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**STATE OF FLORIDA
FIRST DISTRICT COURT OF APPEAL**

FILED

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DIVISION OF
ADMINISTRATIVE
HEARINGS

KATHLEEN SULLIVAN

Appellant/Petitioner,

First DCA Case No. 1D09-3396

v.

Lower Tribunal Case No. 09-0033

**CLAY COUNTY BOARD OF
COMMISSIONERS**

Appellee/Respondent

INITIAL BRIEF OF THE APPELLANT

**Filed by: Kyia Lynn Robinson, Daughter of Appellant (1)
1640B Vineland Circle
Fleming Island, FL 32003
(904) 375-1288**

(1) Kathleen Sullivan died September 3, 2009. Motion is before 1DCA to list daughter, Kyia Lynn Robinson as either Appellant or Co-Appellant.

INDEX

Table of Citations	Page One
Statement of Case and Facts	Page Two
Summary of Argument	Page Seven
Argument	Page Thirteen
Issue of Dispute One	Page Thirteen
Issue of Dispute Two	Page Nineteen
Issue of Dispute Three	Page Twenty Eight
Conclusion	Page Thirty Six
Statement of Signature Authenticity	Page Thirty Eight
Certificate of Service	Page Thirty Eight
Certificate of Font Compliance	Page Thirty Nine

(Footnote: All page references to Petitioner's Composite No. 1/
ATTACHMENT 1 is identified by hand lettering at the top center of each
corresponding page.)

TABLE OF CITATIONS

28 Code of Federal Regulations, 35.107, 35.140, 35.150 (C) and (D)	Page 14
29 Code of Federal Regulations 1630.4 (B), (E), (I); 1630.5; 1630.7 (A), (B); 1630.9 (A), (B), and (C)	Pages 14, 34
Americans with Disabilities Act, Title 42, Chap. 126, Para. 12101- 12103 and 12111-12112	Pages 7, 13, 14, 16, 18, 34
Americans with Disabilities Act, Title II Technical Assistance Manual Chap. 4.00000, Items II-4.1000, II- 4.2000, II-4.3000, II-4.3200; Chap. 8.0000, II-8.1000 (1) and (2)	Pages 13, 14, 15, 16
EEOC Compliance Manual, Sect. 902	Pages 7, 13, 15, 16, 17, 18
EEOC Notice 915.002	Pages 7, 13, 16
Florida Administrative Rules, 28-106, 104 (filing) Item 7, Sub-Para. (B) and (C)	Page 24

STATEMENT OF CASE AND FACTS

1. The Appellant, Kathleen Sullivan, was terminated by her employer, The Clay County Board of Commissioners on May 10, 2008. Although denied, this termination was based upon Appellant's diagnosis of cancer and its related treatment. As such, the Appellant was discriminated against as a Clay County Employee and as an American with a qualifying disability.

2. Appellant filed a Petition for Relief through the Florida Department of Administrative Hearings (DOAH) on January 6, 2009. This was preceded by an investigation by the Florida Department of Human Relations, whom failed to find in favor of the Appellant. The Initial Order was filed on this same date; DOAH assigned Case 09-0033 to the complaint.

3. Response to the Initial Order was filed on January 13, 2009 with a Notice of Hearing filed the next day on January 14, 2009. Also on same date, an Order of Pre-hearing Instructions was filed. The hearing was to be held March 4, 2009; 11:00 a.m., in Green Cove Springs, Florida. On January 15, 2009, an Agency Court Reporter confirmation letter was filed with the Court.

4. A motion for Summary Hearing was filed January 21, 2009. Judge Suzanne Hood conducted a Pre-Hearing conference call on January

26, 2009 with the Appellant and Appellee. An Amended Joint Motion for Summary Hearing was filed on January 28, 2009. This request was granted and filed January 29, 2009.

5. On February 23, 2009, a letter and affidavit were submitted to the Court from Gaither L. Saunders, Jr. as Qualified Representative for the Appellant. This request was granted and filed on February 24, 2009.

6. Appellant's Witness List and Notice of Filing of Appellee's Witness List were filed February 25, 2009. Appellee filed an objection to Appellant's Witness List on this same date. A letter of explanation was filed by Gaither Saunders on behalf of the Appellant February 26, 2009. The List of Witnesses was filed February 27, 2009. Appellee's objection to Appellant's Witness List was sustained by the Court and filed March 2, 2009. An amended Return of Service was filed March 3, 2009.

7. The Hearing was held March 4, 2009 in the Clay County Court House, Green Cove Springs, Florida. In attendance were: Judge Suzanne Hood, Presiding Administrative Law Judge; Mr. Richard O'Connell, HR Manager, Clay County; Kathleen Sullivan, Appellant; Gaither L. Saunders, Jr., Qualified Representative for Appellant; Mr. Fritz Behring, Clay County Manager; Ms. Jennifer Rupert-Bethelmy, Clay County HR Coordinator; Ms. Lori K. Mans and Ms. Margaret P. Zabijaka of Constangy, Brooks and

Smith Law Firm representing the Clay County Board of Commissioners and Ms. Leah P. Maltz, RMR of LPM Court Reporting INC, Court Reporter.

8. The Appellant submitted a Composite Exhibit into evidence marked as Petitioner's Composite Exhibit No. 1., pages 1-92; The Appellee submitted ten (10) exhibits into evidence marked as Respondent's Numbers 1-10. One Joint Exhibit was submitted as Joint Exhibit No. 1.

9. Notable Hearing events were an objection to Appellant's Composite No. 1, pages 74-92 by the Appellee. This evidence was not allowed during the hearing, nor was the Appellant allowed to examine witnesses regarding these pages. The Court instructed Appellant to argue the admissibility of these enclosures in Appellant's Proposed Recommended Order. This omission was damaging to the Appellant's argument.

Also, the Appellee requested additional time to file a Proposed Recommended Order to the Court. The Appellant did not require additional time but agreed to the concession. The Court allowed an additional twenty (20) days. This gave a total of thirty (30) days after the Transcript is filed. The hearing was concluded pending submission of Proposed Recommended Orders by each party and a Final Order from the Court.

10. The Transcript was filed April 14, 2009; this established a Proposed Recommended Order filing deadline of May 14, 2009 at 5:00 p.m. which is close of business at DOAH.

11. Appellant filed a Proposed Recommended Order to DOAH on May 12, 2009. Appellant filed a Certificate of Service on May 13, 2009 as it was overlooked in the May 12th filing.

12. The Appellee failed to meet the filing deadline on May 14, 2009. As result, Appellant filed an objection to late filing by the Appellee the morning of May 15, 2009. This was accomplished via facsimile followed by a hard copy posted May 19, 2009. The Appellee wrote and submitted a rebuttal to Appellant's objection filed May 19, 2009. In response, Appellant wrote an amendment to their objection filed on May 15th and was filed May 20, 2009.

13. Appellant was over ruled on its objection. Appellee's Proposed Recommended Order was accepted on May 20, 2009 with a filing date of May 15, 2009. This objection was wrongfully over ruled and the Appellee's Proposed Recommended Order was considered by the Court in the Final Order.

14. Final Summary Order was issued and filed June 11, 2009 ruling in favor of the Appellee as the Appellant established only two of three

necessary elements during the hearing. Appellant filed a Notice of Appeal with the Department of Administrative Hearings on July 9, 2009. This action was forwarded to the First District Court of Appeal which is the action now before the Court as Case No. 1D09-3396.

15. The fact that Petitioner's Composite No. 1, pages 74-92 were disallowed as admissible evidence handicapped the Appellant. The Appellant could not examine witnesses regarding additional facts strongly in her favor. Consequently, were these pages correctly allowed and considered by the Court, the Appellant should have established the third required element of its argument.

16. The Appellant objected to a major rule infraction of late filing by the Appellee; the Court should have rightfully sustained this objection. Since an objection was placed before Appellee submitted or filed their late evidence, the filing should be considered as no evidence nor be of any consideration.

17. As established by the Court in the Final Order, the Appellant was a qualified American with a disability. Also, the Appellee was established as considering the Appellant as such. The Appellee failed to offer or consider a Reasonable Accommodation. Furthermore, when the Appellant requested Reasonable Accommodation, management terminated

all communication. The few exceptions were when management desired to be heard; and, this was done through their legal representation.

SUMMARY OF ARGUMENT

ISSUE OF DISPUTE ONE: Did the Court Wrongfully omit Petitioner's Composite Exhibit No. 1, pages 74-93? **ANSWER:** Yes.

1. The Appellant submitted evidence based upon the resources available to Human Resource Representatives, Department of Human Relations Investigators and to any person investigating employment rights. Many of these resources are in fact listed on the First District Court of Appeal website.

2. The Appellee objected to this evidence stating it was not qualified material for the purpose of the hearing. That would be a valid argument had Appellant's Qualified Representative been a member of the Florida Bar Association. However, Appellee did not offer any evidence to substantiate why the evidence was inadmissible other than their opinion.

3. Appellant's evidence was published revision EEOC Notice Number 915.002 of the EEOC Compliance Manual, Section 902. Furthermore, it was authored by ADA Division Office of Legal Counsel. This evidence is corroborated by Title 42, Chapter 126, paragraphs 12101-12103 and 12111-12112.

4. The remaining supplemental documentations are EEOC quick reference materials available to anyone researching their rights through the EEOC and the U.S. Department of Justice. By omitting this evidence, it insures that no one has an equal chance before the Court unless they're represented by an attorney. In this respect, to sustain the Appellee's objection is no different than denying the rights she has fought her employer, Clay County for.

5. The points illustrated in the Argument section will show that this evidence was used as intended and indeed valid and should have been admitted as such.

ISSUE OF DISPUTE TWO: Was the Appellee's Proposed Recommended Order wrongfully admitted late, over an objection by the Appellant and created undue prejudice towards the Appellant? ANSWER: Yes.

1. The Appellee requested additional time to file their Proposed Recommended Order. Although not required, the Appellant agreed to this concession. The normal amount of time to file this documentation is ten days. Both the Appellant and Appellee were allowed a total of seventy one days to submit their evidence. Yet, Appellee missed the suspense date by nearly sixteen hours.

2. It was argued that the Appellee's Proposed Recommended order was filed via facsimile and complete with only a tardiness of a few minutes. The evidence conclusively shows this not to be fact. What is supported is the Appellee submitted a Partial Proposed Recommended Order and did so at the last minute. Had the facsimile been complete as stated, it would have been at DOAH nearly twenty minutes late. However, this point is moot as the documentation never reached DOAH on May 14, 2009.

3. The Appellant filed an objection the morning of May 15, 2009 regarding Appellee's rule violation. Furthermore, the objection was on record before the Appellee managed to re-submit their Proposed Recommended Order. Notable, the clerk of DOAH had to telephone the Appellee to inform them that their submission was incomplete.

4. Then the Appellee submitted evidence to the Court that quoted a rule that didn't apply and admitted that they sent an incomplete document to DOAH. Their Proposed Recommended Order was finally entered on May 20, 2009 and post dated to May 15th.

5. Furthermore, the Court over ruled the objection stating the Appellee made a good faith effort and the Appellant was shown no undue prejudice. This is not true, as two citings were used from the Appellee's Proposed Recommended Order that was referenced in the Final Brief.

6. With seven times the standard submission time available (seventy one days instead of ten days), there is no excuse for late submission of documentation to the Court. As an objection was entered before the Appellee's Proposed Recommended Order was even in receipt, the Appellant's objection and Motion to Strike should have been honored.

7. The Argument section of this Brief will show inconsistency, impossibilities and violation of rules that facilitated the admission of Appellee's late Proposed Recommended Order.

ISSUE OF DISPUTE THREE: Was the Appellant fired due to illness, its related treatment, denied rights afforded to peers and denied any reasonable accommodation? ANSWER: Yes.

1. The Appellant was diagnosed with Cancer and never communicated with regarding her career with Clay County. Once

Cancer was established, the Appellant was terminated. All concessions afforded to an employee were not considered or offered. Additionally, the termination letter began by stating, "Due to a medical condition." It is prohibited to use an illness or related treatment in whole or in part for termination considerations.

2. Both testimony and evidence established that decisions regarding the termination were based upon the illness and the time lost in its treatment. Furthermore, as justification to the termination, the County stated the position needed to be filled but failed to fill it immediately.

3. It was established that a hiring freeze was in effect but downplayed when examined about it. Contrary to testimony that County Management is approachable, when the Appellant responded to the termination, the denial was from labor lawyers and not management.

4. Testimony stated that no options other than termination applied to the Appellant; this isn't true as unpaid leave was an authorized option. Additionally, when the Appellant requested a Grievance Committee Hearing by her peers and to be placed on unpaid leave, this was denied by labor attorneys. The reason being that as an "ex-employee" the rules didn't apply.

5. Testimony stated that cost had to be considered regarding the County funds. Yet, the Appellant requested an accommodation that was of no cost to the county and was written in County Policy.

6. The Court established Appellant as a qualified American with a disability. This made the Appellant eligible for consideration under multiple county, state and federal employment laws. The county was obligated to offer reasonable accommodation or grant such if requested. The sole exception would be if the exception created undue hardship on the county. As this was an accommodation of no cost, undue hardship was not a factor. Noteworthy, the position wasn't filed until a substantial amount of time passed, a no cost reasonable accommodation should have been granted.

7. The Argument section will show that the Appellant was terminated primarily due to her illness. The testimony will show that the Appellant was isolated by management by their methods of administration and not allowed to address her concerns.

ARGUMENT

ISSUE OF DISPUTE ONE

1. The Petitioner attempted to submit documentation from the U.S. Equal Opportunity Commission into evidence during the March 14, 2009 Hearing. The Respondent objected to the admissibility of this evidence; specifically, Petitioners Composite No. 1, pages 74-92. (T;) pgs 107, 108, 109, 110, 111, 112.
2. The Petitioner addressed this issue in her Proposed Recommended Order and submitted the two omitted front pages of EEOC Notice No. 915.002 that stated the origin, purpose and user instructions of the documentation. (R-51;) pgs 11, 12, 17-21.
3. This evidence was not admitted as the Respondent's objections were sustained by the Court. Furthermore, the evidence was declared, "unauthenticated, irrelevant, unsupported hearsay, and/or inappropriate material for official recognition." The Petitioner challenges this ruling as the material applies and is supported by Title 42, Chapter 126, sections 12101-12103; Subchapter I, sections 12111-12112; Petitioner's Composite Exhibit No. 1, pages 72 and 73; the Equal Employment Opportunity Commission Compliance Manual, Section 902 and the Americans with Disability Act Title II Technical Assistance Manual, Chapter 4.0000 Employment, items II-

4.1000, II-4.2000, II-4.3000, II-4.3100, II-4.3200 (REF:28 CFR 35.140); Chapter 8.0000 Administrative Requirements, II-8.1000 (1) and (2) (REF: 28 CFR 35.107, 35.150 (C) and (D); 29 CFR 1630.4 (B), (E), (I); 1630.5; 1630.7 (A), (B); 1630.9 (A), (B), and (C.) (R-133;) pg 3.

4. When researching the Americans with a Disability Act, I was immediately led to the U.S. Department of Justice website. This displayed a link to the (PDF) version of Title 42- THE PUBLIC HEALTH AND WELFARE; Chapter 126- EQUAL OPPORTUNITIES FOR INDIVIDUALS WITH DISABILITIES, sections 12101-12103; SUBCHAPTER I-EMPLOYMENT [Title I], sections 12111-12112.

5. The Court stated that Petitioner's evidence was specifically for "lay people" and not intended for a Judge to read. I concede this as true; however, the state investigator was neither Judge nor attorney; rather, she was a "lay person" trained to investigate matters of employment discrimination. This also applies to the Respondent; as their HR Department and HR Director are "Laypersons" trained in matters of employment human resources. This especially applied to the Petitioner as a Clay County employee. (T;) 109, 11-25.

6. This entire matter reached the Court based upon information and guidance tools available to "Laymen." Specifically, the guidelines listed in

the EEOC Compliance Manual and The American with Disabilities Act, Title II Technical Assistance Manual. In this respect, the Court is correct as the Manuals were used as intended, by Laypeople; the end user. The decisions made by human resources should have been prefaced by referencing these two manuals and their in house Clay County ADA policies.

7. Evidence suggests the Respondent's HR department failed to follow guidance of the EEOC Compliance Manual, Section 902 or American with Disabilities Act, Title II Assistance Manual. In this respect, neither did the state investigator which initiated this chain of events. These previous actions caused the Petitioner to file a grievance followed by a Florida Department of Human Relations Investigation. The Appellee's failure to follow guidance of the EEOC Compliance Manual, Section 902 or Americans with Disabilities Act, Title II Assistance Manual necessitated the Administrative Hearing.

8. The primary tool utilized by an EEOC investigator or Human Resources specialist is the EEOC Compliance Manual issued by the U.S. Equal Opportunity Commission. An investigator may certainly reference Title 42 directly; however, that is used primarily by the Court or an attorney as mentioned previously by the Court. Therefore, if more specific guidance

is needed, The American with Disabilities Act, Title II Assistance Manual issued by the Department of Justice is appropriate.

9. The Petitioner submitted two additional pages of EEOC Notice No. 915.002 with her Proposed Recommended Order; pages 17-18. These pages are the beginning of a 48 page revision of the EEOC Compliance Manual. The guidance written on page 17 directs the user to file this entire section behind Section 902, Volume II of the Compliance Manual. This guidance was issued by ADA Division, Office of Legal Counsel.

10. Furthermore, the Petitioner thoroughly referenced Section 902 through 902.9 of the Investigators Manual. The manual is consistent with Title 42, Chapter 126 and Subchapter I; this includes Petitioner's Exhibits 72 and 73, admitted into record. This also includes Petitioner's Exhibits 74-92 which wasn't allowed. The Courts statement of "unauthenticated, irrelevant, unsupported hearsay, and/or inappropriate material for official recognition" is not completely accurate. This evidence originated from Washington, DC under guidelines provided by the Department of Justice and The Equal Employment Opportunity Commission. The information may not apply to a Judge as a matter of law. However, it would apply to an HR Specialist, EEOC Investigator and anyone investigating their employment rights.

11. Not everyone has the financial means to retain an attorney or fight lengthy legal battles. To insure that everyone has equal chance before the Court, tools are made available; IE: The Department of Administrative Hearings Website, The First District Court of Appeals Website, The United States Equal Employment Opportunity Website, The U.S. Department of Justice Website. These websites provide links; IE: DOAH- Uniform Rules, Defend Yourself, Forms; 1DCA- Florida Appellate Section Pro Se Handbook, Common Forms, The Florida Bar; EEOC- Section 902 Enforcement Manual, Enforcement Guidance Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act.
12. Based upon the evidence ruling by the Court, an unrepresented person has little possibility of an impartial hearing and limited chances of winning. Evidence resources available to a Layman aren't considered, as per the Court it is "unauthenticated, irrelevant, unsupported hearsay, and/or inappropriate material for official recognition". Therefore opposing counsel need only place an objection which renders their opposition defenseless. The tools put in place allowing equality before the Court is meaningless by allowing the Respondent's objection.
13. The Court referenced The Americans with Disabilities Act (ADA) Section 12101 and its related regulations. As this was necessary research by

the Court, all evidence submitted by the Petitioner was referenced, necessary and pertinent. Plus, the Petitioner's evidence is in compliance with Section 12101 and its related regulations. The Court should know this to be accurate through its own research. In addition to the Petitioner, these identical materials were referenced by the Respondents HR department and the Department of Human Relations Investigator. It is relevant. To disallow this documentation into evidence is undue prejudice towards the Petitioner. Additionally, it gives the Respondent an unfair advantage.

14. The evidence is not a pamphlet as earlier stated by the Court; rather, it is a complete component of Section 902, Equal Employment Opportunity Commission Compliance Manual. Their authority is not unauthenticated, irrelevant or unsupported hearsay; it comes from Federal Government in Washington, D.C. and delegated to appropriate end users. The Respondent and Petitioner were allowed to submit multiple exhibits of evidence from the Clay County Policy Manual and accepted as evidence. However, the Petitioner submitted evidence from the EEOC Compliance Manual, the initial reference source to all parties and it's denied. I would think the U.S. Department of Justice is as credible as the Clay County Employment Handbook. Also, Respondent concedes this evidence is appropriate for post hearing submission in which this case qualifies. (T;) pg 109, 2-17.

15. Petitioner feels the evidence omitted by the Court is relevant and supported by evidence researched by the Court, (ADA) and complies with that evidence. The Respondent feels there is adequate supporting documentation and logic to admit this omitted evidence. Respondent requests that Petitioner's 74-92 is rightfully and legally admitted into evidence. (ATTACHMENT 1, Petitioners Composite 1, pgs 74-92.)

ISSUE OF DISPUTE TWO

1. The Court stated that the Respondent initiated electronic filing of their Proposed Recommended Order on May 12, 2009 at 16:51 hours and was in partial receipt of five pages by 16:53 hours. The Court continues by stating the Respondent filed an additional 12 pages at 16:57 hours and in DOAH receipt at 17:01 hours 46 seconds. By these calculations, there was two transmissions; combined, only late by approximately two minutes. Per the times provided by the Court, five pages were submitted requiring two minutes. Then, twelve additional pages were submitted requiring an additional four minutes forty six seconds. By adding the two stated times together, a (17) page transmission was successfully completed in seven minutes and 46 seconds. The times does not include a stated time delay between the two transmissions. All evidence indicates this is not possible. (R-133;) pgs 3-4.

2. Evidence supports that the Respondent attempted a facsimile filing on May 12, 2009 at 17:07 hours. The confirmation report "Start" block shows two specific pieces of information. First, the number "14" represents May 14th. The time stamp of 17:07 establishes the facsimile link to 1 (850) 921-6847, the Department of Administrative Hearings. The "Time" block displays 4 minutes and 41 seconds of linked duration. Assuming times the Court stated are correct; three minutes and five seconds are un-accounted for on the Transmit Conf. Report. Notably, since there were two transmissions stated, there should be two individual Transmit Conf. Reports; there is only one. These are two of numerous inconsistencies. (R-133;) pgs 3-4; (R-108;) pg 7, Exhibit "A," "Transmit Conf. Report."

3. It is highly unlikely that the entire document was successfully submitted during this facsimile "attempt," or that two attempts took place. The report indicates that sixteen pages (16) were successfully submitted in four minutes and forty one seconds. By the Court's statement, seventeen pages (17) were in receipt. This is resolved by a matter of simple mathematics.

4. By adding the validated link time of (17:07) and duration time (4:41,) from the report, that gives a job completion time of exactly 17:12 hours; this isn't consistent with an time of approximate 17:02 hours as stated. Notably,

this supports that Respondent's facsimile link began and concluded well after the close of business. Additionally, this was a single attempt rather than two attempts as stated. Petitioner received an E-mailed copy of Respondent's Proposed Recommended Order on May 14, 2009 at 17:18 hours. The email receipt time of 17:18 is consistent since it was likely sent after the facsimile transmission. Neither the Court, nor Petitioner received a copy before the 17:00 deadline.

5. These facts are verified by the Respondent's own evidence; Transmit Conf. Report and statements in their Response to Petitioner's Objection to Late Filing. (R-108;) pgs 2, 3.

6. When the Respondent re-filed their Proposed Recommended Order on May 15, 2009, they submitted a total of sixteen pages. The submission start time isn't clear because the first two pages are missing. However, page three shows a facsimile link time stamp of 11:31 hours and a page completion time stamp of 11:41 hours. Reasonably, an additional minute can be added for the two missing pages. It can be concluded that the transaction initiated at approximately 11:30. (R-83;) pg 1.

7. The final page has a ship time stamp of 11:36 hours with a link termination time stamp of 11:45 hours. This entire transaction took approximately fifteen minutes to complete. Yet, per Respondent's Transmit

Conf. Report dated May 14, 2009, the identical transaction was completed in four minutes and forty one seconds. The difference is ten minutes and 19 seconds; and, there is no second Transmit Conf. Report documenting two transmissions from the previous day; another inconsistency. (R-83;) pg 14.

8. Per the information provided by the Court, the May 14th transaction required seven minutes forty six seconds to complete. The difference is seven minutes and 14 seconds; again, inconsistency; but supported by a reasonable explanation. Once a connection is established between the same two facsimile machines (as in this case,) the transmit time on identical document should not differ. Therefore, by adding the true transaction time of fifteen minutes, a successful (16) page transaction would have completed at 17:22 hours from the confirmed link time of 17:07 on May 14, 2009. As the times fail to match, an incomplete transaction is indicated.

9. Furthermore, the Respondent's admits they were contacted by the Division of Administrative Hearings clerk the morning of May 15, 2009. Respondent was informed by the clerk they received only a partial submission of their Proposed Recommended Order. This is consistent with an incomplete facsimile transmission by the Respondent. Additionally, the time stamp conclusions from the Court and the Transmit Conf. Report should be similar; they are three minutes and five seconds different. This

supports that the Respondent's Proposed Recommended Order wasn't complete May 14, 2009 as stated; a mistake was made. (R-108;) pg 2.

10. Based upon the evidence, there's only one reasonable answer to the numerous discrepancies above. The facsimile attempt on May 14, 2009 by Respondent was not successful. Furthermore, the times submitted by the Court are not correct; nor supported by the evidence. The second facsimile was successful on May 15, 2009 which the evidence supports. (R-108;) pg 2.

11. The Court states that Petitioner filed a second Objection to Respondent's Late Filing on May 19, 2009. This is incorrect. Petitioner filed an initial late filing objection via facsimile the morning of May 15, 2009. The Petitioner wanted a prompt and timely response on record of Respondent's rule violations. As Petitioner's standard operating procedure, a "hard copy" of the objection was mailed to the Department of Administrative Hearings May 15, 2009. The Petitioner did not file dual objections. (R-133;) pg 4; (R-97;) pg 3.

12. Petitioner did file an AMENDMENT to the Original Objection Dated May 15, 2009. All references, rules and policies are clearly posted on the DOAH web site. As results of Petitioner's valid objection, Respondent needed a defense; they chose Rule 28-106.204 of the Florida Administrative Code. This rule is not listed nor utilized on the Division of Administrative

Hearings Website under rules. The Respondent was “bending” the rules; a reprimand was in order and requested by the Petitioner. (R-113.)

13. Notably, the Respondent violated Florida Administrative Rule 28-106.104 “Filing” Item 7, Subparagraph (B) that covers electronic filing. Subparagraph (C) now applied and was correctly utilized by the Court regarding filing procedures. These rules are listed on DOAH Website as viable. By rule, the Respondent was nearly sixteen (16) hours late.

14. The Petitioner graciously agreed to a twenty day extension at the request of the Respondent. This concession allowed a total of thirty (30) days. The Petitioner took adequate measures to insure her Proposed Recommended Order was submitted on time to both the Court and the Respondent as instructed. Contrary to statements by the Respondent, this was not an option; it was a Division of Administrative Hearings requirement. (T;) pgs 240, 241, 242.

15. The Respondent was allowed thirty (30) days as was the Petitioner. Per testimony, the Respondent was most concerned regarding commitments over the immediate 15-20 days following the March 4, 2009 hearing. The hearing date, plus twenty (20) days equals March 24, 2009. If more time was needed after this date, a request to the Court and Petitioner was appropriate. Respondent made no such request.

16. The transcript was filed April 14, 2009; which was an additional twenty one (21) days from March 24, 2009. To date, that sub-totals forty one (41) days from hearing to transcript posting. Then adding the additional thirty (30) days allowed, both sides were granted a total of seventy one (71) days to have a Proposed Recommended Order filed with the Court and each other. This was over twice (seventy one days versus thirty days) the amount of time allocated by the Court.

17. Respondent's states they filed before close of business on May 14, 2009 as with other proceeding in this matter. Based upon the evidence, this statement is not supported. Evidence supports the Respondent did not file before close of business on May 14, 2009. Furthermore, Respondent's Proposed Recommended Order was not the same as other filings in these proceedings. Other filings were not "Hearing Based" nor allowed additional filing time at the Respondents' request. (R-108;) pg 1.

18. The Respondent initiated no filing procedures until May 14, 2009; this was after receiving Petitioner's Proposed Recommended Order on May 12th. In this respect, the additional 61 days were of no consequence. Respondent used the last two available days to prepare and file. This indicates their filing a Proposed Recommended Order was not a priority. Only then it became "damage control" after the Petitioner filed an objection to the rule violation.

19. Respondent was irresponsible to file late after requesting an extension.

In fact, the filing was so late, a confirmation call to the DOAH clerk was impossible because the Department of Administrative Hearings had already closed. Respondent was completely unaware their submission was not on record and a problem existed. By this time, the Petitioner had its objection filed and on record.

20. Even with seventy one days allocated, the Respondent missed the filing deadline by sixteen hours. Notably, to defend their filing error, Respondent referenced a rule not legally considered by DOAH; failed to submit both Transmit Conf. Reports of the initial transmission, (assuming that two actually exist) and submitted a single Transmit Conf. Report that actually confirms their late filing.

21. It could further be argued by the Petitioner that the Clerk shouldn't have called the Respondent regarding the problem. Had the Clerk not done so, Respondent's Proposed Recommended Order would not exist and been of no consideration by the Court. The Respondent's facsimile failure is thoroughly covered by rules and required no reminder from the clerk that they were in error. The Respondent accepted that responsibility by filing electronically at the last minute.

22. Any late filing issues are rightfully the Courts discretion unless an extension was granted or an objection existed. Petitioner's objection was valid and on record before the Respondent submitted a Proposed Recommended Order. No time extension was requested nor granted. Furthermore, Respondent's Proposed Recommended Order was not submitted in its entirety and correctly posted into record at 11:41 a.m., May 15, 2009 as complete. This was undeniably late by nearly sixteen hours; a fact, and a major rule violation.

23. The Court stated that Petitioner suffered no undue prejudice as results of Respondent's Proposed Recommended Order. This is not true. The Court referenced two citings listed in Respondent's Proposed Recommended Order; had Petitioner's objection been upheld, those cases would not be referenced unless researched independently by the Court. (R-133;) pgs 4, 16; (R-82;) pg 11.

24. Additionally, the Respondent objected to Petitioner's Composite Exhibits 74-92 which are reference tools utilized by Equal Opportunity Employment Commission Investigators. This objection was upheld by the Court and heavily favored the Respondent. The Respondent offered only their opinion regarding this evidence; a rule was never quoted. Had the Respondent not objected, Petitioner's evidence could have been submitted

and considered by the Court. Furthermore, witnesses could have been examined.

25. As the Respondent objected then to Petitioner, and was acknowledged by the Court, the Petitioner objected to Respondent with greater cause as a multitude of cohabating facts existed. Yet, Petitioner was totally disregarded by the Court in this ruling.

26. Based upon the facts contained in items one (1) through twenty five (25,) Respondent's Proposed Recommended Order was wrongfully allowed regardless of a legitimate, prompt objection by the Petitioner. Notably, the objection was on record first. The Proposed Recommended Order by the Respondent shouldn't have been late period. The Court should have rightfully sustained Petitioner's objection and Motion to Strike Respondent's Proposed Recommended Order from the record. Petitioner's objection is renewed and enforcement of the Motion to Strike respectfully requested.

ISSUE OF DISPUTE THREE:

1. The Court states that the Petitioner's circumstances did not fall under any Clay County policy in respect to unpaid leave. In fact, the Court states this as an "undisputed fact. The Petitioner challenges this portion of the conclusions in item 35. (R-133;) pg 15.

2. These circumstances fall into the category of non traditional leave.

Leave under these conditions is handled at Human Resources Level.

In sworn testimony from Mr. O'Connell, HR Director, his initial role regarding Kathleen Sullivan's illness was to gain more information.

Obtaining medical documentation from Dr. Augusto Villegas was a reasonable action by the HR Department. This information consisted of a single paragraph summarizing the illness, treatment plan and estimated duration of the treatment. Although instructed to do so, no calls were made to Dr. Villegas. No contact was made with the Petitioner other than to request documentation followed by a letter of termination (T;) pgs 22, 24, 193, 223; (ATTACHMENT 1, Petitioner's Composite No. 1,) pg 3.

3. Clay County Leave Policy covers, in detail, both sick and unpaid leave contingencies. The Petitioner requested unpaid leave as both sick and routine leave were exhausted. This was an authorized and valid request per Clay County Policy. The policy states, "the supervisor may require the employee to use any part of his accrued Sick Leave, or if Sick Leave has been fully depleted, the employees Personal Leave. The supervisor may thereafter require the employee to take such leave without pay as is medically determined sufficient to restore him/her to normal health." (ATTACHMENT 1, Petitioner's Composite No. 1,) pgs 26-27.

4. This was the exact situation the Petitioner was facing as routine and sick leave were exhausted. The Petitioner was not an employee with disciplinary issues; in fact, she was powerless regarding the illness. Under these circumstances, unpaid leave should have been the first consideration; it was not. Rather, her career was decided by a single paragraph with no additional research or follow up. This in fact was considered thorough research and every option exhausted according to management. The evidence doesn't support these conclusions.

5. Before termination was initiated, the Petitioner had rights as a Clay County employee that were by passed and ultimately not honored by management. The Petitioner had the right to be informed of management decisions affecting her career. The Petitioner had the right to deal openly and directly with management. The Petitioner had the right think and speak for her self regarding career concerns. The Petitioner had the right to utilize formal mechanisms; IE: Grievance Committee, for a fair hearing by peers regarding work related issues.

6. Clay County Management was obligated to respect the employee's right to be heard. Listen fairly to non union represented employees. Be responsive to the needs of their employees. Actively communicate with

employees regarding matters affecting their jobs and careers. Insure that honest efforts are made to remedy any wrong.

7. Although this is written Clay County policy, these appropriate steps were bypassed. Noteworthy, Mr. O'Connell further states employees can approach management with any issue as they are given a thorough orientation regarding Clay County policy. When the Petitioner approached management after the fact, she was responded to by one of the most powerful legal firms in the Jacksonville area. (ATTACHMENT 1, Petitioner's Composite No. 1,) pg 23; item 1.10 (T;) pg 192.

8. Mr. O'Connell, states that Clay County Policies apply to all county employees. The exceptions are unionized employees in Public Works and Public Safety. Employees are required to read policy manual and sign a compliance statement of understanding. (T;) pg 17-18, 11-19, 1-10 .

9. The signed compliance statement insures the employee knows their rights and agrees compliance to written policy. He further stated only the Board of County Commissioners can authorize any deviation from this policy. There is no evidence indicating the Board of Commissioners authorized these blatant deviations of written policy. When asked why none of these policies applied, the Petitioner was told, because "you're an ex-employee."

10. Therefore, as an active employee, the Petitioner was excluded on several standard rights afforded to her peers. As such, all these acts were discriminatory to the Petitioner. The sworn statement of Mr. O'Connell that termination was the only option isn't supported by the facts.

(ATTACHMENT 1, Petitioner's Composite No. 1,) pg 2; (T;) pgs 17, 18, 27, 28.

11. The Court determined that the Respondent did perceive the Petitioner as disabled. Additionally, the Court determined the Petitioner was a qualified person with a disability. This point has been argued by the Petitioner but never acknowledged by the Respondent. (R-133;) pgs 14-15.

12. Since the Court concluded the Petitioner was a Qualified American with a Disability, the Petitioner qualified for consideration under the Clay County (ADA) policy. This is why the Respondent objected to Petitioner's Composite No. 1, pages 74-92 as it substantiates the allegations of discrimination. Reference (ATTACHMENT 1, Petitioner's Composite No. 1, REF: Issue of Dispute One;) pgs 75, 76, 77, 80-82, 86, 89, 90, 91.

13. The Clay County (ADA) policy specifies fair employee treatment; provides opportunities equal to others working or seeking work in Clay County. This policy prohibits discrimination regarding demotion, layoff, right of return from layoff, termination, leave of absence, sick leave and

other leave. This policy is further expanded stating that a person with a disability shall not be isolated or excluded and reasonable accommodations will be offered. (ATTACHMENT 1, Petitioner's Composite No. 1,) pgs 72-73.

14. The first sentence in the termination letter begins with, "Due to a medical condition." This statement prefaces the termination as ILLNESS related. When asked "what" medical condition he was referring to, Mr. O'Connell confirmed he was referring to CANCER. Mr. O'Connell continues with no available leave was an additional consideration in the termination. Furthermore, per testimony, the illness, amount of time for treatment, the fact that there isn't a cancer cure, the lost time for treatment and no exact return date were factored in the termination. (ATTACHMENT 1, Petitioner's Composite No. 1,) pg 4; (T;) pgs 22-25.

15. During direct examination of Mr. O'Connell, his references and explanations regarding the Petitioner's termination were based upon the illness itself. All relating issues with the Cancer treatment were listed as additional justification for the termination. Furthermore, the County terminated the Petitioner in the most callous and ruthless of manners. Per the existing policy, an employee with disciplinary issues is fore warned and

granted full rights before termination. Yet, the Petitioner was terminated without notice and with no rights granted equal to those of peers.

16. Respondent violated ADA, Sec. 12112. [Section 102] Para. (A); specifically, per testimony, her discharge was based upon the illness and treatment related issues; her employment rights were never considered by management; IE: rights by virtue of all Clay County employees.

17. Respondent violated 12112 Para. (B) (1), and CFR Title 29, Vol. 4, Sec. 1630.5 as Petitioner was segregated from management and contacted through their attorneys and only then to be denied requests or reasonable answers. These actions certainly insured the Petitioner could not exercise her rights. Also violated were 12112 Para. (3.) (A) and (4) and CFR Title 29, Vol. 4, Sec. 1630.7 (A) and (B) as standards of administration were utilized that have the effect of discrimination on the basis of disability. Additionally, these actions excluded and denied equal benefits to a qualified individual with a disability.

18. Most notably, The Respondent violated 12112 Para (5) (A), and CFR Title 29, Vol. 4, Sec. 1630.9 (A,) (B,) and (C) as no reasonable accommodation was offered or granted when requested. Furthermore, Mr. O'Connell stated the Petitioner only had a right to request such accommodations as an active employee. Yet, he is unable to explain how she

could accomplish such by the procedures the county utilized in her Termination. (T;) pgs 30, 32-34, 36, 45-47.

19. Had the Respondent followed their leave policy, this would be Reasonable Accommodation in accordance with the Clay County (ADA) Policy statement. Although both policies were current, neither was applied nor considered. The declaration of no Clay County Policy regarding the Petitioner is not supported by the evidence.
20. Based upon the weight of all evidence, the Petitioner was fired for the primary reason of having cancer. The testimony supports this allegation. Furthermore, the Petitioner was terminated in such a manner to minimize recourse. When the Petitioner contacted management that, according to testimony, is employee friendly; all contact was ceased and the only contact was through their legal representation. These actions and retaining specialized legal counsel is consistent with an employer deeply concerned about their administrative actions regarding the Petitioner's termination.
21. The Petitioner submits that all elements of Discrimination have been met. As a minimum, it is undisputed that Clay County failed to consider or grant a reasonable accommodation to a qualified individual. To terminate an employee, in writing and prefacing it with "Due to a medical condition" was not only arrogant, it was callous. In addition, to justify these actions by

failure to administer Clay County existing policy then insist the Petitioner isn't ineligible due to her termination is insulting.

CONCLUSION

1. The Appellant respectfully requests that which was originally sought; to be treated fairly. To date; this has not happened. And regrettably, in this respect, it no longer matters.
2. The Appellant, Kathleen E. Sullivan passed away on September 3, 2009 at 17:51 hours from congestive heart failure. This was exactly one year, four months and sixteen days post Cancer diagnosis. Although going through chemotherapy, she was fairly active and vibrant until June 2009. This was more than adequate time to resume work if only in a part time position.
3. This case is a matter of law and what is more believable. The Appellant was diagnosed with cancer and terminated. Although there were several contingencies available to her employer, the only one considered was termination. Notably, as an American with a disability, she wasn't offered or granted a no cost reasonable accommodation.
4. It was the Appellant's desire that this case be completed should her death precede final Appellate Court action. Therefore, in a separate Motion, Kyia Lynn Robinson, daughter to the Appellant petitions the Court to hear this matter through to its completion.

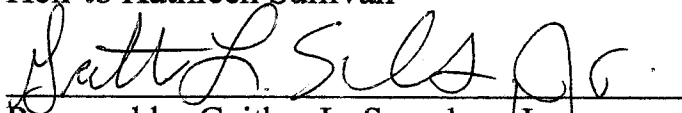
5. The Appellant wanted no one to endure such apathetic treatment when they are undergoing treatment for illness as she was. The Appellant's desire was to insure that the rights of others in her position were recognized and respected in a humane and compassionate manner. The last sixteen months of the Appellant's life should have been peaceful; instead, she endured a bitter battle against a ruthless adversary. It is requested that this Court conclude all elements of Discrimination due to Illness have been met by the Appellant.

SIGNED and SUBMITTED this 11th day of September 2009

Respectfully submitted,



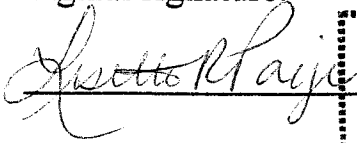
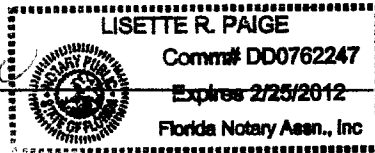
Kyia Lynn Robinson, Daughter of Appellant,
Heir to Kathleen Sullivan



Prepared by Gaither L. Saunders, Jr.
DOAH Approved Qualified Representative
For Appellant, Kathleen Sullivan

STATEMENT OF SIGNATURE AUTHENTICITY

Kyia Lynn Robinson 218-98-5250 appeared before me on this date. Having produced proper identification, signed this document which I attest is her original signature.

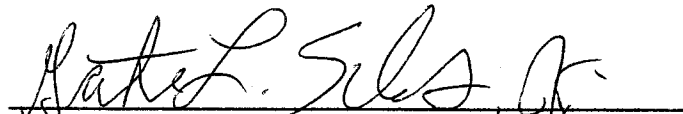



September 11, 2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Initial Brief has been served to Attorneys for the Appellee on this 11th day of September 2009 via certified first class United States mail on the following:

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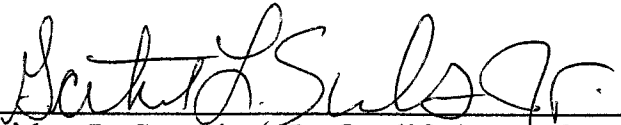

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this document was prepared in Times New
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Gaither L. Saunders, Jr. Qualified Rep. for
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