APPLICATION FOR NOMINATION TO THE COUNTY COURT

(Please attach additional pages as needed to respond fully to questions.)

DATE: November 17, 2009 Florida Bar No.: 947652

GENERAL: Social Security No.: REDACTED

1. Name **Ryan Christopher Rodems** E-mail: Rodems@barkerrodemsandcook.com

   Date Admitted to Practice in Florida: 09/23/1992

   Date Admitted to Practice in other States:

2. State current employer and title, including professional position and any public or judicial office.

   Barker, Rodems & Cook, P.A., Partner

3. Business address: 400 North Ashley Drive, Suite 2100

   City Tampa County State Florida ZIP 33602

   Telephone (813) 489-1001 FAX (813) 489-1008

4. Residential address: 210 Excalibur Court

   City Brandon County State Florida ZIP 33511

   Since 2002 Telephone (813) 661-1156

5. Place of birth: Buffalo, New York

   Date of birth: 12-04-1966 Age: 42

6a. Length of residence in State of Florida: Since 1973

6b. Are you a registered voter? X Yes ☐ No

   If so, in what county are you registered? Hillsborough

7. Marital status: Married

   If married: Spouse's name Tami Alane Rodems

   Date of marriage 05/11/1996

   Spouse's occupation Manages our home

If ever divorced give for each marriage name(s) of spouse(s), current address for each former spouse, date and place of divorce, court and case number for each divorce.

Only married once.

8. Children

Name(s)	*Age(s)*	*Occupation(s)*	*Residential address(es)*
Nicholas	10	Student	Lives with parents

9. Military Service (including Reserves)

Service	*Branch*	*Highest Rank*	*Dates*
United States Naval Reserve		Midshipman	1985-1986

Rank at time of discharge Midshipman Type of discharge Honorable

Awards or citations NROTC Academic Gold Star

HEALTH:

10. Are you currently addicted to or dependent upon the use of narcotics, drugs, or intoxicating beverages? If yes, state the details, including the date(s).

No.

11a. During the last ten years have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: Kleptomania, Pathological or Compulsive Gambling, Pedophilia, Exhibitionism or Voyeurism?

Yes ☐ No **X**

If your answer is yes, please direct each such professional, hospital and other facility to furnish the Chairperson of the Commission any information the Commission may request with respect to any such hospitalization, consultation, treatment or diagnosis. ["Professional" includes a Physician, Psychiatrist, Psychologist, Psychotherapist or Mental Health Counselor.]

Please describe such treatment or diagnosis.

11b. In the past ten years have any of the following occurred to you which would interfere with your ability to work in a competent and professional manner?

- Experiencing periods of no sleep for 2 or 3 nights
- Experiencing periods of hyperactivity
- Spending money profusely with extremely poor judgment

- Suffered from extreme loss of appetite
- Issuing checks without sufficient funds
- Defaulting on a loan
- Experiencing frequent mood swings
- Uncontrollable tiredness
- Falling asleep without warning in the middle of an activity

Yes ☐ No **X**

If yes, please explain.

12a. Do you currently have a physical or mental impairment which in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner?

Yes ☐ No **X**

12b. If your answer to the question above is Yes, are the limitations or impairments caused by your physical or mental health impairment reduced or ameliorated because you receive ongoing treatment (with or without medication) or participate in a monitoring or counseling program?

Yes ☐ No ☐

Describe such problem and any treatment or program of monitoring or counseling.

13. During the last ten years, have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservatorship or committee? If yes, give full details as to court, date and circumstances.

No.

14. During the last ten years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by Federal or State laws? If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

No.

15. In the past ten years, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? If so, please state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No.

16. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? If so, please state the date you were requested to submit to such a test, the type of test required, the name of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

No.

17. In the past ten years, have you suffered memory loss or impaired judgment for any reason? If so, please explain in full.

No.

EDUCATION:

18a. Secondary schools, colleges and law schools attended.

Schools	*Class Standing*	*Dates of Attendance*	*Degree*
Mulberry High School		1981-1985	High School Diploma
University of Southern California		1985	
University of Florida		1986-1989	Bachelor of Science, Business Administration
Florida State University		1989-1992	Juris Doctor

18b. List and describe academic scholarships earned, honor societies or other awards.

I earned a NROTC academic scholarship in 1984. In 1985, at USC, I earned a NROTC Gold Star for superlative academic performance. At FSU, I was a member of the Law Review.

NON-LEGAL EMPLOYMENT:

19. List all previous full-time non-legal jobs or positions held since 21 in chronological order and briefly describe them.

None.

PROFESSIONAL ADMISSIONS:

20. List all courts (including state bar admissions) and administrative bodies having special admission requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have been suspended or resigned.

Court or Administrative Body	*Date of Admission*
United States Supreme Court	October 4, 2004
United States Court of Appeals, Eleventh Circuit	June 17, 2004
United States District Court, Middle District of Florida	October 16, 1992
Florida Bar	September 23, 1992

LAW PRACTICE: (If you are a sitting judge, answer questions 21 through 26 with reference to the years before you became a judge.)

21. State the names, dates and addresses for all firms with which you have been associated in practice, governmental agencies or private business organizations by which you have been employed, periods you have practiced as a sole practitioner, law clerkships and other prior employment:

Position	*Name of Firm*	*Address*	*Dates*
Law Clerk	The Ausley Law Firm	227 South Calhoun Street, Tallahassee, Florida 32301	1990, 1991
Intern	Office of the State Attorney, Tenth Judicial Circuit	255 North Broadway Avenue, Bartow, Florida 33830	1991
Intern	Florida Supreme Court	500 South Duval Street, Tallahassee, Florida 32399-1927	1992
Associate	Alpert, Josey & Grilli, P.A.	100 South Ashley Drive, Suite 2000, Tampa, Florida 33602	1992-1997

Partner	Alpert, Barker & Rodems, P.A.	100 South Ashley Drive, Suite 2000, Tampa, Florida 33602	1997-2000
Partner	Barker, Rodems & Cook, P.A.	400 North Ashley Drive, Suite 2100, Tampa, Florida 33602	2000-Present

22. Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

I am Board Certified by the Florida Bar in Civil Trial law and "AV" rated by Martingale-Hubbell. Our law firm represents individuals and businesses in civil matters involving employment, contracts, torts and insurance, in federal and state trial and appellate courts, administrative tribunals and arbitrations.

Our clients include publicly traded and closely-held corporations, small businesses, insurance companies, and individuals. In addition to retaining us to litigate, our clients have sought advice on business formations, executive compensation, employment discrimination, ERISA, and insurance policies, including general liability, disability, health, homeowners, motor vehicle, and employment practices.

23. What percentage of your appearance in courts in the last five years or last five years of practice (include the dates) was in:

Court		Area of Practice	
Federal Appellate	~5 %	Civil	~75 %
Federal Trial	~40 %	Criminal	~5 %
Federal Other	%	Family	~5 %
State Appellate	~5 %	Probate	%
State Trial	~40 %	Other	~15 %
State Administrative	~10 %		
State Other	%		
	%		
TOTAL	100 %	TOTAL	100 %

24. In your lifetime, how many (number) of the cases you have tried to verdict or judgment were:

Jury?	20	Non-jury?	~10
Arbitration?	~10	Administrative Bodies?	~25

25. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended or terminated by an employer or tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No.

26. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain in full.

No.

(Questions 27 through 30 are optional for sitting judges who have served 5 years or more.)

27a. For your last 6 cases, which were tried to verdict before a jury or arbitration panel or tried to judgment before a judge, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

Gregory Herbert, Esquire, 407/418-2431
Tom Billiris, Esquire, 727/943-9466
Robert Bleakley, Esquire, 813/221-3759
Dabney Conner, Esquire/Sean Parker, Esquire, 863/533-7117
Lewis Collins, Esquire, 813/281-1900
Thomas G. Gonzalez, Esquire, 813/273-0050

27b. For your last 6 cases, which were settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

Gregory E. Mierzwinski, Esquire, 813/805-6886, *Austin v. Jacknette*, Florida 13th Judicial Circuit, 05-02592, Division: "E";

James I. Sullivan, Esquire, 813/276-1662, *Takamatsu v. William Ryan Homes*, USDC, M.D. Fla., Case No. 8:08-cv-938-T-26;

Thomas G. Gonzalez, Esquire, 813/273-0050, *Endress v. TECO*, Florida 13th Judicial Circuit, Case No.: 04 10462;

Kevin Johnson, Esquire, 813/273-0050, *Hill v. Gould & Lamb*, Florida 12th Judicial Circuit, 2007-CA-5441;

Lee Bodie, Esquire, 813/223-5505, *Olgia v. HSN*, Fla. DOAH, 99-009809;

Craig Berman, Esquire, 727/550-8989, *Richardson v. HSN*, USDC, M.D. Fla. 8:07-CIV-1375-T-24;

27c. During the last five years, how frequently have you appeared at administrative hearings?
~3 average times per month

27d. During the last five years, how frequently have you appeared in Court?
~5 average times per month

27e. During the last five years, if your practice was substantially personal injury, what percentage of your work was in representation of plaintiffs? ~50 % Defendants? ~50 %

28. If during any prior period you have appeared in court with greater frequency than during the last five years, indicate the period during which this was so and give for such prior periods a succinct statement of the part you played in the litigation, numbers of cases and whether jury or non-jury.

29. For the cases you have tried to award in arbitration, during each of the past five years, indicate whether you were sole, associate or chief counsel. Give citations of any reported cases.

WrestleReunion, LLC v. Live Nation, Television Holdings, Inc., United States District Court, Middle District of Florida, Case No. 8:07-cv-2093-T-27, August 31-September 10, 2009. Lead Counsel for Plaintiff (co-counsel Chris A. Barker)(jury trial).

Brieson Corp. v. Brownstone Industries, LLC, Florida Thirteenth Judicial Circuit, Case No. 05-10571, January 20-22, 2009. Lead counsel for Plaintiff (co-counsel William J. Cook)(jury trial).

Simmons v. Orlando Predators, Florida Thirteenth Judicial Circuit, Case No. 05-CA-004622, May 2007. Lead counsel for Plaintiff (co-counsel Chris A. Barker).

D'Angelo v. The School Board of Polk County, United States District Court, Middle District of Florida, Case No. 8:05-cv-563-T-26TBM, June 2006. Trial Counsel for Plaintiff (co-counsel Chris A. Barker). Reported at: D'Angelo v. Sch. Bd., 497 F.3d 1203 (11th Cir. Fla. 2007).

Marks, et al. v. Verizon Florida, Inc., Florida Thirteenth Judicial Circuit, Case No. 03 CA 011480, April 2006; Counsel for Plaintiffs (solo).

Knapp v. City of Tarpon Springs, et al., Florida Sixth Judicial Circuit, Case No. : 04-6765-CI-015, December 2005; Co-counsel for Defendant International Golf Maintenance, Inc. (Lead counsel Chris A. Barker).

Figari, et al. v. Harvey, Florida Thirteenth Judicial Circuit, Case No. 03-CA-011182, Division B, December 2005; Judge Charlene E. Honeywell; Counsel for Petitioners (solo).

Malcolm v. Home Shopping Network, State of Florida, Division of Administrative Hearings, Office of the Judge of Compensation Claims, Case No. 03-014688LLH, 2007. Counsel for Home Shopping Network (solo).

Griffis v. G. Pierce Wood Memorial Hospital, State of Florida, Division of Administrative Hearings, Office of the Judge of Compensation Claims, Case No.: 98-027597DBB. Counsel for Claimant (solo). Reported at *G. Pierce Wood Mem'l Hosp. v. Griffis*, 921 So. 2d 757 (Fla. 1st DCA 2006).

Mosquera v. Home Shopping Network, State of Florida, Division of Administrative Hearings, Office of the Judge of Compensation Claims, Case No. 01-008879LLH, Counsel for Home Shopping Network (solo). Reported at: Mosquera v. Home Shopping Network en Espanol, LLC, 890 So. 2d 1237 (Fla. 1st DCA 2005).

30. List and describe the six most significant cases which you personally litigated giving case style, number and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant. Give the name of the court and judge, the date tried and names of other attorneys involved.

Losh, et al. v. G.I.S. Housing, Inc. d/b/a Freedom Village I, United States District Court, Middle District of Florida, Case No. 8:02-cv-1126-T-30EAJ; Preliminary Injunction 2002; Judge James S. Moody, Jr.; Opposing Counsel: Brian A. Burden, Esquire.

Lonnie Losh was a 51 year old man who suffered from Multiple Sclerosis, Cerebral Palsy and the after-effects of Polio. He was wheelchair-bound, and could not speak, and communicated by hand signals or writing. For twenty-two years, Mr. Losh had lived alone at Freedom Village I, a reduced-rent apartment complex owned and operated by Goodwill Industries. His apartment door -- until June 20, 2002 -- was locked by a deadbolt, but the latch of the door knob was disengaged so that Mr. Losh was able to open his door using rope tied to the door handle.

On June 20, 2002, the apartment complex manager ordered maintenance workers to install pneumatic door closers on all apartment doors, on the order of the Pinellas Park Fire Chief. These devices forced doors to close whenever opened. Once installed, Mr. Losh could not open his door without assistance from another person because he did not have the strength to push it open. Effectively, he was imprisoned in his apartment. Mr. Losh's care giver, Mr. Wright, told the apartment manager of the danger Mr. Losh faced because of the pneumatic door closer, and Mr. Losh, through the assistance of Mr. Wright, sent a letter to the manager, pleading for the pneumatic device to be removed.

Freedom Village I's manager responded that the device would not be removed. Further, all residents were advised that if any resident disabled the pneumatic door device, he or she would be issued a "seven day notice" of violation of the lease -- a prerequisite to an action to evict the tenant.

Acting as lead counsel, I represented Mr. Losh and another tenant in a federal lawsuit arising under the Fair Housing Act, the Rehabilitation Act of 1973, and the United States Housing Act of 1937. We pursued a preliminary injunction, and after an evidentiary hearing, District Judge James Moody ordered Freedom Village I to remove the pneumatic door closing devices. As a result, Goodwill Industries agreed to install mechanical door openers for the residents who otherwise could not open their doors.

This case was significant because the residents of Freedom Village I were physically or mentally disabled, and lived there only because they were unemployed and living on government subsistence. The apartment manager had a history of harsh treatment towards the residents and ignored their concerns. The residents, already suffering from poverty and physical impairment or mental illnesses, felt hopeless. With the success this case brought, Mr. Losh and Ms. McSherry, the other plaintiff, and many of the other residents, began to believe that the justice system would protect them.

D'Angelo v. The School Board of Polk County, United States District Court, Middle District of Florida, Case No. 8:05-cv-563-T-26TBM, reported at D'Angelo v. Sch. Bd., 497 F.3d 1203 (11th Cir. Fla. 2007); Tried June 2006; Judge Richard A. Lazzara; Opposing Counsel: Dabney Conner, Esquire and Sean Parker, Esquire.

In 2002, Michael L. D'Angelo was appointed principal of Kathleen High School. At that time, the faculty was demoralized, crime was high, and students freely used drugs on campus. In fact, on Mr. D'Angelo's first day, the School Resource Officer, while in full uniform, witnessed a drug sale take place less than ten feet from him. Mr. D'Angelo made immediate changes, including securing the school, removing drug dealers and banning gang activity. KHS improved academically, and the changes Mr. D'Angelo imposed reduced crime and drug dealing.

Mr. D'Angelo sought more funding to improve KHS academics. When the School Board denied increased funding, Mr. D'Angelo explored converting KHS to a charter school. Shortly thereafter, the Superintendent decided to not renew his contract.

I represented Mr. D'Angelo in a lawsuit against the School Board of Polk County, alleging Mr. D'Angelo's First Amendment rights were violated. Approximately three weeks before trial, the United States Supreme Court issued Garcetti v. Ceballos, 126 S. Ct. 1951 (2006), holding that a public employee's speech in the course of official duties is not protected under the First Amendment. As a result, we lost on a directed verdict.

The reason the case was significant to me was the recognition by Judge Lazzara upon ruling against Mr. D'Angelo:

"I know this is a harsh blow to Mr. D'Angelo and his wife. . . . And I'll tell everybody right here, including Mr. and Mrs. D'Angelo, I don't like this decision. I think you were -- you were morally wronged. . . . When you look at the time-line in this case, which is corroborated, corroborated by the documentary evidence . . . there's no question that's what motivated him to terminate him and to effectively end a great career. . . .You know, I've always been taught that for every wrong there's a remedy. Well, there was a remedy here, which turned out to be hollow. So I say to you, Mr. D'Angelo and Mrs. D'Angelo, I think this is the first time I've ever done this, I apologize to you. I don't like making this decision, but the law compels it.

And I want to congratulate Mr. Rodems and I congratulate defense counsel. You did your job for your client, it's an excellent job. But I want to congratulate Mr. Rodems and Mr. Barker. You did an excellent job. You put together one good case. And I hope you appeal me and I hope -- and I'll say it for the record -- I hope the Eleventh Circuit reverses me and says you were wrong, Lazzara, and we'll come back here and we'll try it and we'll

give it to that jury."

EEOC and Zechella v. Outback Steakhouse, Inc., United States District Court, Middle District of Florida, Case No. 8:99-CV-2218-T-26-MSS; September 2001; Judge Richard A. Lazzara; Opposing Counsel: William Sizemore, Esquire.

Dena Zechella was the lone female in the construction and design department at the headquarters of Outback Steakhouse, Inc. As a political favor, the chairman of Outback hired Steve Wilson, a former Tampa Bay Buccaneer who had recently been released from prison for DUI manslaughter. Mr. Wilson was hired to do the same job as Ms. Zechella, but at a much higher salary. When Ms. Zechella complained about the pay discrimination to the chairman, she was fired.

I represented Ms. Zechella. The trial began on September 10, 2001. Due to the terrorist attacks on September 11, many judges nationwide declared mistrials. Our Judge decided we would go forward. We proved that Outback discriminated and retaliated against Ms. Zechella, and the jury awarded $2.2 million to her. Because it is headquartered in Tampa, Outback is a highly regarded company. This verdict brought attention to the issue of equal pay for women.

Richardson v. HSN, United States District Court, Middle District of Florida, Case No. 8:07-CV-1375-T-24

I defended the Home Shopping Network. Plaintiff, who was HIV positive, alleged his illness was a motivating factor in his termination. The case illustrated the potential damage that unfounded allegations of discrimination can have on employees and the importance of the discovery process. We were able to refute the allegations and resolve the case without a trial.

Wilson, et al. v. Buccaneers Football Stadium Ltd. Partnership, Thirteenth Judicial Circuit, Case No. 99-5018; Litigated in 1999 and 2000; Judge Sam D. Pendino; Opposing Counsel: Arnold Levine, Esquire.

Otha "Gene" Wilson was a long-suffering fan of the Tampa Bay Buccaneers. From shortly after the Buccaneers were founded in 1976 until 1997, when the Bucs routinely lost ten or more games per year and the average attendance was less than 25,000, Gene had season tickets at Tampa Stadium near the 50 yard line.

In the mid-to-late 1990s, the Bucs' owners spearheaded the construction of a new stadium, and the financing of it was dependent upon Gene and other seasonticket holders agreeing to buy seats in the new stadium -- and paying substantial "Charter Seat Deposits." To induce Gene and others to pay the CSD, the Bucs promised that seating priority in the new stadium would be based on seniority. When the seat assignments were announced, Gene's seats were near the end zone. He hired our law firm to represent him and a class of season ticketholders in a case arising under the Florida Deceptive and Unfair Trade Practices Act.

My role initially was to draft the complaint, manage discovery, and work closely with the clients. In the end, I was responsible for creating the settlement concept, and processing

the class action settlement, which was approved by the Court. Everything in this case was a battle. There were discovery battles, efforts by opposing counsel to disqualify the trial judge, and two mediations. The case was significant to me not for what I learned in the courtroom but for what I learned outside the courtroom about managing a case with extraordinarily wealthy defendants, powerful trial attorneys and high stakes in a very public and publicity-driven lawsuit.

Ernest v. 60 Watt, Inc., Thirteenth Judicial Circuit, Case No. 02-03326; December 2003; Judge Gregory Holder; Opposing Counsel: Herman Blumenthal, Esquire.

My partner and I represented 60 Watt, Inc., a nightclub in Valrico, Florida. Mr. Ernest, 6' 4" and 270 pounds, was a patron on New Year's Eve. When he went out to his truck to retrieve something, he noticed a young black male, 5' 7" and 145 pounds, standing next to his truck. After berating the young black male with the ultimate racial epithet for standing next to his truck, the young black male picked up a softball-sized chunk of concrete and threw it at Mr. Ernest, hitting him in the head and causing a concussion, severe laceration and a neck injury. Mr. Ernest sued the nightclub, alleging it should have protected him from the young, black male.

Our defense was that there was nothing the nightclub operator could have done to prevent a one-punch attack, which was provoked by the use of racial epithets. Judge Greg Holder agreed, granting a directed verdict in favor of our client in this premises liability action. Judge Holder stated that this was the first time in his career that he had entered a directed verdict in a negligence case.

31. Attach at least one example of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach writing for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

I wrote the submission in its entirety.

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE:

32a. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved and the dates of service or dates of candidacy.

I have applied through the Judicial Nominating Commission process in 2008 and 2009.

32b. List any prior quasi-judicial service:

Dates *Name of Agency* *Position Held*

Types of issues heard:

32c. Have you ever held or been a candidate for any other public office? If so, state the office, location and dates of service or candidacy.

No.

32d. If you have had prior judicial or quasi-judicial experience,

(i) List the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance.

(ii) Describe the approximate number and nature of the cases you have handled during your judicial or quasi-judicial tenure.

(iii) List citations of any opinions which have been published.

(iv) List citations or styles and describe the five most significant cases you have tried or heard. Identify the parties, describe the cases and tell why you believe them to be significant. Give dates tried and names of attorneys involved.

(v) Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give date, describe complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

(vi) Have you ever held an attorney in contempt? If so, for each instance state name of attorney, approximate date and circumstances.

(vii) If you are a quasi-judicial officer (ALJ, Magistrate, General Master), have you ever been disciplined or reprimanded by a sitting judge? If so, describe.

BUSINESS INVOLVEMENT:

33a. If you are now an officer, director or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

Officer/Director, Barker, Rodems & Cook, P.A. I will resign my position as soon as professionally possible.

33b. Since being admitted to the Bar, have you ever been engaged in any occupation, business or profession other than the practice of law? If so, give details, including dates.

I have served as an adjunct instructor at Hillsborough Community College, Ybor City campus, teaching Business Law I and II in 2002, 2003 and 2006.

33c. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind. If so, identify the source of such compensation,

the nature of the business enterprise, institution, organization or association involved and the dates such compensation was paid and the amounts.

I have served as an adjunct instructor at Hillsborough Community College, Ybor City campus, teaching Business Law I and II in 2002, 2003 and 2006. The compensation was less than $1,600 per semester.

POSSIBLE BIAS OR PREJUDICE:

34. The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you as a general proposition believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

No.

MISCELLANEOUS:

35a. Have you ever been convicted of a felony or a first degree misdemeanor?

Yes No **X** If "Yes" what charges?

Where convicted? Date of Conviction:

35b. Have you pled nolo contendere or pled guilty to a crime which is a felony or a first degree misdemeanor?

Yes No **X** If "Yes" what charges?

Where convicted? Date of Conviction:

35c. Have you ever had the adjudication of guilt withheld for a crime which is a felony or a first degree misdemeanor?

Yes No **X** If "Yes" what charges?

Where convicted? Date of Conviction:

36a. Have you ever been sued by a client? If so, give particulars including name of client, date suit filed, court, case number and disposition.

My law firm was sued by a former client, and I am defending the lawsuit.

36b. Has any lawsuit to your knowledge been filed alleging malpractice as a result of action or inaction on your part?

No.

36c. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the amounts involved.

No.

37a. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you?

No.

37b. Have you ever owned more than 25% of the issued and outstanding shares or acted as an officer or director of any corporation by which or against which a petition in bankruptcy has been filed? If so, give name of corporation, your relationship to it and date and caption of petition.

No.

38. Have you ever been a party to a lawsuit either as a plaintiff or as a defendant? If so, please supply the jurisdiction/county in which the lawsuit was filed, style, case number, nature of the lawsuit, whether you were Plaintiff or Defendant and its disposition.

No.

39. Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, give the particulars.

No.

40. To your knowledge within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a formal complaint or formal accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? If so, please state the date(s) of such formal complaint or formal accusation(s), the specific formal complaint or formal accusation(s) made, and the background and resolution of such action(s). (Any complaint filed with JQC, refer to 32d(v).

In approximately April 2003, a former client, Roslyn Vazquez, filed a complaint with the Florida Bar claiming I had charged an inappropriate fee in a contingency fee case, even though she signed a contingent fee contract, and signed a stipulation approving the fee, which was approved by the federal court. She also accused me of misrepresenting facts in a summary judgment hearing, despite that no motion for summary judgment was ever even filed, and telling her to testify untruthfully in court, even though there was never any in-court testimony. The Florida Bar dismissed each of these allegations as unfounded on June 18, 2003.

In approximately September 2005, a former client, Rita Pesci, filed a complaint with the Florida Bar also claiming I had charged an inappropriate fee in a contingency fee case, even though she signed a contingent fee contract, and even though she signed a stipulation resolving the fee, which was presented to the federal court. The Florida Bar dismissed each of these allegations as unfounded on July 12, 2007, with the grievance committee voting 5-0 to find no probable cause, and declaring my fee to be "reasonable."

Apparently, in approximately May 2007, Neil J. Gillespie, a former client of the law firm who sued our law firm in a dispute over attorneys' fees, filed a grievance against me with the Florida Bar. In his grievance, he alleged that I had used confidential information derived from our law firm's previous representation of him while defending our law firm in

the lawsuit against our law firm. Without even requesting a written response from me, the Florida Bar found no basis for further proceedings and dismissed the complaint. I only learned of the complaint when the Florida Bar issued its letter dismissing it on May 15, 2007.

41. Are you currently the subject of an investigation which could result in civil, administrative or criminal action against you? If yes, please state the nature of the investigation, the agency conducting the investigation and the expected completion date of the investigation.

No.

42. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No.

43a. Have you filed all past tax returns as required by federal, state, local and other government authorities?

Yes **X** No ☐ If no, please explain.

43b. Have you ever paid a tax penalty?

Yes ☐ No **X** If yes, please explain what and why.

43c. Has a tax lien ever been filed against you? If so, by whom, when, where and why?

No.

HONORS AND PUBLICATIONS:

44. If you have published any books or articles, list them, giving citations and dates.

I am a co-author of two books: Florida Practice Handbook, Workers' Compensation with Forms, Volumes 1 and 2, 1995 and Florida Practice Handbook, Motor Vehicle No-Fault Law, 1998.

45. List any honors, prizes or awards you have received. Give dates.

I have been awarded a rating of "AV" by Martindale Hubbell, and I am Board Certified in Civil Trial law by the Florida Bar.

46. List and describe any speeches or lectures you have given.

I have lectured on Ethics for Lorman Business Services for Continuing Legal Education, and these courses were approved for credit by the Florida Bar. I have also lectured for the Florida Association of School Board Officers, the Hillsborough County Bar Association Public Law School, the National Safety Council, the American Liver Foundation, Gulf Coast Chapter, and I have served in the past as a Certified Instructor, Workers' Compensation Adjusters, Florida Department of Insurance.

47. Do you have a Martindale-Hubbell rating? Yes **X** If so, what is it? AV No ☐

PROFESSIONAL AND OTHER ACTIVITIES:

48a. List all bar associations and professional societies of which you are a member and give the titles and dates of any office which you may have held in such groups and committees

to which you belonged.

Florida Bar, 1992-current
Hillsborough County Bar Association, 1992-current
Past member of the Florida NELA, American Bar Association, the Lakeland Bar Association, ATLA, NASCAT.

I was also a Barrister in the Justice William Glenn Terrell American Inn of Court from 2001-2003.

Former member of the Board of Directors of the American Liver Foundation, Gulf Coast Chapter, and founder and former member of the Board of Directors of the Florida Liver Association

48b. List, in a fully identifiable fashion, all organizations, other than those identified in response to question No. 48(a), of which you have been a member since graduating from law school, including the titles and dates of any offices which you have held in each such organization.

National Rifle Association, since approximately 1998
Camelot Woods II Homeowners' Association, President 2003-2005.
American Liver Foundation, Gulf Coast Chapter, Board member
Florida Liver Association, Board member

48c. List your hobbies or other vocational interests.

I enjoy golfing, fishing, and attending sporting events with my son.

48d. Do you now or have you ever belonged to any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

No.

48e. Describe any pro bono legal work you have done. Give dates.

Throughout my career, I have represented a number of people in pro bono matters, including domestic violence injunction petitions, consumer-contract disputes, landlord-tenant disputes, family law matters and providing general legal advice.

SUPPLEMENTAL INFORMATION:

49a. Have you attended any continuing legal education programs during the past five years? If so, in what substantive areas?

Civil Trial law, appellate law and ethics.

49b. Have you taught any courses on law or lectured at bar association conferences, law school forums, or continuing legal education programs? If so, in what substantive areas?

I have lectured on ethics for lawyers, and I have lectured on workers' compensation for insurance adjusters and employers. I have also taught business law classes at Hillsborough Community College, Ybor City campus.

50. Describe any additional education or other experience you have which could assist you in holding judicial office.

While at my former law firm, I served as managing partner. I was responsible for hiring and discharging employees, administering the firm, managing its business affairs and developing new business. I have also taught college students at a community college. I have worked with diverse groups, including the American Liver Foundation and the Southern Christian Leadership Conference. I also served as President of my homeowners' association for two years.

51. Explain the particular potential contribution you believe your selection would bring to this position.

My family moved to Lakeland in 1973 from Buffalo, New York. In 1994, I moved to Hillsborough County, and since then I have lived in Tampa or Brandon. After interning with the State's Attorney and later for Chief justice Leander Shaw, I wanted to work in public service. At 42 years of age, with over seventeen years of experience as lawyer handling complex civil litigation, including class and collective actions and multi-district litigation, I have a wide range of experiences that I believe have prepared me to serve as a judge. I take great pride in being prepared in the courtroom and in developing good working relationships with opposing counsel. Before he was a judge, I worked with Judge Stephens, and I had cases against Judge Sabella and Judge Levens. I have tried cases before Judge Holder, Judge Crenshaw, Judge Honeywell, Judge Cook, and Judge Levens. I have a tremendous amount of respect for these judges, and it would be an honor to serve with them.

52. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

In 2008, I submitted applications to the Tenth Judicial Circuit JNC. In 2009, I submitted applications to the Thirteenth Judicial Circuit JNC.

53. Give any other information you feel would be helpful to the Commission in evaluating your application.

For several years, I had been contemplating seeking a judicial appointment, but I felt it was important to achieve Board Certification in Civil Trial law first. I met that goal in 2007. In early 2008, a circuit vacancy occurred in Polk County. My parents still live in the same neighborhood where I grew up, and I still have many friends and clients in Polk County. I believed it was the right time in my career to pursue a judicial appointment. I was proud to be nominated by the JNC in Polk County for each of the three circuit vacancies in 2008. I interviewed with Governor Crist, and I received positive feedback, including from the Governor's General Counsel and legal staff. The Governor appointed three county court judges to fill the circuit vacancies, and the Governor's General Counsel encouraged me to continue to pursue judicial appointment.

Several members of the Governor's legal staff discussed the issues posed by appointing applicants from outside a circuit, and they suggested that I apply in the circuit where I lived and practiced.

In 2009, I applied for the circuit and county vacancies created by the elevation of Judge Crenshaw to the Second DCA, the retirement of Judge Anderson, and the elevation of Judge Rice. I was nominated for the county court vacancies, and was one of three nominees invited to meet with Governor Crist for Judge Anderson's vacancy.

REFERENCES:

54. List the names, addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for judicial position and of whom inquiry may be made by the Commission.

Hon. Richard A. Lazzara, United States District Court, 801 North Florida Avenue, Suite 15-B, Tampa, Florida 33602; 813/301-5350

Sen. Ronda Storms, 313 E. Robertson Street, Brandon, FL 33511; 813/651-2189

Shauna Burkes, Esquire, Home Shopping Network, 1 HSN Drive, St. Petersburg, Florida 33729; 727/872-4641

Peter J. Grilli, Esquire, Peter J. Grilli, P.A., 3001 West Azeele Street, Tampa, Florida 33609; 813/874-1002

James M. Craig, Esquire, Thompson, Sizemore, Gonzalez & Hearing, P.O. Box 639, Tampa, Florida 33601-0639; 813/273-0050

James O. Simmons, Jr., 208 Excalibur Court, Brandon, Florida 33511; 813/661-7690

Lewis F. Collins, Jr., Esquire, Butler Pappas Weihmuller Katz Craig LLP, 777 South Harbour Island Boulevard, Tampa, Florida 33602-5729; 813/281-1900

Hank B. Campbell, Esquire, Valenti Campbell Trohn Tamayo & Aranda, P.A., 1701 South Florida Avenue, Lakeland, Florida 33803-2262; 863/686-0043

Sean R. Parker, Esquire, Boswell & Dunlap LLP, Post Office Drawer 30, Bartow, Florida 33831; 863/533-7117

Mark A. Alessandroni, Lakeland Laboratories, 1910 Harden Blvd, Lakeland Florida 33803; 863/686-4271

CERTIFICATE

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(l), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read, and understand the requirements of the Florida Code of Judicial Conduct.

Dated this 17 day of November, 2009.

Signature

(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . *The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.*

FINANCIAL HISTORY

In lieu of answering the questions on this page, you may attach copies of your completed Federal Income Tax Returns for the preceding three (3) years. Those income tax returns should include returns from a professional association. If you answer the questions on this page, you do not have to file copies of your tax returns.

1. State the amount of gross income you have earned, or losses you have incurred (before deducting expenses and taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

   2008 -- $164,272; 2007 -- $130,000; 2006 -- $237,873

2. State the amount of net income you have earned, or losses you have incurred (after deducting expenses but not taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

   2008 -- $164,272; 2007 -- $130,000; 2006 -- $237,873

3. State the gross amount of income or losses incurred (before deducting expenses or taxes) you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

   2008 -- None; 2007 -- None; 2006 -- $1,526.24, Adjunct Instructor, Hillsborough Community College

4. State the amount of net income you have earned or losses incurred (after deducting expenses) from sources other than the practice of law for the preceding three-year period on a year by year basis, and generally describe the sources of such income or losses.

   2008 -- None; 2007 -- None; 2006 -- $1,526.24, Adjunct Instructor, Hillsborough Community College

JUDICIAL APPLICATION DATA RECORD

The judicial application shall include a separate page asking applicants to identify their race, ethnicity and gender. Completion of this page shall be optional, and the page shall include an explanation that the information is requested for data collection purposes in order to assess and promote diversity in the judiciary. The chair of the Commission shall forward all such completed pages, along with the names of the nominees to the JNC Coordinator in the Governor's Office (pursuant to JNC Uniform Rule of Procedure).

(Please Type or Print)

Date: November 17, 2009

JNC Submitting To: Thirteenth Judicial Circuit

Name (please print): Ryan Christopher Rodems

Current Occupation: Attorney

Telephone Number: 813/489-1001 Attorney No.: 947652

Gender (check one): X Male ☐ Female

Ethnic Origin (check one): X White, non Hispanic

☐ Hispanic

☐ Black

☐ American Indian/Alaskan Native

☐ Asian/Pacific Islander

County of Residence: Hillsborough

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

DISCLOSURE PURSUANT TO THE
FAIR CREDIT REPORTING ACT (FCRA)

The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or other employment-related actions.

CONSUMER'S AUTHORIZATION FOR FDLE
TO OBTAIN CONSUMER REPORT(S)

I have read and understand the above Disclosure. I authorize the Florida Department of Law Enforcement (FDLE) to obtain one or more consumer reports on me, for employment purposes, as described in the above Disclosure.

Printed Name of
Applicant: Ryan Christopher Rodems

Signature of Applicant: Ryan C Rodems

Date: 11/17/2009

THIRTEENTH JUDICIAL NOMINATING COMMISSION:
Supplement (B) to Application

Applicant: Please answer the following additional questions.

Name: Ryan Christopher Rodems

Please state your Martindale-Hubbell rating, if available.

AV

Are you Board Certified by the Florida Bar?
If so, what area: Civil Trial Law

(submit original and nine copies of this form)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TODD M. RICHARDSON,

Plaintiff,

vs. **Case No. 8:07-CIV-1375-T-24MSS**

HSN GENERAL PARTNER LLC,
a foreign limited liability company,

Defendant.
_____/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant HSN General Partner LLC moves for summary judgment in its favor, pursuant to Fed. R. Civ. P. 56(b), and as grounds therefor would state that there are no material facts in dispute, and Defendant is entitled to judgment in its favor, as detailed in the memorandum of law.

MEMORANDUM OF LAW

I. INTRODUCTION

Defendant HSN General Partner LLC hired Plaintiff Todd M. Richardson as a Senior Photographer on May 5, 2004. From the beginning, his performance and quality as a photographer were below expectations. By the end of his first year, he had been placed on written warning twice and issued a "below expectations" annual performance evaluation. On June 9, 2005, he was given a third and "Final Warning." By mid-April 2006, his supervisors began preparing his second annual performance evaluation, and it became clear that not only had his performance and quality not improved, it had actually declined. Thus, on April 20, 2006,

Plaintiff was terminated because his quality and productivity were below expectations.

Thereafter, Plaintiff filed a three count complaint, alleging Defendant terminated his employment because of his HIV status, (Dkt 2, Complaint, Counts I and II), or because he "filed a charge of discrimination and participated in a proceeding" regarding his HIV status. Id., Count III. Summary judgment is appropriate because Plaintiff cannot establish a prima facie case as to Counts I, II or III and there is no evidence that any actions ever taken against Plaintiff were motivated in any way by his HIV status or charge of discrimination.

II. FACTS

The "Home Shopping Network" or "HSN" offers merchandise for sale on its television network and website. (Pace Declaration at ¶ 2). At its Pinellas County campus, HSN has a Photography Studio, which is part of the Creative Services department. Id. at ¶¶ 4-5. Victoria "Tori" Coyle is and was the Director of the Photography Studio, and she reports to the Vice President of Creative Services, Kate Pedrick. Id. at ¶ 5. David Leshko is and was a Senior Photographer and the Manager of the Photography Studio, and he reports to Ms. Coyle. (Leshko Declaration at ¶ 2). Mr. Leshko supervises the Photography Studio photographers. Id. at ¶ 2.

The Photography Studio photographs products that HSN offers for sale on its website or through its television broadcast. Id. at ¶ 3. The products vary, and include jewelry, handbags, cosmetics and home decor products. Id. at ¶ 5. When products are scheduled for broadcast on television or placement on the website, the Photography Studio receives a list of products to photograph along with a schedule for completion. Id. at ¶ 3. Rodney Smith, the Assistant Photography Studio Manager, and Mr. Leshko are responsible for coordinating the work of the photographers, ensuring that it is completed on time and of a high quality. Id. at ¶ 4. The

Photography Studio operates on two shifts and has several photographers. Id. at ¶ 5. The products scheduled for immediate broadcast are given the highest priority. Id. The night shift photographs the products that the day shift was unable to complete or any priority items. Id.

Mr. Leshko has maintained records of the productivity of his photographers for several years. Id. at ¶ 6. Initially, he did so to help his supervisor understand the staffing needs of his department. Id. The information he maintained included the number of shots per day on average for each of his photographers. Id. According to Mr. Leshko, "[i]t is not unusual for our photographers to photograph a hodgepodge of products in a given shift." Id. at ¶ 5. Because of that, Mr. Leshko required the photographers to shoot an average of 25 per day over a month rather than set a minimum number of daily shots. Id. at ¶ 6.

On May 5, 2004, Plaintiff was hired as a Senior Photographer, the higher of the two photography positions. Id. at ¶ 7. Newly hired photographers work with Mr. Leshko on the day shift for up to two weeks so that he can orient them in the Photography Studio procedures and observe their skills. Id. at ¶ 9. A Senior Photographer is expected to have better technical skills, more experience, and to be capable of producing a larger volume of higher quality photographs than a Photographer. Id. at ¶ 7. According to Mr. Leshko, from the beginning, Plaintiff had difficulty with his photography skills. Id. at ¶ 9. His lighting and composition were poor. Id. He did not seem to grasp the concepts or procedures. Id. His retention level of information was not very good. Id. at ¶ 10. At the end of the standard orientation, Mr. Leshko was concerned with Plaintiff's abilities so he extended it. Id. at ¶ 9.

After the extended orientation, Mr. Leshko felt compelled by the workload to assign Plaintiff to start working on the night shift, even though he had misgivings about his ability to

function as a Senior Photographer. Id. at ¶ 10. Because Plaintiff was still not grasping the concepts and his photographic quality not up to standards, Mr. Leshko directed Plaintiff to come in two hours early each day to work directly with him. Id. at ¶ 11. On a daily basis, Mr. Leshko reviewed Plaintiff's work with him and gave him extra training. Id.

Plaintiff's productivity was much lower than other photographers, which created extra work for the other photographers, who were plainly unhappy with him. Id. at ¶ 12. Even before his low productivity made his co-workers unhappy -- and months before Plaintiff revealed he was HIV positive -- Plaintiff admits he was not well liked. According to Plaintiff, shortly after Plaintiff was hired, a fellow photographer, Mark Talerico snooped in Plaintiff's briefcase, looked at Plaintiff's pay stub and "told all the photographers that I was hired in at a much higher rate than they were. Well, how do you think that went over with all the photographers? . . . No, not very well. . . . they'd turn their backs to me." (Richardson depo., p. 85, l. 16 - p. 86, l. 3).

Plaintiff testified that Mr. Talerico "didn't like me from the beginning." (Richardson depo., p. 85, l. 6-7). During one spat, Mr. Talerico told Plaintiff, "[y]ou suck as a photographer, and you're nothing but a little girl." (Richardson depo., p. 83, l. 14-18). Mr. Leshko issued a written warning to Mr. Talerico for making the comment. (Richardson depo., p. 84, l. 4-9). This preceded Plaintiff's self-revelation of his HIV.

According to Plaintiff, he was not the only one who was disliked. Plaintiff testified that the "[d]ay-shift people didn't like night-shift people." (Richardson depo., p. 98, l. 22-23). One photographer even told Plaintiff "who hated who, who didn't like who, why Marc didn't like Dave, why Dave didn't like Marc. Marc thought that Dave didn't deserve his position as a photographer. There was a lot of unrest." (Richardson depo., p. 98, l. 6-10). "[T]hey were

bringing me on because there was unsettlement in the department, that there were people that weren't happy working with people and they were going to move people around, and that was going to somehow solve their problem." (Richardson depo., p. 97, l. 19-24). One reason Plaintiff believed there was discord was because of "cherry picking" -- day shift photographers picking the easier shots and leaving the harder ones for the night shift. "Cherry picking" occurred before he began working at HSN. (Richardson depo., p. 82, l. 1-22). In fact, "it happens in the industry all the time." (Richardson depo., p. 89, l. 4-22).

Around October 2004, Plaintiff decided to reveal to Mr. Talerico that he was HIV positive. (Richardson depo., p. 182, l. 22 - p. 183, l. 20). Oddly, this revelation occurred after Mr. Talerico had referred to Plaintiff as "a little girl." Apparently, the two had patched up their differences so sufficiently that Plaintiff felt comfortable revealing his medical condition. Eventually, Plaintiff also told Mr. Leshko about his HIV status:

> Dave pulled me aside and said, "What happened last night?" I said, "'I'm sorry. I was feeling a little sick. I was running to the bathroom and all this." I said, "Dave, I think that you should know I have HIV," and he said, "I already knew that." And that's when I asked him how did he know that, and he told me that Marc told Rubin, Rubin told him.

(Richardson depo., p. 181, l. 17 - p. 182, l. 9). Plaintiff was suffering side effects from a new medication for his HIV. (Richardson depo., p. 32, l. 6-10). These symptoms impacted his ability to do his job. (Richardson depo., p. 33, l. 17-20).

Once Plaintiff's HIV status became known and because of Plaintiff's self-reported difficulties with his new medicines, the Photography Studio's Human Resources Business Partner, Julie Pace, became involved to assist as necessary. (Leshko Declaration at ¶ 13); (Pace

Declaration at ¶¶ 8-10).[1] On October 24, 2004, Ms. Pedrick, Vice President of Creative Services, told Ms. Pace that, while she was sympathetic to his medical condition, Plaintiff's "productivity level is so low that it is almost more of a distraction than an asset having him on staff. . . . the studio is really falling behind and this seems to be a part of the reason." (Pace Declaration at ¶ 9). Thus, even before he revealed his HIV status, Plaintiff's low productivity was such an issue that even the head of the business unit was concerned.

Around October 25, 2004, Plaintiff visited the "Wellness Center," an on-site facility open to employees and staffed by a nurse. Id. at ¶ 10. In addition to providing information and treating minor illnesses and injuries, the Wellness Center reviews accommodations employees may need for their jobs and assists as necessary with employees who may require leave. Id. Plaintiff testified that he did not want to take a short term disability leave of absence.[2] (Richardson depo., p. 33, l. 24 - p. 34, l. 10). Plaintiff was advised that he needed to fulfill all of the duties and requirements of his job as a Senior Photographer. (Leshko Declaration at ¶ 13).[3]

Over the next several months, Plaintiff's performance did not improve, despite counseling on productivity and the quality of his work. (Leshko Declaration at ¶ 14). In

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[1] Because of its size, HSN has many departments, each of which has assigned to it a "Human Resources Business Partner." The Human Resources Business Partner, an employee of the Human Resources department, assists the department with all human resources issues. (Pace Declaration, ¶¶ 3-4).

[2] For employees, such as Plaintiff, who did not qualify under the Family and Medical Leave Act, Defendant has a "Personal Leave of Absence" policy that permits leave for employees, such as Plaintiff, not covered by the FMLA. [Orienteering Guide, p. 73]

[3] There is no evidence that Plaintiff ever returned to the "Wellness Center" with issues relating to his illness, and Plaintiff never again advised his supervisor or Human Resources Business Partner that his illness was impacting his ability to work.

December 2004, Plaintiff's shot count was 282, whereas photographer Larry Wittek's was 452 and Mr. Talerico's was 610. Id. at ¶ 15. In January 2005, Plaintiff's shot count was even lower, 227, whereas Mr. Wittek's was 451 and Mr. Talerico's was 521. Id. In February 2005, Plaintiff's shot count was 273, whereas Mr. Wittek's was 511 and Mr. Talerico's was 542. Id.

On March 2, 2005, after consulting with his superiors and Ms. Pace, Mr. Leshko issued to Plaintiff a PDP. Id. at ¶ 16. A PDP is a formal, written document outlining actions or behavior by an employee which is not acceptable or appropriate or which violate HSN's rules or procedures. (Pace Declaration at ¶ 11). According to Ms. Pace, "[t]he goal of a PDP is to make it clear to the employee what is not acceptable, provide clear goals/expectation, and to give the employee a chance to improve or correct the situation." Id.

Upon receipt of the PDP, Plaintiff argued that his productivity was low because he did not have a workstation to immediately begin photographing products when he came in at 3:30 p.m. (Leshko Declaration at ¶ 17). To Mr. Leshko, this explanation was unacceptable because there are many tasks a photographer must do before shooting photographs. Id. To eliminate this as an issue, however, Mr. Leshko told Plaintiff that he would leave Mr. Leshko's workstation open for Plaintiff to use upon his arrival. Id. Thereafter, Plaintiff had a workstation available as soon as he arrived. Id. Yet, his productivity did not improve. Id. at ¶ 18.

On the PDP, Plaintiff wrote "I have nothing to say at this time. I will work to achieve the objectives that I have discussed with David Leshko." Id. at ¶ 17. The next day, on March 3, 2005, Plaintiff sent Mr. Leshko an e-mail, advising that he was retaining an attorney because he believed he had been discriminated against. (Pace Declaration at ¶ 12). The Photography Studio's Human Resources Business Partner, Ms. Pace, was notified of the e-mail, and she called

Plaintiff on March 3, 2005. Id. Ms. Pace also spoke to Ms. Coyle, the Director of the Photography Studio, and asked her to obtain the photographer's productivity reports which showed that Plaintiff produced almost half the quantity of his peers, based on the reports from December 2004 and January and February 2005. Id.

Ms. Pace met with Plaintiff on March 18, 2005. Id. at ¶ 13. She told him that everyone wanted him to succeed and that, despite his illness, the photography department needed him to be able to fulfill all of the requirements of the job of Senior Photographer. Id. She discussed his low productivity and told him that he was expected to achieve 25 "shots" per day. Id.

Plaintiff also discussed his beliefs of discrimination. Id. at ¶ 14. He said that Mr. Leshko requested that he not shoot knives or, if he did so, that he wear safety gloves. Id. He also said he overheard Mr. Leshko tell another employee a story about a man in a park, and Plaintiff believed the man had lesions from AIDS. Id. Plaintiff said that Mr. Leshko told the man in the park to go away. Id.[4]

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[4] Plaintiff wrote a statement to "identify why I believe David Leshko, my supervisor at HSN, has a problem with people with AIDS," relating this conversation:

> They were discussing a man in the park that Denise had seen with -- a man who had lesions all over his face and that she thought it was really unfair of somebody like that to be in a park where it would scare children.. . . Dave concurred to what she said, 'I wouldn't want my children to have to witness something like that. I wouldn't want my children to be scared in a park.' . . . and he said, 'Oh, I can't believe someone would do something like that.' . . . They were in agreement that a person who had lesions on their face shouldn't be allowed in a public park because it scared little kids.

(Richardson depo., Exhibit 11). In deposition, Plaintiff admitted that Mr. Leshko's only description was that the man in the park looked sick and had boils on his face, and the words "AIDS" or "HIV" were never uttered. Plaintiff never saw this man in the park, and he even admitted that it is possible that children could be frightened by men in parks. (Richardson depo., p. 191, l. 5-7 and p. 192, l. 1-6).

Ms. Pace spoke to Mr. Leshko, who said he did not know anything about a man with AIDS in a park, although he did have a conversation with Denise Little, and she told him that there was a homeless or vagrant hanging around in a park near Mr. Leshko's house, and he should be aware of it since he had young daughters. Id. at ¶ 15. Mr. Leshko said there was no mention of anyone with lesions or HIV, and he did not speak to anyone at a park. Id.

Mr. Leshko also told Ms. Pace that when he assigned Plaintiff some knives to photograph, Plaintiff complained he did not want to shoot knives. (Leshko Declaration at ¶ 29). Mr. Leshko said he told Plaintiff "this is what we do," meaning the Photography Studio's role is to shoot the product requested. According to Mr. Leshko, Plaintiff then said he was concerned he might cut himself. Mr. Leshko told him that the company had protective gloves. Id. Mr. Leshko says he went and retrieved the gloves and gave them to Plaintiff. Id. According to Mr. Leshko, before Plaintiff began working in the Photography Studio, photographers had occasion to photograph knives, and several photographers had cut themselves while composing the knives for photographing. Id. at ¶ 28. To prevent injuries, HSN ordered gloves for its photographers to wear while handling the knives. Those gloves were purchased before Plaintiff was hired. Id.

Ms. Pace was satisfied, having heard both Plaintiff's version and Mr. Leshko's version that Mr. Leshko was motivated to issue the PDP only by Plaintiff's performance. Id. at ¶ 18. About a week after the meeting, Plaintiff wrote an e-mail to Ms. Pace, stating he believed that "HSN and Tory Coyle want me to succeed at my job." Id. at ¶ 19.

Each of the PDPs includes a date for follow-up or review. (Leshko Declaration at ¶ 21). Because Plaintiff and Mr. Leshko worked in the same studio and Mr. Leshko observed his shot count and the quality of his work on a daily basis, they had numerous follow-ups and counseling

sessions after the first PDP. Id. In fact, Mr. Leshko's counseling of Plaintiff on his productivity and quality continued until he was terminated. Id. Even after making sure he had a workstation available as soon as he arrived, over the next month, Plaintiff's shot count still did not reach 25, and his lighting and composition were still below standards. Id. at ¶¶ 18-19.

Since Plaintiff was hired on May 5, 2004, his annual performance evaluation was due on or before May 5, 2005. Id. at ¶ 18. His performance was clearly below expectation, and the March 2, 2005 PDP did not result in a significant improvement. Id. When an employee's performance is below expectation, Defendant places the employee on a PDP. (Pace Declaration at ¶ 20). Ms. Pace met with Plaintiff on May 4, 2005, and a second PDP and a "below expectations" performance evaluation were delivered to him. Id. at ¶ 21. Again, they discussed Plaintiff's belief that the knives issue and the story about the man in the park showed Mr. Leshko was biased against him because he was HIV positive. Id. Ms. Pace told him that management had approved the PDPs, that management and the other photographers felt the work was distributed fairly, and that some photographers had mentioned that they are forced to do more work when other photographers have low productivity. Id.

On May 13, 2005, Plaintiff filed a charge of discrimination with the EEOC, claiming he was discriminated against because of his "medical status." (Richardson depo., Exh. 3). HSN and the EEOC completed independent investigations and neither determined that Plaintiff's charge of discrimination had evidentiary support. (Pace Declaration at ¶ 22); (Richardson depo., Exh. "6").

Despite two PDPs and numerous counseling, by June 9, 2005, Plaintiff's performance still had not improved. (Leshko Declaration at ¶ 20). At that point, because Plaintiff had been issued two prior PDPs and a "below expectations" annual performance evaluation, the

appropriate step was to issue a third PDP, but as a "Final Warning." Id. Ms. Pace met with Plaintiff and advised him that a "Final Warning" meant that he could be terminated for any additional infractions. (Pace Declaration at ¶ 23). He said he understood, but he disagreed with it. Id. Ms. Pace left on maternity leave for the next several months, ibid, and in two of the next three months, Plaintiff met his productivity targets. (Leshko Declaration at ¶ 22). However, each month from October 2005 to April 2006, Plaintiff failed to meet his productivity target. Id.

Around April 2006, it was again time to begin preparing Plaintiff's annual performance evaluation. (Pace Declaration at ¶ 24). It was clear that his performance would again be below expectations. Id. Because he was already on "Final Warning," an additional PDP was neither appropriate nor warranted. Id. Under these circumstances, termination was appropriate. Id. Before the termination decision was made, however, Ms. Pace reviewed all of the PDPs, the performance feedback and the productivity reports showing Plaintiff had not met the productivity targets from October 2005 through April 2006. Id. at ¶ 25. She had met with Plaintiff numerous times, and she was aware of his allegations of discrimination. Id. Ms. Pace testified that if she had "even the slightest concern" that Mr. Leshko or Ms. Coyle had any motivation to terminate Plaintiff because of anything other than performance, she would have notified her supervisor and the HSN legal department so that the necessary intervention could occur. Id. Nothing supported a belief that either Ms. Coyle or Mr. Leshko was motivated by any reason to terminate Plaintiff other than his below expectation performance and his failure to meet his productivity targets. Id. Plaintiff was terminated on April 20, 2006. (Dkt 2, Complaint, ¶)(Dkt 3, Answer, ¶ 11).

III. APPLICABLE LAW FOR PLAINTIFF'S DISPARATE TREATMENT CLAIMS

An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir.1984). Federal courts "do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere." Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir.1991).

Plaintiff is alleging disparate treatment under state anti-discrimination laws.[5] "A plaintiff alleging disparate treatment may establish a prima facie case of discrimination in several ways. One such way is to produce credible direct evidence of discriminatory intent." Smith v. Horner, 839 F.2d 1530, 1536 (11th Cir. 1988). "Direct evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.' . . . '[O]nly the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of' some impermissible factor constitute direct evidence of discrimination." Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004). In deposition, Plaintiff denied that anyone made any such remarks. (Richardson depo., pp. 141, 208, 214, 229-232, 245). Plaintiff can present no direct evidence of discrimination.

A second method of proving disparate treatment is through circumstantial evidence under

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[5] Federal caselaw regarding Title VII and the ADA is applicable. Byrd v. BT Foods, Inc., 948 So. 2d 921, 925 (Fla. 4th DCA 2007); Razner v. Wellington Reg'l Med. Ctr., 837 So. 2d 437, 440 (Fla. 4th DCA 2002); Albra v. Advan, Inc., 490 F.3d 826, 835 (11th Cir. 2007)(section 760.50, Florida Statutes claims are construed in conformity with the ADA).

the framework announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). "Courts have modified the McDonnell Douglas/Burdine formulation as necessary to facilitate analysis in a wide range of discrimination claims." Armstrong v. Flowers Hosp., 33 F.3d 1308, 1313-1314 (11th Cir. 1994). If Plaintiff can put forth such a prima facie case, then he has established a presumption of discrimination, and the burden would shift to Defendant "to articulate a legitimate, non-discriminatory reason" for Plaintiff's adverse employment action. Smith, 839 F.2d at 1536. Defendant would simply have the burden of production, not to persuade the Court that it was motivated by the reason. Id. If Defendant articulates a legitimate nondiscriminatory reason for the adverse employment action, then "the inferential presumption of discrimination" is eliminated -- the McDonnell Douglas framework disappears -- and Plaintiff bears the ultimate burden of proving that Defendant intentionally discriminated against him because of his HIV status. Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1193 (11th Cir. 2004).

IV. PLAINTIFF CANNOT PROVE A PRIMA FACIE CASE

Plaintiff cannot prove a prima facie case for Counts I, II or III.

A. Plaintiff Cannot Prove a Prima Facie Case for Count I

In Count I, Plaintiff alleges that he "was terminated from employment and otherwise discriminated against with respect to the terms, conditions and privileges of employment by Defendant because of his disability. Defendant's discriminatory conduct was in violation of FCRA." (Dkt 2, Complaint at ¶ 14). To establish a prima facie case of handicap discrimination, Plaintiff must show (1) a "handicap,"[6] (2) that he was otherwise qualified to perform the job, and

[6] The FCRA does not define the term "handicap," and thus the Courts "look to the ADA's definition of a 'disability.'" Byrd, 948 So. 2d at 926.

(3) that he was discriminated against based upon the handicap. Cleveland, 369 F.3d at 1193.[7] For purposes of this motion, Defendant concedes that Plaintiff has HIV. Defendant does not concede HIV, at least in this case, is a "handicap" because Plaintiff testified that his HIV does not limit him in any way. (Richardson depo., pp. 298-300).[8] "It is insufficient for individuals

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[7] Under the ADA, "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. § 84.3(j)(2)(ii); 28 C.F.R. § 41.31(b)(2)(1997).

[8] HIV is not a per se "disability" under the ADA. Courts must evaluate each claim individually. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999)(Courts must "determine the existence of disabilities on a case-by-case basis."). In Bragdon v. Abbott, 524 U.S. 624 (1998), the Supreme Court declined to decide the question of "whether HIV infection is a per se disability under the ADA," although it affirmed the district court's and appellate court's holdings that Respondent Abbot's HIV infection was a disability under the ADA because it substantially limited the major life activity of reproduction. Id. at 641-42.

What distinguishes Abbot from the present case shows why HIV infection is not a per se disability. In the case at bar, Plaintiff testified that he has chosen not to procreate, and his decision had nothing to do with his HIV status. (Richardson depo., p. 300, l. 11-16). His HIV has not substantially limited his decision not to have children, whereas in Abbott, "[t]estimony from the respondent that her HIV infection controlled her decision not to have a child is unchallenged. . . . In the context of reviewing summary judgment, we must take it to be true." 524 U.S. at 641. Likewise, this Court must take Plaintiff's testimony to be true that his HIV status did not substantially limit his decision to procreate. Blanks v. Southwestern Bell Communs., Inc., 310 F.3d 398, 401 (5th Cir. 2002)("Specifically, Blanks fails to assert that his HIV status substantially impaired his major life activity of reproduction. Blanks testified that after his wife gave birth to their daughter in the early 1990's-long before SWB's alleged discrimination-the couple decided not to have any more children and his wife underwent a procedure to prevent her from having any more children."); Reese v. American Food Serv., 2000 U.S. Dist. LEXIS 14343, 19-20 (E.D. Pa. Sept. 29, 2000)("While persons afflicted with Hepatitis C may find their ability to procreate or have intercourse is limited by the disease, there is no evidence that plaintiff does so. He testified that he and his wife have not altered their sexual practices since he was diagnosed and that he does not use a condom regularly during sex. One cannot reasonably find from the record presented that plaintiff's sexual practices have been significantly limited. See Qualls v. Lack's Stores, 1999 U.S. Dist. LEXIS 5731, 1999 WL 731758, at *3 (N.D. Tex. March 31, 1999) (that plaintiff now sometimes uses a condom during

attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those 'claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial.'" Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 198 (2002). Thus, Plaintiff does not have a "handicap."[9] Additionally, he was unqualified to perform the job of Senior Photographer because he was unable to meet the productivity levels or quality levels of that job. Thus, his prima facie case as to Count I fails.

B. Plaintiff Cannot Prove a Prima Facie Case for Count II

In Count II, Plaintiff alleges that "Plaintiff was terminated from employment and otherwise discriminated against with respect to the terms, conditions and privileges of employment by Defendant because of his disability. Defendant's discriminatory conduct was in violation of section 760.50." (Complaint at ¶ 17). Plaintiff does not specify which subsection of section 760.50, Florida Statutes Count II arises under, but it is clear that there are no allegations

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intercourse does not constitute a 'substantial limitation on one's sex life.')."). Moreover, the only evidence in this case about whether a HIV infection substantially limits procreation shows it does not. Plaintiff testified that technology now exists to extract the virus from sperm and impregnate females without transmission of the HIV infection. (Richardson depo., p. 300, l. 2-10).

[9] Nor is there any evidence that Defendant "regarded" Plaintiff as disabled. 42 U.S.C. § 12102(2)(B). Carruthers v. BSA Adver., Inc., 357 F.3d 1213, 1217 (11th Cir. 2004)("[N]o reasonable jury could find that Carruthers's evidence established that BSA perceived her impairment as one that substantially limited the major life activities of working or performing manual tasks. Carruthers herself admitted at trial that BSA's knowledge of her condition was limited to her physician's diagnosis . . . and her work restrictions. . . . [T]he only other support Carruthers offers for her contention that BSA perceived her to be disabled is the fact that (1) BSA informed her that she would be terminated if she could not maintain a full-time schedule and (2) BSA placed an advertisement for her replacement shortly after learning of her inability to perform the basic tasks of her position.").

that he was discharged or discriminated against because he took a HIV test, section 760.50(3)(a), Florida Statutes, or his claim involves "housing, public accommodations, or governmental services," section 760.50(4), Florida Statutes, or that the Defendant breached confidentiality of information relating to "health insurance benefits or life insurance benefits," section 760.50(5), Florida Statutes. Thus, Count II must arise under section 760.50(2), Florida Statutes, which eliminates the requirement that the Plaintiff's HIV be a "handicap," an element of Count I.

Because section 760.50, Florida Statutes' "employment discrimination provisions shall also be construed in conformity with the ADA," Albra, 490 F.3d at 835, to prove a prima facie case, Plaintiff must prove: (1) he has or is perceived to have AIDS, AIDS-related complex or HIV, (2) that he was otherwise qualified to perform the job, and (3) that he was discriminated against based upon his protected status. Cleveland, 369 F.3d at 1193. Defendant concedes for this motion that Plaintiff has and had HIV. Defendant does not concede that Plaintiff was qualified to perform the job of Senior Photographer, as evidenced by his poor performance, poor quality and termination. Thus, his prima facie case as to Count II fails.

C. Plaintiff Cannot Prove a Prima Facie Case for Count III

In Count III, Plaintiff alleges that he "was terminated from his employment and otherwise retaliated against by Defendant because he filed a charge of discrimination and participated in a proceeding to address Defendant's unlawful employment practices. Defendant's disparate treatment of Plaintiff was in violation of the FCRA." (Complaint at ¶ 20).[10]

"To make a prima facie case for retaliation, the plaintiff must show: 1) a statutorily

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[10] Although Plaintiff wrote an e-mail to his supervisor after receiving the first PDP on March 2, 2005, claiming it was discriminatory, Declaration of Julie Pace at ¶ 12, Plaintiff did not allege in Count III that he was retaliated against for sending this e-mail.

protected expression; 2) an adverse employment action; 3) a causal link between the protected expression and the adverse action." Sullivan v. Amtrak, 170 F.3d 1056, 1059 (11th Cir. 1999).

The Plaintiff's termination was an adverse employment action, but he fails to establish the causal link. Plaintiff's first charge of discrimination was filed on or about May 13, 2005[11] -- after he received his second PDP and "below expectations" performance evaluation on May 4, 2005. Thus, he cannot claim that the actions in issuing the first two PDPs or the performance evaluation were retaliatory. Griffin v. GTE Fla., Inc., 182 F.3d 1279, 1284 (11th Cir. 1999)("At a minimum, Griffin must show that the adverse act followed the protected conduct; this minimum proof stems from the important requirement that 'the employer was actually aware of the protected expression at the time it took adverse employment action.'").

To establish causal connection, "a plaintiff need only show 'that the protected activity and the adverse action were not wholly unrelated.'" Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1354 (11th Cir. 1999). "[T]o show the two things were not entirely unrelated, the plaintiff must generally show that the decision maker was aware of the protected conduct at the time of the adverse employment action. . . . A decision maker cannot have been motivated to retaliate by something unknown to him." Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000). Plaintiff testified that he did not know "who was involved in the decision-making process to terminate" his employment. (Richardson depo., p. 119, l. 7-10). Mr. Leshko testified that he did not have authority to terminate Plaintiff. (Leshko Declaration at ¶ 23). Plaintiff cannot establish who the decisionmaker was or that the decisionmaker was even aware that the Plaintiff had filed a charge of discrimination. The causal link is broken.

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[11] Richardson depo., Exh. 3.

Plaintiff cannot even prove temporal proximity. His charge of discrimination was filed over eleven months before his termination on April 20, 2006. "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close." Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001). Even "[a] three to four month disparity between the statutorily protected expression and the adverse employment action is not [close] enough." Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007); Wascura v. City of S. Miami, 257 F.3d 1238, 1245 (11th Cir. 2001)(three and one-half months not close enough). Plaintiff's prima facie case as to Count III fails. Clearly, eleven months is not "close enough."

V. DEFENDANT HAS ARTICULATED LEGITIMATE, NONDISCRIMINATORY REASONS FOR PLAINTIFF'S TERMINATION SUPPORTED BY UNREBUTTED PROOF

Assuming arguendo that Plaintiff has established a prima facie case for Counts I, II or III, Plaintiff was not terminated because of his HIV status or because he filed a charge of discrimination; he was terminated because he was incompetent and not productive. In fact, Plaintiff was told of these reasons on April 20, 2006 when he was notified of his termination. "Low shot count, same as the initial write-up of poor shot count, poor quality, poor composition, not fulfilling the required number of shots per day." (Richardson depo., p. 118, l. 7-15).

These are legitimate, nondiscriminatory reasons for his termination. Therefore, "the inferential presumption of discrimination" is eliminated -- the McDonnell Douglas framework disappears -- and Plaintiff bears the ultimate burden of proving that Defendant intentionally discriminated against him because of his HIV status. Cleveland, 369 F.3d at 1193; Sullivan, 170

F.3d at 1059 (After a plaintiff proves a prima facie case, "[i]f the defendant offers legitimate reasons, the presumption of [discrimination] disappears. . . . The plaintiff must then show that the employer's proffered reasons for taking the adverse action were actually a pretext for prohibited" conduct.).

There is no evidence that Plaintiff's HIV status played any role in the termination decision. Mr. Leshko counseled Plaintiff about his productivity long before Plaintiff revealed he was HIV positive. Plaintiff admits, "Well, in the first few months of the thing, he would say, 'You didn't shoot enough shots last night.' And I thought I was working just as hard as everybody else." (Richardson depo., p. 114, l. 14-17). Plaintiff cannot dispute Mr. Leshko's opinion about the quality of his work. "Well, Dave was a good photographer. And I'll admit, he was a better photographer than I was, he's been in the business a lot longer than I have." (Richardson depo., p. 101, l. 18-20).

Plaintiff was asked, "[d]id you at any time in your employment ever hear David Leshko say anything negative about anyone with AIDS?", Plaintiff responded, "[n]o." (Richardson depo., p. 197, l. 8-11). See Wascura, 257 F.3d at 1246 ("For example, in one such question, counsel asked: 'But he never said to you, look, I don't approve of people who contract the AIDS virus. I want you out of here.' Wascura answered: 'Oh, no, he never said that.").

During his deposition, Plaintiff was asked several times to disclose any evidence he had or reasons he believed his supervisor was biased against him because of his HIV status. He related the "man in the park" story and knives-gloves incident, discussed above, and that Mr. Leshko gave him "hodgepodge" assignments, making his job tougher. Even accepting Plaintiff's version of the "man in the park" story, Mr. Leshko never mentioned HIV or AIDS and it is not

reasonable to assume a man described as "sick" had HIV or AIDS. Regarding the knives, it is reasonable and not inherently discriminatory to offer gloves to a person handling sharp objects. Even Plaintiff admitted that it would be a reasonable precaution to use gloves while handling sharp objects to try to prevent cuts to one's hands. (Richardson depo., p. 201, l. 16-22). Plaintiff admitted that knives are sharp, that he has been cut by knives and bled, and that HIV is communicable by contact with the blood of someone who is HIV positive. Plaintiff also testified that he would do whatever he could to prevent others from being infected with HIV. (Richardson depo., p. 200 , l. 3-11). He testified that a request by Mr. Leshko to wear gloves to avoid cuts and thereby the potential infecting of others made sense. (Richardson, depo. p. 204, l. 15-19).

As for the "tougher assignments," Plaintiff testified "Dave would say, 'Todd, you're going to have a hodgepodge kind of night,' meaning I was going to jump around and I was going to go from jewelry to shoes to handbags to whatever." (Richardson depo., p. 208, l. 7-13). Plaintiff worked the night shift and the nature of the work was dictated by the company's needs. (Leshko Declaration at ¶¶ 5, 10). It was not unusual for all photographers, not just Plaintiff, to have a hodgepodge of work. Id. at ¶ 5. Mr. Leshko testified that the hodgepodge nature of the work was a factor in using a monthly shot count average of 25 per day rather than requiring a daily minimum of 25 shots. Id. at ¶6.[12]

Plaintiff's inference of discrimination from these matters is not reasonable. Carlin

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[12] Plaintiff has no other evidence: "Other than what's in that Exhibit No. 11 that you have written and what you have just told me about the work assignments being more difficult, was there anything else, any other fact or circumstance, that led you to the conclusion that Dave Leshko has a problem with people with AIDS? . . . "No." (Richardson depo., p. 209, l. 22 - p. 210, l. 3).

Communication, Inc. v. Southern Bell Tel & Tel. Co., 802 F.2d 1352, 1356 (11th Cir. 1986)(Unreasonable inferences must be "cast[ ] aside."). No reasonable factfinder could conclude from Plaintiff's versions that there is any inference of a bias by Mr. Leshko against people who are HIV positive.

Plaintiff "assumed" the reason he was fired was because of his charge of discrimination.

> [B]ecause I couldn't see why I was being fired. After being there for two years, all of a sudden, I'm fired. . . . Well, the first time I make the complaint to the EEOC and these write-ups happen, well, the write-ups stop. All of their disciplinary action, all of their disciplinary reports stop. And so I believe that everything is okay, that they believe that when I made the first complaint that my complaint was legitimate and that after that, there's no written warnings. There's no disciplinary reports. There's no counseling, there is nothing in the last six months.

(Richardson depo., p. 121, l. 25- p. 121, l. 18). Plaintiff's testimony that the "write-ups" stopped after he filed the charge of discrimination is not correct. Defendant issued the "Final Warning" PDP on June 9, 2005, three weeks after Plaintiff filed the May 13, 2005 charge of discrimination. Even accepting Plaintiff's testimony that Plaintiff was not counseled after his "Final Warning," what of it? A "Final Warning" is just that. Any conduct warranting a PDP after a "Final Warning" would be sufficient to support termination under Defendant's policies. Plaintiff has implied -- without any evidentiary basis -- that the delay in termination may have been a conspiracy to avoid the appearance of temporality. This argument is weakened considering the Defendant issued the "Final Warning" less than a month after the charge of discrimination.

There is a reasonable explanation for the delay in termination after the "Final Warning": Plaintiff met his production target two of the next three months, and Mr. Leshko hoped he had "turned the corner." (Leshko Declaration at ¶ 22). Beginning in October 2005 and until he was terminated, however, Plaintiff missed his target every month, but Mr. Leshko testified that he did

not have the authority to terminate Plaintiff. (Leshko Declaration at ¶ 23).

Arguing Plaintiff should have been terminated earlier is nothing more than second-guessing the Defendant's business judgment. "[F]ederal courts do not sit to second-guess the business judgment of employers. Stated somewhat differently, a plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer." Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519, 1543 (11th Cir. 1997). "Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000).

What finally led to his termination was Plaintiff's second annual evaluation due in May 2006. It is undisputed that it would have been "below expectations" again. Because he was on "Final Warning," placing him on another PDP was not appropriate; termination was appropriate.[13]

When asked why he thought Mr. Leshko wanted him to be fired, Plaintiff gave reasons

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[13] According to the progressive discipline policy, "Step 1" is a "Verbal Discussion," "Step 2" is a "Written Counseling,""Step 3" is a "Warning," "Step 4" is a "Final Warning," and "Step 5" is "Termination." [Orienteering Guide, p. 47-48]. Plaintiff has also implied that his termination was against Defendant's policies because PDPs only stay active for one year, and the precursor PDP was issued on March 2, 2005. Defendant's "progressive discipline" policy states "[d]isciplinary actions are in effect for one year from the date of the most recently issued Progressive Disciplinary Plan (PDP). [Orienteering Guide, p. 47] The "Final Warning" PDP was issued June 9, 2005. Plaintiff may also argue -- and in the absence of record evidence -- that the Defendant deviated from its policies requiring it to follow certain steps before termination. Regardless, "[s]tanding alone, deviation from a company policy does not demonstrate discriminatory animus." Mitchell v. USBI Co., 186 F.3d 1352, 1355-1356 (11th Cir. 1999).

predating his revelation of his HIV status and charge of discrimination: "Well, look how much problems I caused for Dave. . . . Dave Leshko was put into management training after the first explosion -- during the first meeting between Marc Talerico, myself and David Leshko." (Richardson depo., p. 173, l. 3 - p. 174, l. 9). Per Plaintiff, this occurred within a month after Plaintiff was hired, and long before Plaintiff revealed he was HIV positive. (Richardson depo., 174, l. 10-16 and p. 83, l. 14-18). Plaintiff also believes Mr. Leshko made his workload tougher because of this incident.[14] (Richardson depo., p. 210, l. 4-12). Plaintiff even agreed that if Mr. Leshko bore animosity because of the management program, then it arose before Plaintiff ever revealed he was HIV positive. (Richardson depo., p. 211, l. 15-21). This defeats Plaintiff's claims.

After a defendant offers a legitimate, nondiscriminatory reason for the adverse employment action, "[i]f the plaintiff fails to proffer sufficient evidence to create a genuine issue of material fact as to whether each of the defendant's proffered reasons is pretextual, the defendant is entitled to summary judgment." Wascura, 257 F.3d at 1243. Plaintiff cannot establish that the reasons for his termination -- poor quality and lack of productivity -- were pretextual. "A reason is not pretext for discrimination 'unless it is shown both that the reason was false, and that discrimination was the real reason.'" Brooks v. County Com'n of Jefferson County, Ala., 446 F.3d 1160, 1163 (11th Cir. 2006).

Regarding Mr. Leshko's opinion about the quality of Plaintiff's work, Plaintiff cannot

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[14] Plaintiff also accused Mr. Talerico of making Plaintiff's workload tougher by "cherry-picking" easy assignments, but Plaintiff testified Talerico did this "so that he could work less, that he could do whatever he wanted to, because that's what Marc did anyway. . . . Everyone had issues with Marc Talerico. Abby Hoffman had issues with him before they became buddies before they found out what I was making." (Richardson depo., p. 156, l. 25 - p. 157, l. 12).

show it was false. He admitted Mr. Leshko was a better photographer with more experience. Moreover, "[t]he inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of his performance." Holifield v. Reno, 115 F.3d 1555, 1565 (11th Cir. 1997). Plaintiff may argue that the quality of his work is a subjective reason, but "[a] subjective reason can constitute a legally sufficient, legitimate, nondiscriminatory reason under the McDonnell Douglas /Burdine analysis. . . Subjective reasons can be just as valid as objective reasons." Chapman, 229 F.3d at 1034. Regarding Plaintiff's lack of productivity, Plaintiff cannot prove the data to show Plaintiff's low productivity was false. (Leshko Declaration, Exh. 5).[15]

VI. CONCLUSION

Defendant is entitled to summary judgment because Plaintiff cannot prove a prima facie

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[15] Plaintiff may also try to prove pretext by arguing other photographers missed their targets but were not terminated. Rioux v. City of Atlanta, 520 F.3d 1269, 1279-1280 (11th Cir. 2008)("Rioux's second argument supporting his burden of showing pretext, that Dunham was a similarly-situated employee who was treated more favorably than Rioux following similar misconduct . . .."). Some use this argument to prove a prima facie case. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)(A prima facie case is proven by establishing that "(1) he belongs to a protected class, (2) he was qualified for the job, and (3) the misconduct for which the employer demoted him was the same or similar to what a similarly situated employee engaged in, but that the employer did not discipline the other employee similarly.").

In either case, the Court must "evaluate 'whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.'" Rioux, 520 F.3d at 1279-80. The "'quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.'" Id. As Exhibit "5" to Mr. Leshko's Declaration shows, Plaintiff missed his target 8 out of his last 10 months -- while on "Final Warning." While others missed their targets, they did so much less frequently and there is no evidence that they were on "Final Warning." No evidence shows that any other employee's "quantity and quality" of missing the 25 shot count target was "nearly identical." Moreover, Plaintiff is unable to offer any evidence as to when a verbal or written warning is appropriate for missing monthly targets or whether any other photographer was or was not disciplined. Any argument that Plaintiff was treated differently than others similarly situated is pure speculation.

case, and Defendant has offered unrebutted evidence of legitimate, nondiscriminatory reasons for his termination. It is undisputed that Defendant began raising his quality and productivity before Plaintiff ever revealed he was HIV positive and before he filed a charge of discrimination. The Eleventh Circuit has rejected the argument that "'summary judgment is especially questionable and should seldom be used in employment discrimination cases because they involve examination of motivation and intent.' . . . 'the summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on either side of the scale.'" Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004).

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Craig Berman, Esquire. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants: N/A.

/s/ Ryan Christopher Rodems
RYAN CHRISTOPHER RODEMS, ESQUIRE