of Sales for Respondent in August 2009 on achieving above her objectives on the Jacksonville directory and Jacksonville Beach campaigns. *Id.* 29-30; Petitioner's Exhibits (Ex.) 11 and 12.

9. Also in 2009, Petitioner was awarded a customer quality award for perfect Customer Service, which was signed by executives, including Matt Currey. *Id.* 31-32; Petitioner's Ex. 13.

10. In November 2009, Petitioner was switched to the Jacksonville campaign, which was led by Al Morris. *Id.* 33. Mr. Morris told Petitioner she was his first pick for the Jacksonville campaign. *Id.*

11. Mr. Morris was an area sales manager during the time period of 2009-2010. Tr. 173 (testimony of Al Morris). Mr. Morris admits that he selected Petitioner because of her performance, in part. *Id.* 176.

12. Mr. Morris was Petitioner's direct supervisor from November 2009 until approximately June 2010. *Id.*

13. Matt Currey was the general manager and Mr. Morris had reporting responsibilities to Mr. Currey. *Id.*

14. Petitioner's interaction with Mr. Morris prior to the fall of 2009 was fine. Tr. 32 (testimony of V. Carter). There were no conflicts or anything of that nature when Petitioner first started working with Mr. Morris in November 2009. *Id.* 34.

15. Under Mr. Morris' supervision, Petitioner was not permitted to go out in the field to sell to existing customers until toward mid-January and the end of January 2010. *Id.* 34.

Instead, Petitioner and others were only to sell to non-billing accounts from November 2009-January 2010. *Id.* 34.

16. In the beginning of December 2009 things "went south" with Petitioner's relationship with Mr. Morris and Mr. Currey. *Id.* 35. At that time, Petitioner had filed for an order of protection against a co-worker's wife, and from the onset of that act Petitioner was subjected to intense scrutiny and micromanagement by Messrs. Morris and Currey. *Id.*

17. Petitioner spoke with Messrs. Morris and Currey notifying them regarding the situation involving the co-worker's wife and restraining order. *Id.* 36.

18. Following Petitioner's notification of Messrs. Morris and Currey regarding the situation, Petitioner was suddenly subjected to different treatment by Mr. Morris. *Id.* 38. There was a campaign review during which Mr. Morris was basically yelling at Petitioner, and a co-worker was instructed not to assist Petitioner with entering information into a new computer system. *Id.*

19. In the middle of December 2009, Mr. Morris and Mr. Currey also yelled at Petitioner on the telephone, directing her to return to the office for a test that she had scheduled for after Christmas vacation, although Petitioner informed them that she could not immediately return to the office because her automobile had a flat tire. *Id.* 39-40, 180. Mr. Morris and Mr. Currey then directed Petitioner to take a picture of the flat tire, but she did not have a camera. *Id.* 39. Petitioner indeed did have a flat tire, *id.*, and Mr. Morris admitted in testimony that Petitioner had presented a receipt for a new tire, and that the flat tire was the truth. *Id.* 181-182, 196 (testimony of A. Morris).

20. Mr. Morris initially testified that he believed that when he and Mr. Currey called

Petitioner in December about taking the YP Connect test, Petitioner had taken and failed the test. *Id.* 221. Mr. Morris also testified that Petitioner had been scheduled to take the test the day he and Currey called her about the test in December. *Id.* 223. However, Mr. Morris also admitted that he had never seen anything that stated Petitioner was required to take the test in December. *Id.* 224.

21. Petitioner signed and filed a Charge of Discrimination for sex discrimination with the EEOC on December 31, 2009. *Id.* 37; Petitioner's Ex. 3.

22. Petitioner filed her sex discrimination complaint with the EEOC because she in good faith believed that she was being singled out by Messrs. Morris and Currey because she was a female. *Id.* 40.

23. As soon as Petitioner returned to work from Christmas break in early January 2010, she took the YP Connect test. *Id.* 41.

24. On January 7, 2010, Petitioner then made an internal ethics complaint of sex discrimination with Respondent's ethics hot line. *Id.*41-42; Petitioner's Ex. 2.

25. Petitioner's internal ethics complaint of sex discrimination with Respondent was made by her as a good faith complaint of gender discrimination. *Id.* 43. Mr. Morris and Matthew Currey were specifically named in Petitioner's internal ethics complaint of gender discrimination. *Id.* 44; Petitioner's Ex. 2.

26. Following Petitioner's EEOC charge and her internal discrimination complaint, Petitioner's work was continuously micromanaged and scrutinized. *Id.* 44-45.

27. 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. *Id.* 45. For example, after the EEOC charge and internal discrimination complaint, Mr. Morris'

demeanor was very angry and "very, very hostile, talking down to [Petitioner]." *Id.* 45-46. Mr. Morris is a "big guy", an "ex-army guy" and stands about six foot three. *Id.* 48.

28. Diane Smith, who worked with Petitioner and Mr. Morris in the same office as a sales representative, observed Mr. Morris bringing Petitioner into his office and being vocal and condescending with her. Ms. Smith also observed that Petitioner would exit the office and appear "pretty shaken up." *Id.* 140-142 (testimony of Diane Smith).

29. Ms. Smith, however, had observed that Petitioner was a strong performer and knew Petitioner had been part of the prestigious President's Club, which was reflective of Petitioner's high performance. *Id.* 142-143.

30. Ms. Smith observed that Mr. Morris did not treat male employees the way he treated female employees, like the Petitioner and herself. *Id.* 144.

31. Mr. Morris admitted that he became aware that Petitioner had filed a charge of discrimination with the EEOC, and that the EEOC charge had involved him. *Id.* 177 (testimony of A. Morris).

32. Mr. Morris was informed of Petitioner's EEOC charge by Mr. Currey as well as Respondent's HR department. *Id.* Mr. Morris was not happy that Petitioner had filed a discrimination complaint against him. *Id.* 195.

33. Respondent admitted that on January 6, 2010, Petitioner filed an internal ethics complaint utilizing the ethics hotline regarding discrimination and discussions were held by Respondent with management on January 27, 2010, regarding Petitioner's concerns. *Id.* 273; Petitioner's Ex. 3.

34. Al Morris also admitted that he became aware of rumors of Petitioner saying she

believed Mr. Morris was not treating her the same as other people and that he had become aware of these rumors in January 2010. Mr. Morris also admitted that he was aware of Petitioner's EEOC charge. *Id.* 177-178 (testimony of A. Morris).

35. Petitioner filed a grievance pertaining to a hostile work environment on February 19, 2010, involving Mr. Morris' treatment. *Id.* 49 (testimony V. Carter); Petitioner's Ex. 4. The issues in the grievance involved discrimination, harassment and inequality of treatment. *Id.* 50.

36. On March 16, 2010, there was a meeting in the workplace that involved Petitioner, Mr. Morris, Mr. Currey, Mr. Hartman, Mr. Marty Snipes and Ms. Laura Belknap. *Id.*; Petitioner's Ex. 17.

37. At the meeting, Petitioner raised that she had had obstacles at work since December and at the meeting Mr. Morris yelled at Petitioner and called her a liar. *Id.* 52. Mr. Snipes, the union Vice President in attendance, believed that the meeting was because of the situation with Mr. Morris and Petitioner, and found that he had to stop the meeting. Mr. Snipes also noted that Petitioner's allegation that Mr. Morris was being badgering or intimidating to Petitioner behind closed doors was credible because Mr. Morris called Petitioner a liar four times in front of everyone at the meeting. *Id.* 162-164 (testimony of Marty Snipes).

38. Mr. Morris admitted that the March 16, 2010 meeting was tense. *Id.* 191 (testimony of A. Morris). Mr. Morris believed that since December 2009, Mr. Currey had known that there had been issues involving Petitioner and Mr. Morris, including that Petitioner believed that Mr. Morris was not treating her equally in the workplace. *Id.* 192.

39. Petitioner filed another grievance against Mr. Morris in May 2010 for his hostile

behavior, including his attempt to write up Petitioner for insubordination. *Id.* 53; Petitioner's Ex. 16. Petitioner also filed a grievance about Mr. Morris not properly paying her. *Id.* 54-55; Petitioner's Ex. 19.

40. Petitioner was also forced to file another grievance against Mr. Morris for his unreasonable actions regarding billing adjustments on sales contracts. *Id.* 55-56; Petitioner's Ex. 18. Two of the grievances were resolved in Petitioner's favor. *Id.* 56.

41. During the time Mr. Morris supervised Petitioner following her EEOC Charge and internal complaints, Mr. Morris would commit to accompanying Petitioner on sales calls and then cancel at the last minute. *Id.* 58.

42. Petitioner completed her work under Mr. Morris for the Jacksonville campaign, but received no formal discipline from him regarding her sales numbers. *Id.* 57.

43. Mr. Morris admitted that he complained about Petitioner's General Manager Overrides ("GMOs) being excessive without having the full data he needed to make that determination. *Id.* 227-228, 206.

44. After working with Mr. Morris, Petitioner's next supervisor was Amy Topnick, beginning in June 2010 for the Palatka campaign. *Id.* 59 (testimony of V. Carter).

45. Mr. Morris had the office right next to Ms. Topnick's office at that time. *Id.* 63-64.

46. Petitioner and Ms. Topnick had no hostility between them before the Palatka campaign. *Id.* 64.

47. Ms. Topnick had gone to President's Club with Petitioner and Ms. Topnick selected Petitioner for her Palatka campaign team. *Id.*243 (testimony of Amy Topnick).

48. Ms. Topnick reported to Matt Currey and knew Mr. Morris and his son. *Id.* 244. Ms. Topnick also went to the same church as Mr. Morris. *Id.*

49. Ms. Topnick had not spoken to Mr. Morris about Petitioner before selecting Petitioner for the Palatka campaign. *Id.* 245.

50. However, after the Palatka campaign began, Ms. Topnick spoke with Mr. Morris about Petitioner. *Id.* Mr. Morris told Ms. Topnick that Petitioner was not someone who could be on his team and that she had other problems. *Id.* 245-246.

51. Petitioner told Ms. Topnick that she was not happy at work and with certain managers prior to coming onto Ms. Topnick's team. *Id.* 246.

52. Mr. Morris spoke regularly with Ms. Topnick about the sales teams, and various individual sales representatives were always a subject of conversation. *Id.* 234-235. After Petitioner learned she would be working with Ms. Topnick, Ms. Topnick told Petitioner that she was going to have a chance to redeem herself. *Id.* 63.

53. After the Palatka campaign began, Petitioner was constantly threatened with termination by Ms. Topnick. *Id.* 64 (testimony of V. Carter). Petitioner worked with Ms. Topnick daily, five days a week. *Id.* 65-66.

54. Early on during the Palatka campaign, Ms. Topnick would not go on ride-alongs with Petitioner and was condescending toward Petitioner. *Id.* 65-66.

55. Later during the Palatka campaign, Petitioner started suffering physical symptoms of backaches, migraines and anxiety. *Id.* 64-65. When calling out for illness, Petitioner would make multiple attempts to contact Ms. Topnick, but she could not be reached. *Id.*

56. Petitioner did not feel as if Ms. Topnick was treating her fairly in the workplace. *Id.* 73. Ms. Topnick was always threatening Petitioner with termination. *Id.* 138.

57. Petitioner had personal paid time ("PPT") that had accumulated, but despite

complying with the provisions of the union contract for taking such time, Ms. Topnick would not accommodate Petitioner's reasonable requests to take PPT. *Id.*66-68; Petitioner's Ex. 22.

58. Petitioner had health issues that progressively worsened, which started in May 2010. *Id.* 68-69. Petitioner had migraines and backaches that were stress related, and there was nothing outside of work that caused these issues. *Id.* 69. Petitioner also sought counseling through the Respondent's EAP program. *Id.* 70.

59. Even after the Palatka campaign, Ms. Topnick had a supervisory role over Petitioner. *Id.*70; 249 (testimony of A. Topnick).

60. In September 2010, Petitioner emailed Ms. Topnick regarding Petitioner's attempt to contact Ms. Topnick three (3) times to advise her of Petitioner's absence from work with no response. *Id.* 250; Petitioner's Ex. 21. Ms. Topnick, however, then called Petitioner and left a message that Petitioner had a half hour to call or the absence would be an unauthorized absence subject to discipline, but Topnick did not otherwise respond to Petitioner's email. *Id.* 250-25. Ms. Topnick also had to send Petitioner an email, in consultation with Respondent's HR, on September 10, 2010, stating that her threatened discipline would not materialize. *Id.*251; Petitioner's Ex. 20.

61. For the time period of April 1, 2009 through September 30, 2010 as well as July 1, 2010 through September 30, 2010, Petitioner performed sales work within Respondent's first or second quartiles, which is a high sales ranking within Respondent's sales organization. *Id.* 61-62; Petitioner's Ex. 8.

62. In fact, for the period of April 1, 2009 through September 30, 2010, Petitioner ranked 11th out of 26 sales employees, and Petitioner's performance was satisfactory. *Id.* 253-254 (testimony of A. Topnick); Petitioner's Ex. 8.

63. Petitioner's sales performance was consistent over the Palatka campaign and at no time did Ms. Topnick take over Petitioner's sales. *Id.* 270 (testimony of V. Carter).

64. Petitioner was forced out of the workplace in early October 2010 because she could not continue to operate and function due to her health. *Id.* 74. Petitioner's health was declining rapidly so she took both Family Medical Leave Act and short-term disability leave to protect her health. *Id.* 74-75; 147-149 (testimony of D. Smith).

65. Quitting the job was not an option for Petitioner since it was her livelihood. *Id.* 138.

66. Respondent has a policy allowing for 450 days of disability leave unpaid, and Petitioner took steps to comply with that policy. *Id.* 75-76; Petitioner's Ex. 6. Petitioner was approved for short term disability leave beginning on October 8, 2010, and thereafter in February 2011. *Id.* 111, 76; Petitioner's Ex. 7.

67. While out on leave, Petitioner filed an internal ethics complaint in January 2011 after she became aware that Ms. Topnick had told other employees in the workplace that she hoped Petitioner would not return to work. *Id.*77-78; 149-150 (testimony of D. Smith); Petitioner's Ex. 14.

68. While Petitioner was still on leave, in September 2011 Respondent required Petitioner to return to work at "full capacity." *Id.*79-80; Petitioner's Ex. 26. However, the 450 days of short-term disability Petitioner had been on was without pay. *Id.* 80.

69. Petitioner attempted to seek an accommodation to return to work at some capacity, but was told that she would only be permitted to return to work at full capacity; otherwise she would be terminated. *Id.* 80, 139; 279-281, 288 (testimony of A. Miller). As of this time, Petitioner had not exhausted the 450 days of unpaid leave. *Id.*

70. By letter dated September 19, 2011 from Mr. Albert Miller, Petitioner was officially

notified of her termination and enclosed therewith was a B-form which was placed in Petitioner's personnel file. *Id.* 81; Petitioner's Ex. 27;

71. Mr. Miller had been informed when he started in Jacksonville, having transferred from Hartford, Connecticut in August 2010, that Petitioner had internal complaints, grievances. *Id.* 282-285 (testimony of A. Miller).

72. When Petitioner did not show up at work on September 19, 2011 she was terminated and a B-Form was filled out by Mr. Miller's assistant that stated: "Terminated, Victoria Carter, for misconduct consisting of unexcused absences, i.e., failure to substantiate or provide medical information regarding her absence, and failure to return to work." *Id.* 289-290; Petitioner's Ex. 27.

73. However, prior to Mr. Miller's September 19, 2011 letter, Petitioner had informed Mr. Miller that she could not return to work because of her doctor's orders. Thus, the reason for Petitioner's termination as listed in the B-form was inconsistent with the known reason for Petitioner's inability to return to work at full capacity. *Id.* 292-294, 298-299; Respondent's Ex. 26 .

74. Promptly following her termination, Petitioner signed and filed a charge of retaliation with the FCHR on September 20, 2011. *Id.* 82; Petitioner's Ex. 30.

75. Petitioner made approximately $70,000.00 annually from Respondent. *Id.* 82-83; Petitioner's Exs. 30, 23.

76. Petitioner was also provided benefits of full health, dental and medical insurance as well as retirement and 401(k) benefits. *Id.* 84. Petitioner paid $30 a month for health insurance because Respondent paid 80% of the cost, but following her termination, Petitioner had to pay $500 a month for health insurance under COBRA. *Id.*

77. Petitioner has been unable to find work due to her health conditions and is currently treated by medical professionals. *Id.* 83-84.

CONCLUSIONS OF LAW

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

79. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, Florida Statutes, prohibits discrimination and retaliation in the workplace.

80. Subsection 760.10(7) , Florida Statutes, provides:

> It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

81. To establish a claim of retaliation under Title VII[4], a plaintiff must prove that she engaged in statutorily protected activity, she suffered a materially adverse action, and there was some causal relation between the two events. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). To establish a causal connection between the protected conduct and the adverse employment action, a plaintiff need only show that the two are not wholly unrelated. *Wideman v. Wal-Mart Stores, Inc.* 141 F.3d 1453, 1457 (11th Cir. 1998). A plaintiff may establish a causal nexus by showing that that the defendant was aware of the protected activity and there is a close temporal proximity between the protected activity and the adverse action. *Id.* at 1457.

82. The anti-retaliation provision of the Act makes it an unlawful employment practice

[4]Claims under the Florida Civil Rights Act are analyzed under the same framework and standards as the Title VII claims. *See Reis v. Universal City Development Partners, Ltd.*, 442 F.Supp.2d. 1238, 1252 (M.D.Fla.2006).

for an employer to discriminate against any employees who has opposed any unlawful employment practice or filed a charge. Fla. Stat. 760.10(7).

83. The United States Supreme Court has recognized that the term "discriminate" in Title VII retaliation cases is not limited to "discriminatory actions that affect the terms and conditions of employment." *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2412-13 (2006). An employer can retaliate against an employee "by taking actions not directly related to his employment or by causing him harm outside the workplace." *Id.* at 2412. Thus, the anti-retaliation provision of Title VII extends "beyond workplace-related or employment-related retaliatory acts and harm." *Id.* at 2414. Further, the significance of an act of retaliation depends on the particular circumstances, thus "[c]ontext matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships.'" *Id*. at 2415 quoting *Oncale v. Sundowner Offshore Svcs, Inc.*, 523 U.S. 75, 81-82 (1998). A plaintiff must show that a reasonable employee would have found the challenged action materially adverse, meaning the action would have had the effect of dissuading another employee from making a charge of discrimination. *Id.* (citations omitted).

84. Hostile work environment may also be shown by retaliatory harassment in the workplace: "The weight of authority supports the view that, under Title VII, the creation and perpetuation of a hostile work environment can comprise a retaliatory adverse employment action under 42 U.S.C. § 2000e-3(a)." *Noviello v. City of Boston***,** 398 F.3d 76, 89 (2005 1st Cir.), *citing*, *Wideman*, 141 F.3d at 1456. Retaliatory harassment, like other discriminatory harassment, requires a showing of whether the bad acts, taken in the aggregate, are sufficiently severe or pervasive to constitute actionable harassment. *Id.* at 93. Thus, where a retaliatory act rises to the level of substantiality, the hostile work environment doctrine as developed under the

anti-discrimination jurisprudence of Title VII, is "readily transferable to the retaliatory harassment context." *Id.*

85. All of the acts described in Petitioner's charge were ongoing acts of retaliatory harassment creating a hostile work environment for her leading to her forced departure from the workplace in October 2010. The United States Supreme Court rejected the application of "discrete acts" to hostile environment claims. *Nat'l R.R. Passenger Co. v. Morgan*, 536 U.S. 101, 115-116 (2002). Hostile environment claims by their very nature are "composed of a series of separate acts." *Id.* A "hostile work environment claim should be reviewed in its entirety so long as one of the events comprising it fell within the statute of limitations." *Shields v. Fort James Corp*, 305 F.3d 1280, 1281-1282 (11th Cir. 2002). *See Watson v. Blue Circle, Inc.*, 305 F.3d 1252, 1258-1259 (11th Cir. 2003) ("so long as one act contributing to the claim occurs within the filing period, 'the entire time period of the hostile environment may be considered by a court for the purposes of determining liability'").

86. Petitioner's charge of discrimination in this matter, *see* Petitioner's Ex. 30, alleges retaliatory harassment as continuous and ongoing action leading to her being forced from the workplace in October 2010, and formally terminated in September 2011.

87. Petitioner having to flee the workplace in early October 2010, due to the retaliatory hostile work environment, fell within the applicable time frame under the Florida Civil Rights Act. Her formal termination by letter dated September 19, 2011 was also within the Act's limitations. The actions against Petitioner by Mr. Morris and Ms. Topnick were part of a series of adverse actions taken against Petitioner resulting in a retaliatory hostile environment. Accordingly, evidence of the on-going retaliatory hostile environment is properly admissible and

considered as long as one of the events comprising the retaliatory environment fell within the statute of limitations. *Shields*, 305 F.3d at 1281-1282.

88. Petitioner has made out a prima facie case of unlawful retaliation. Petitioner has established that she engaged in statutorily protected activity, she suffered a materially adverse action, and there was a causal relation between the two events. A causal relationship is shown by "temporal proximity" and a showing that the plaintiff's statutorily protected activity and the adverse employment action are not "wholly unrelated." *See Wideman*, 141 F.3d at 1457. In this case, Petitioner was one of Respondent's top sales representatives until she filed an EEOC charge, internal grievances and ethics complaints. Almost immediately after making these complaints, her supervisors' attitude and treatment toward her diametrically changed and became hostile. Thus, Petitioner has shown a temporal proximity and that the retaliation she suffered and her protected activity were not unrelated.

89. With regard to Respondent's alleged reason for terminating Petitioner, there are inconsistencies therefore such alleged reason must be found to be pretextual. First, Respondent stated that Petitioner, despite having not exhausted the 450 days of unpaid leave, had not timely requested additional time off. Tr. 298-299. Thereafter, the September 19, 2011 termination letter and B-Form placed in Petitioner's personnel file stated: "Terminated, Victoria Carter, for misconduct consisting of unexcused absences, i.e., failure to substantiate or provide medical information regarding her absence, and failure to return to work." *Id.* 289-290; Petitioner's Ex. 27. Accordingly, the official termination reason was pretext.

90. Once a prima facie case is established, a defendant must prove a legitimate, non-discriminatory reason for the challenged actions with credible evidence. A plaintiff may then establish pretext for the proffered reason either directly by showing that a discriminatory reason

more likely than not motivated the employer or indirectly by demonstrating such "weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could find them unworthy of credence." *Jackson v. State of Ala. State Tenure Com'n*, 405 F.3d 1276, 1289 (11th Cir. 2005). Inconsistencies in reasoning for discipline can lead to a jury inference of pretext. *Lewis v. Michael Stores, Inc.*, 2007 WL 2254502, *12-13 (M.D.Fla. 2007); *see also, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147, 120 S. Ct. 2097, 2108, 147 L. Ed. 2d 105 (2000); *see also Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1195 (11th Cir. 2004)(shifting reasons allowed the jury to find Defendant's explanation unworthy of credence).

91. In this case, Petitioner clearly engaged in protected activity by filing a Charge of Discrimination with the EEOC and internal complaints with Respondent alleging sex discrimination in early 2010. Following Petitioner's protected activity, Petitioner, who had been an exceptional sales employee for Respondent, was subjected to a hostile work environment, including unwarranted accusations, criticism of her work, physical intimidation and repeated threats to her job security. Due to this treatment, Petitioner was forced from the workplace in October 2010, and ultimately subjected to a formal termination on September 19, 2011. Since Respondent had no serious complaints or issues with Petitioner's job performance until after she filed her complaints, Respondent is unable to assert a legitimate, non-retaliatory reason for the adverse actions it took against Petitioner.

92. After an administrative hearing, if the FCHR finds that a discriminatory practice has been committed, the FCHR must issue a final order "prohibiting the practice and providing affirmative relief from the effects of the practice . . ." § 760.11, Fla. Stat.

93. Additionally, an award of reasonable attorneys' fees pursuant to § 760.11(6) may be

made to a prevailing party.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is **RECOMMENDED** that the Florida Commission on Human Relations enter a final order:

1. Finding that Respondent AT&T has engaged in an unlawful employment practice by retaliating against Petitioner by forcing her from the workplace in October 2010 and by formally terminating Petitioner's employment as of September 19, 2011.
2. Ordering Respondent to pay Petitioner $163,333.32 ($70,000 annual salary from departure in early October 2010 to December 2012 at $5,833.33 per month) in back pay through the date of this Recommended Order, plus $5,833.33 per month thereafter through the date of the Commission's final order, with interest accruing on the total amount at the applicable statutory rate from the date of the Commission's final order. Additionally, two years of front pay of $70,000.00, plus health insurance premium/COBRA paid by Petitioner at $500.00 a month from October 2011 to present.
3. Ordering Respondent to pay Petitioner $250,000.00 in compensatory damages through the date of this Recommended Order, plus $10,416.66 per month thereafter through the date of the Commission's final order, with interest accruing on the total amount at the applicable statutory rate from the date of the Commission's final order.
4. Prohibiting any future acts of unlawful retaliation by Respondent.
5. Awarding Petitioner her reasonable attorneys' fees and costs.

Dated: December 14, 2012

Respectfully submitted,

__/s/ Neil L. Henrichsen____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished this 14th day of December, 2012 via email to Anthony Hall, Esq. (email: sjhall@littler.com) and to Melanie Zaharias (mzaharias@littler.com) at Littler Mendelson PC, 111 North Magnolia Avenue, Suite 1250, Orlando, FL 32801; and Denise Crawford, Agency Clerk, Florida Commission on Human Relations, Suite 100, 2009 Apalachee Parkway, Tallahassee, Florida 32301; Email: violet.crawford@fchr.myflorida.com .

/s/ Neil L. Henrichsen
Neil L. Henrichsen