Ohio Civil Rights Commission

Memo

To: Desmon Martin, Chief of Enforcement and Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: October 5, 2010

Re: *Debra M. Darr v. Union Vision Center of Manchester Road dba Co-op Optical*

(AKR) B3060304 (28942) 07202004 22A – 2004 – 03066C

Complaint No. 9875

CONSIDERATION OF ADMINISTRATIVE LAW JUDGE'S REPORT

ALJ RECOMMENDS DISMISSAL ORDER

Report issued: September 28, 2010

Report mailed: October 4, 2010

**** Objections due: October 27, 2010**

DMJ:tg

Ohio Civil Rights Commission

Governor
Ted Strickland

Board of Commissioners
Eddie Harrell, Jr., Chairman
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October 4, 2010

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Re: *Debra M. Darr v. Union Vision Center of Manchester Road dba Co-op Optical*
Complaint No. 9875

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty (20) days from the mailing date of this report.

Pursuant to Ohio Administrative Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **Wednesday, October 27, 2010**. *No extensions of time will be granted.*

Any objections received after this date will be **untimely filed** and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Chief of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414**. All parties and the Administrative Law Judge should receive copies of your Statement of Objections.

FOR THE COMMISSION

Desmon Martin / tg

Desmon Martin
Chief of Enforcement and Compliance

DM:tg

Enclosure

cc: Lori A. Anthony, Chief – Civil Rights Section [Marilyn Tobocman]
Denise M. Johnson, Chief Administrative Law Judge

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

DEBRA M. DARR

Complainant

v.

UNION VISION CENTER OF MANCHESTER ROAD DBA CO-OP OPTICAL

Respondent

Complaint No. 9875
(AKR) B3060304 (28942) 07202004
22A-2004-03066C

CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

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Complainant

ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
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INTRODUCTION AND PROCEDURAL HISTORY

Debra M. Darr (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on July 20, 2004.

The Commission investigated the charge and found probable cause that Union Vision Center of Manchester Road, Inc. dba Co-Op Optical (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on December 14, 2005.

The Complaint alleged Respondent terminated Complainant's employment for reasons not applied equally to all persons without regard to their disability status.

Respondent filed an Answer to the Complaint on June 6, 2005. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on February 6-7, 2007 at the Akron Government Building, Room 203, 161 South High Street, Akron, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing, consisting of 383 pages; exhibits admitted into evidence during the hearing; the evidentiary deposition of Dr. Elizabeth Connelly, D.O., taken on October 11, 2006; and the post-hearing briefs filed by the Commission on May 9, 2008; by Respondent on June 24, 2008; and a reply brief filed by the Commission on July 13, 2008.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on July 20, 2004.

2. The Commission determined on December 16, 2004 it was probable Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued a Complaint after conciliation failed.

4. Complainant was hired by Respondent in 1979.

5. Respondent provides optical services to the public which involve eye examinations, sales, and fittings of glasses and contact lenses.

6. Respondent's employees are represented by the Machinist Union and Aerospace Workers District 54 (the Union). (Tr. 23)

7. Initially, Complainant was hired to do insurance billing duties and was classified as an insurance technician under the Collective Bargaining Agreement (CBA).

8. Donald Rockhold (Rockhold) and Pam Forsea (Forsea) purchased Respondent in October 1985. (Tr. 351)

9. Rockhold and Forsea had been employees of the previous owner and coworkers of Complainant.

10. Rockhold and Forsea are also both licensed opticians and perform optician duties for Respondent.

11. After Rockhold and Forsea purchased the business Complainant withdrew from the Union to become Respondent's secretary. (Tr. 22-23)

12. Complainant held the position of secretary for Respondent until 1992 when she resigned as secretary/treasurer and was put back into the Bargaining Unit under the bookkeeper classification. (Tr. 23)

13. Complainant then performed the duties of receptionist and pre-testing. (Tr. 20)

14. In 1998 Complainant left her receptionist duties to become an Apprentice Optician (AO). (Tr. 36)

15. In the position of AO, the employee operates as an optician but is required to have a licensed optician as a supervisor on the premises with the AO at all times. (Tr. 36, 40, 136, 194)

16. Since Rockhold and Forsea purchased the business in 1985 it had cash flow problems. In 2000 Respondent's revenue began to decrease. (Tr. 29, 279)

17. To deal with the cash flow problems Judy Topa was laid off in 1991 and Kim Watling was laid off in 1999.

18. Complainant was aware checks had bounced on Respondent's corporate account due to insufficient funds. (Tr. 30)

19. Complainant also refrained from paying some bills during her tenure as bookkeeper because there was not enough money in the account. (Tr. 30)

20. Complainant, Anna Marie McFarland, Donna D'Andrea, and Robin Ricks agreed to take hourly pay cuts to save Ned Cabonor's optician position. (Tr. 31)

21. On other occasions departing employees were not replaced, as when Judy Collins quit in 2003 and Rose Movsesian retired the first of January 2004.

22. Rockhold and Forsea also discontinued their company vehicles. They no longer hired out the cleaning, the grass cutting or the maintenance on the building, discontinued their postal machine and cut their own salaries. (Tr. 363)

23. Rockhold and Forsea loaned Respondent money to keep it in business. (Tr. 31, Comm. Ex. 8)

24. Respondent's tax returns from 1998 to 2003 showed gross sales dropped $200,000 per year. (Tr. 276-279, Resp. Ex. II, JJ, KK)

25. In January of 2004 Complainant was diagnosed with breast cancer which resulted in a mastectomy, performed February 3, 2004.

26. Complainant learned the cancer was "stage three" and she would need chemotherapy.

27. Within two weeks of her surgery, Complainant returned to work. Complainant did not work her full work week of 32 hours, but averaged 17.85 hours per week. (Tr. 55-57, 65)

28. On June 3, 2004, Respondent laid off Complainant from her position as AO.

29. Complainant filed a grievance under the CBA on June 9, 2004. The meeting regarding the grievance ended with Forsea

asking Complainant if she would take concessions to a different position. Complainant did not respond to Forsea's query.

30. In March of 2005 Respondent sought to hire new employees. The new employee positions arose as a result of two employees leaving to work for a competitor with the doctors who had previously worked for Respondent performing examinations for customers.

31. Pursuant to recall rights under the CBA Complainant sent a handwritten letter asking to be considered for any open position. (Tr. 72, Comm. Ex. 24)

32. Respondent responded to Complainant's letter by stating they were seeking to hire a licensed optician, as well as an experienced Insurance Claims Technician (ICT). (Resp. Ex. BB)

33. Complainant responded by letter dated April 24, 2005 with a list of duties she had performed over the years at Respondent. (Resp. Ex. CC)

34. Respondent did not hire Complainant for the position of ICT on the basis she lacked the necessary computer experience to perform the job.

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.[1]

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[1] Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleged in the Complaint Respondent terminated Complainant's employment for reasons not applied equally to all persons without regard to their disability status.

2. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

> (A) For any employer, because of the ... disability, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G), 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial

evidence means evidence sufficient to support a finding of unlawful discrimination under the Americans with Disabilities Act of 1990 (ADA) or the Rehabilitation Act of 1973.

5. The order of proof in a disability discrimination case under Ohio law requires the Commission to first establish a *prima facie* case. The Commission has the burden of proving:

> (1) that he or she is (disabled);
>
> (2) that an adverse employment action was taken by an employer, at least in part, because the individual is (disabled); and
>
> (3) that the person, though (disabled) , can safely and substantially perform the essential functions of the job in question.
>
> *Hood v. Diamond Products., Inc.*, 74 Ohio St. 3d 298, 1996 Ohio 259, 658 N.E.2d 738, 739 (Ohio 1996).

6. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). *Id.*, at 802, 5 FEP Cases at 969, n. 13.

7. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981).

8. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its employment action.[2] *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

> ... "clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.

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[2] Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254, 25 FEP Cases at 116.

> The defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the termination; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.
>
> *EEOC v. Flasher Co.*, 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

> *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine*, *supra* at 254-55, 25 FEP Cases at 116, n.8.

The presumption created by the establishment of a *prima facie* case "drops out of the picture" when the employer articulates a legitimate, nondiscriminatory reason for the employment action. *Hicks*, *supra* at 511, 62 FEP Cases at 100.

9. "Disability" is defined as:

> a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

R.C. 4112.01(A)(13).

10. The Commission may satisfy the first requirement of a *prima facie* case by showing Complainant was not disabled, but she was "regarded as having a physical or mental impairment." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999).

> [A]n individual may fall into the definition of one regarded as having a disability if an employer ascribes to that individual an inability to perform the functions of a job because of a medical condition when, in fact, the individual is perfectly able to meet the job's duties.
>
> *Sutton*, 527 U.S. at 489.

11. Regulations issued to provide interpretive guidance for terms found in the ADA define "substantially limits" to mean a person is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
>
> 29 C.F.R. § 1630.2(j)(1).

12. Major life activities" are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing,

hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).[3]

13. "If not contained within these exemplars, the activity must be 'significant' to everyday life." *Rossbach v. City of Miami,* 371 F.3d 1354 at 1357 (11th Cir. 2004), *citing Bragdon v. Abbott,* 524 U.S. 621 at 638 (1998).

14. It is undisputed that Rockhold and Forsea were aware Complainant was diagnosed with breast cancer in January of 2004 and had a mastectomy on February 3, 2004.

15. Complainant returned to work within two weeks of her surgery and received chemotherapy treatments. These treatments caused Complainant to feel fatigued, experience a lot of nausea and hair loss. (Tr. 57-58)

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[3] However, an EEOC Interpretive Guideline states this list is not meant to be exclusive, and added lifting as one example of another "major life activity." 29 C.F.R. § 1630.2

16. The determination as to whether cancer is a disability should be made on a case-by-case basis as there are different forms of cancer, and there may be instances where cancer is "not so pernicious in its effects to warrant a finding that a person afflicted with the disease is handicapped." *Hood* at 303.

17. The statute was designed to protect those who live with a disability that significantly affects the way they live their lives on a daily basis. *McGlone, supra,* at 571.

18. The Commission's evidence does not support the determination Complainant's cancer "substantially limits" major life activities. The Commission failed to establish the cancer's affect on Complainant's major life activities of lifting, walking, reproduction and sexual activity were long-term or permanent in nature. *Toyota, supra.*

19. Complainant's physician, Dr. Connelly, testified that as of October 2006, Complainant had no current evidence of recurrence. (Connelly Tr. 57)

20. Dr. Connelly testified she would place no medical restrictions on Complainant in performing the duties of an optician or similar job. (Connelly Tr. 60-61)

21. Complainant had no medically imposed restrictions on walking, seeing, hearing, speaking, breathing, learning and/or working. (Connelly Tr. 62-63)

22. Additionally, Dr. Connelly had placed no limitations on Complainant's ability to engage in sexual intercourse. (Connelly Tr. 66)

23. Complainant's surgery and chemotherapy occurred during the first half of 2004. By 2005, Complainant performed the following activities:

- February 2005:
  - completed a major house and closet cleaning (Tr. 166), and
  - assisted her husband in tearing out carpeting (Tr. 167-168)
- April 2005: accomplished a major landscaping project (Tr. 171); and

- June 2005: assisted in installing a screen door at her home. (Tr. 172)

24. Additionally, the Commission has not introduced credible evidence Rockhold or Forsea regarded Complainant as being disabled. In order for an individual to be "regarded as" disabled,

> it is necessary that a covered entity entertain misconceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.
>
> *Sutton*, at 479.

25. The testimony of Rockhold and Forsea regarding Complainant's condition after she returned to work was more of expressions of compassion rather than regarding her condition as limiting her ability to perform the essential functions of her job:

> Mr. Rockhold: That was a day that particularly that Debra was very sick. She had her head down on the desk. Pam came to her asked her if she wasn't feeling good could she, did she want to go home. You know, if you can't do any better, please go home. Debra took it as an offense that we were sending her home. Um, she came at Pam and said you are trying to get rid of me and Pam said no I am not. And I said Pam if Debra feels better here, please she will stay. And that was the

> conversation. There was no meanness in it, there was no, I remember my mom going through surgery and cancer and it made her proud that she went to work everyday and worked hard. And if that is what kept Deb fighting then let her sit at the desk with her head down.
>
> (Tr. 293)

> Ms. Forsea: We were having an extremely emotional time. Debbie wasn't feeling well that day at all. Um, I don't know why, um what precipitated the conversation but we ended up in the kitchen and she was crying. And, I am sorry Debbie, she showed me her mastectomy scar, and my heart was breaking for her. And I said I-I hate to see you go through this Debbie, I just, to go through, I had experienced it with my father, and not breast cancer, of course not. But it was just compassion.
>
> (Tr. 353)

26. Assuming *arguendo* that the Commission did establish a *prima facie* case of disability discrimination, Respondent's articulation of a legitimate, nondiscriminatory reason for Complainant's layoff removes any need to determine whether the Commission proved a *prima facie* case, and the "factual inquiry proceeds to a new level of specificity." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 31 FEP Cases 609, 611 (1983), *quoting Burdine, supra* at 255, 25 FEP Cases at 116.

> Where the defendant has done everything that would be required of him if the plaintiff has properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.
>
> *Aikens, supra* at 713, 31 FEP Cases at 611.

27. The *prima facie* phase merely serves to raise a rebuttable presumption of discrimination by eliminating the most common nondiscriminatory reasons for the (layoff). *Citing, Hollins v. Atlantic Co.*, 188 F.3d 652, 659 (6th Cir. 1999) (*quoting Burdine*, 450 U.S. at 253-54). It is only the first stage of proof in a Title VII case, and its purpose is simply to force [a] defendant to proceed with its case. *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861-62 (6th Cir. 1997).

28. Respondent met its burden of production with the introduction of evidence Complainant's position was eliminated due to financial exigencies.

29. Respondent having met its burden of production, the Commission must prove Respondent unlawfully discriminated

against Complainant because she was disabled or regarded her as disabled. *Hicks*, *supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence Respondent's articulated reason for Complainant's layoff was not the true reason, but was "a pretext for discrimination." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine*, *supra* at 253, 25 FEP Cases at 115.

> [A] reason cannot be proved to be a "pretext for discrimination" unless it is shown *both* that the reason is false, *and* that discrimination is the real reason.
>
> *Hicks*, *supra* at 515, 62 FEP Cases at 102.

30. Thus, even if the Commission proves Respondent's articulated reason is false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the ... [Commission's] proffered reason of ... [disability] is correct. That remains a question for the factfinder to answer ....
>
> *Id.*, at 524, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer Complainant was, more likely than not, the victim of disability discrimination.

31. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason. The Commission may directly challenge the credibility of Respondent's articulated reason by showing the reason had no basis *in fact* or it was *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reason without additional evidence of unlawful discrimination.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination ... [n]o additional proof is required.[4]

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[4] Even though rejection of a respondent's articulated reason is "enough at law to *sustain* finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* 2749, 62 FEP Cases at 100, n.4.

Hicks, supra at 2749, 62 FEP Cases at 100 (emphasis added).

32. The Commission may indirectly challenge the credibility of Respondent's reason by showing the sheer weight of the circumstantial evidence makes it "more likely than not" the reason was a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove the reason did not *actually* motivate the employment decision, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

33. Since Respondent purchased Union Vision in 1985, Respondent has had continual cash flow problems. (Tr. 29-30)

34. From 1998 to 2003 Respondent's gross sales dropped $200,000 per year. (Tr. 276-279, Resp. Ex. II, JJ, KK)

35. Some of the actions taken by Rockhold and Forsea to address the cash flow problems were:

- Employees took a cut in hours in 2003 to help the financial situation (Tr. 91);

- Employees who left were not replaced (Tr. 31);

- Rockhold and Forsea loaned Union Vision their own money to keep the business solvent (Tr. 31);

- Rockhold and Forsea watched purchases, costs of goods, and signed notes to labs to get bigger discounts (Tr. 280);

- Rockhold and Forsea discontinued the use of their company vehicles, and no longer hired out the cleaning, grass cutting, or maintenance on the building (Tr. 363); and

- Rockhold and Forsea discontinued the use of the postal machine and cut their own salaries before laying off employees (Tr. 363).

36. Rockhold and Forsea's reasons for Complainant's layoff in 2004 were credible. At the time of Complainant's layoff, Respondent had four licensed opticians. (Tr. 295) Of the four, Rockhold and Forsea held two of those positions.

37. As an AO, Complainant could not work independently. She had to work under the supervision of a licensed optician. (Tr. 295)

38. During the time Complainant was an AO she did not apply to take the exam to become a licensed optician. Although the Commission argued the actions of Respondent contributed to Complainant's failure to take the exam, a reasonable inference can be drawn from the evidence the failure was due to Complainant's own lack of initiative.

39. In needing to further cut costs Respondent determined the AO position was expendable. (Tr. 295)

40. After Complainant was laid off, the employees of Respondent voted to cut their hours in order to save Ned Caboner's optician position. (Tr. 234)

41. Evenutally Caboner was laid off in late 2004. (Tr. 199)

42. I find that there was ample testimonial and documentary evidence in the record to support the determination the layoff of Complainant happened at an unfortunate time in her personal life, but was necessitated for valid, sound financial reasons.

RETALIATION

43. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas*, supra, for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The burden of establishing a *prima facie* case is not onerous. *Burdine*, supra. It is simply part of an evidentiary framework "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*, at n.8.

44. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases 969, n.13.[5] In this

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[5] The Commission moved during the hearing to amend the Complaint to include an allegation of retaliation, pursuant to R.C. 4112.05(C) which sets forth in pertinent part:

> Any complaint (...) may be amended by (...) the hearing examiner conducting a hearing under division (B) of this section, at any time prior to or during the hearing. (...) The respondent has the right to file an answer or an amended answer to the original and amended complaints and to appear at the hearing in person, by attorney, or otherwise to examine and cross-examine witnesses.

The Commission's Motion was **granted**.

case, the Commission may establish a *prima facie* case of unlawful retaliation by proving:

(1) Complainant engaged in an activity protected by R.C. Chapter 4112;

(2) The alleged retaliator knew about the protected activity;

(3) Thereafter, Respondent subjected Complainant to an adverse employment action; and

(4) There was a causal connection between the protected activity and the adverse employment action.

Hollins, supra.

45. Generally, mere temporal proximity between a protected activity and a materially adverse action without other indicia of retaliatory conduct is not sufficient to establish the causal connection element of a retaliation claim. *See Michael v. Caterpillar Financial Services*, 496 F.3d 584, 596; *Tuttle v. Metro. Gov't. of Nashville*, (C.A. 6, 2007), 474 F.3d 307, 321; *Little v. BP Exploration & Oil Co.*, (C.A. 6, 2001), 265 F.3d 357, 363-64; *Nguyen v. City of Cleveland*, 229 F.3d 559, 593; *Johnson v. University of Cincinnati*, (C.A. 6. 2000), 215 F.3d 561, 582-83.

46. Where some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality. *Mickey v. Zeidler Tool & Die Co.*, (6th Cir. 2008, 516 F.3d 516, 525.

47. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas* for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases 969, n.13. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Burdine*, supra.

48. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for the employment action.[6] *McDonnell Douglas, supra.* To meet this burden of production, Respondent must:

> ... "clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.
>
> *Hicks*, supra.

The presumption created by the establishment of a *prima facie* case "drops out of the picture" when the employer articulates a legitimate, nondiscriminatory reason for the employment action. *Hicks, supra* at 511, 62 FEP Cases at 100.

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[6] Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254, 25 FEP Cases at 116.

> The defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the failure to recall; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.
>
> *EEOC v. Flasher Co.*, 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

49. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent's articulation of a legitimate, nondiscriminatory reason for not recalling Complainant to the newly-created position of ICT removes any need to determine whether the Commission proved a *prima facie* case, and the "factual inquiry proceeds to a new level of specificity." *U.S. Aikens*, supra.

> Where the defendant has done everything that would be required of him if the plaintiff has properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.
>
> *Aikens, supra.*

50. Respondent met its burden of production with the introduction of evidence that Complainant did not meet the qualifications for the position of ICT.

51. Respondent having met its burden of production, the Commission must prove Respondent retaliated against Complainant because she engaged in protected activity. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance

of the evidence Respondent's articulated reason for not recalling Complainant was not the true reason, but was "a pretext for ... [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine, supra* at 253, 25 FEP Cases at 115.

> [A] reason cannot be proved to be a "pretext for [unlawful retaliation]" unless it is shown *both* that the reason is false, *and* that ... [unlawful retaliation] is the real reason.
>
> *Hicks, supra* at 515, 62 FEP Cases at 102.

52. Thus, even if the Commission proves Respondent's articulated reason was false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the ... [Commission's] proffered reason of ... [unlawful retaliation] is correct. That remains a question for the factfinder to answer ....
>
> *Id.*, at 524, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer Complainant was, more likely than not, the victim of unlawful retaliation.

53. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason. The Commission may directly challenge the credibility of Respondent's articulated reason by showing the reason had no basis *in fact* or it was *insufficient* to motivate the employment decision. *Manzer, supra.* Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reason without additional evidence of unlawful discrimination.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination ... [n]o additional proof is required. [7]
>
> *Hicks, supra* at 511, 62 FEP Cases at 100 (emphasis added).

54. Complainant filed a grievance in June of 2004. Respondents and Complainant and Complainant's Union representative met. No resolution to the grievance was reached.

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[7] Even though rejection of a respondent's articulated reason is "enough at law to *sustain* finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* at 511, 62 FEP Cases at 100, n.4.

55. Complainant filed a charge of discrimination with the Commission in July of 2004.

56. Complainant's re-call rights are governed by a CBA:

Section 6.1 (...)

> Company shall observe the principle of company-wide seniority, provided that the senior employee is within the classification and is capable of immediately performing the available work without any training. (...)

57. When Complainant was laid off in June of 2004 her position classification was Apprentice Optician.

58. Complainant was not eligible to bump another employee at the time of her layoff. Pursuant to Article VI, Section 6.1 of the CBA, she was not in the same classification as any other employee working for the Respondent. (Comm. Ex. 4, 5)

59. In March of 2005 two doctors who had worked for Respondent left and the employee who did the insurance billing, Donna D'Andrea, and a receptionist, Robin Ricks, went with them. (Tr. 138)

60. The new position was created because two employees had left to work for doctors who had worked for Respondent. The two employees who left held the positions of receptionist and insurance billing clerk. The new position combined the two positions into one. (Tr. 303)

61. Complainant contacted Respondent to provide an updated address in case of recall and to let them know she was interested in returning to work. (Tr. 72; Comm. Ex. 24)

62. Complainant received a letter from Respondent, dated April 18, 2005, stating that Respondent was considering recall or taking applications for experienced insurance claim technicians and a part-time licensed dispensing option.

> (...) Currently, we are considering recall under the Collective Bargaining Agreement and/or are taking applications for experienced insurance claim technicians. This person should be proficient in Word, Excel, PowerPoint and be able to generate and send the various insurance claims via the internet. This person should be able to code the diagnosis and procedures for proper reimbursement from both Medicare and Medicaid. (...)
>
> (Comm. Ex. 25)

63. The letter stated Respondent was not considering recall of an Apprentice Optician. They did not consider Complainant as having any experience or qualifications for the positions to be filled. (Tr. 72, Comm. Ex. 25)

64. Complainant's response listed her qualifications and experience in insurance billing and computer skills:

> Insurance Clerk: Have filled out and processed insurance claims with diagnosis and procedure codes, checked with insurance companies for eligibility and coverage. I have billed Medicare, Medicaid, General Relief and many other third party plans.
>
> Computer Skills: I have worked in Microsoft Word, and know how to search the Web. I am also able to send and receive E-mail. I feel I could easily adapt to online billing.
>
> (Resp. Ex. CC)

65. On cross-examination Complainant admitted on the date she was laid off, June 3, 2004, she had no computer experience. (Tr. 130)

66. Complainant also admitted on cross-examination she had never worked on a job where she had to use a computer or be proficient in using programs. (Tr. 144)

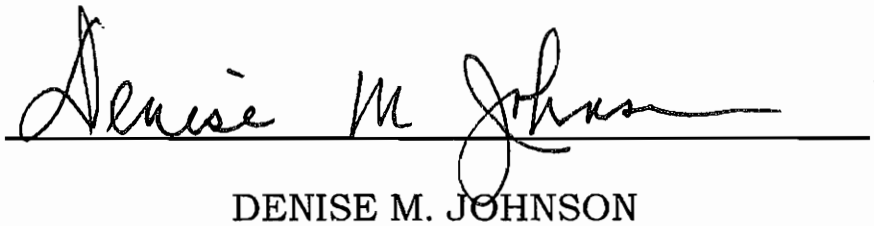
67. According to the CBA Complainant did not have recall rights to the position of insurance claims technician because she was not in that classification when she was laid off, and she had no computer skills to perform the job of insurance claims technician.

> (...) If and when it becomes necessary to lay off any employees, the Company shall observe the principle of company-wide seniority, provided that the senior employee is within the classification and is capable of immediately performing the available work without any training. (...)
>
> (Comm. Ex. 4)

68. The Commission did not meet its evidentiary burden and failed to persuade the ALJ that Respondent's failure to hire Complainant as an insurance claims technician in March of 2005 was due to her having filed a charge of discrimination in July of 2004.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9875.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

September 28, 2010

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

October 25, 2010

RECEIVED

OCT 27 2010

OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

Desmon Martin
Chief of Enforcement and Compliance
Ohio Civil Rights Commission
State Office Tower 5th Floor
30 East Broad Street
Columbus, OH 43215-3414

Re: *Debra M. Darr v. Union Vision Center of Manchester Road dba Co-Op Optical*
Complaint No. 9875

Dear Mr. Martin

Attached please find the original of the Objections to the Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendations being submitted by the Counsel for the Ohio Civil Rights Commission, Principal Assistant Attorney General Marilyn Tobocman by E-Mail. A copy will follow by mail.

Sincerely,

Marilyn Tobocman

Marilyn Tobocman

Enc.

cc. Darr, Gross Tscholl, Johnson

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RECEIVED

OCT 27 2010

OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

STATE OF OHIO
CIVIL RIGHTS COMMISSION

IN THE MATTER OF:	) **COMPLAINT NO. 9875**
DEBRA DARR,	)
Complainant,	) **CHIEF HEARING EXAMINER DENISE M. JOHNSON**
and	)
UNION VISION CENTER of MANCHESTER ROAD, d.b.a. CO-OP OPTICAL	)
Respondent.	)

OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGE

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Complainant

I. INTRODUCTION

The Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendations ("ALJ's Report") issued on October 4, 2010 made the following recommendations to which these objections are directed:

- The Commission's evidence does not support the determination that Complainant's cancer "substantially limits" major life activities. (ALJ's Report at 17, ¶18)
- The Commission's evidence does not support the determination that Respondent regarded Complainant as having an impairment. (ALJ's Report at 19-20, ¶¶24-25)
- The Commission failed to prove that Complainant was terminated due to her Cancer. (ALJ's Report at 26, ¶42)
- The Commission did not prove that Respondent's failure to hire Complainant as an insurance claims technician in March of 2005 was due to her having filed a charge of discrimination in July of 2004. (ALJ's Report at 37, ¶68)

The following objections ask the Commissioners to reverse these determinations and find that:

- Complainant's Cancer is a disability.
- Complainant's disability was a significant factor in her termination.
- Respondent's failure to consider Complainant for the position of receptionist and insurance billing clerk was in retaliation for her having filed a charge alleging discriminatory lay-off because of disability.

The bases for these objections are set forth below.

II. THE COMMISSIONERS MUST REVERSE THE DETERMINATION THAT COMPLAINANT DID NOT MEET ANY OF THE THREE DEFINITIONS OF DISABILITY UNDER R.C. CHAPTER 4112.

The ALJ's Report failed to consider the extensive evidence presented at hearing that established Debra Darr was disabled. In so doing, the ALJ's Report ignored how the Ohio Laws Against Discrimination define disability. And among those definitions, the ALJ's Report disregarded evidence of Respondent's observations regarding Debra Darr's physical and mental condition during the fifteen weeks between her mastectomy and her lay-off.

Instead, the ALJ's Report relied on alleged physical activities that Debra Darr had on her calendar eight months and a year after her lay off.

The term "disability" pursuant to Ohio 's Laws Against Discrimination means:

> a **physical or mental impairment that substantially limits one or more major life activities**, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment, **or being regarded as having a physical or mental impairment.** R. C 4112.01(A)(13)(emphasis added).

As a further definition of "[p]hysical or mental impairment", the statute includes:

> "[d]iseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple scleroses, **cancer**, heart disease, diabetes, human immunodeficiency virus infection, mental retardation, emotional illness, drug addiction, and alcoholism." R.C. 4112.01(A)(16)(a)(iii)(emphasis added).

All of these definitions defining the term "disability" in Ohio's Laws Against Discrimination were ignored in the findings of the ALJ's Report.

A. Debra Darr was disabled as a result of her Cancer and the debilitating effects of the chemotherapy her Cancer required.

The ALJ's Report finds that, "[t]he Commission failed to establish the Cancer's affect on Complainant's major life activities of lifting, walking, reproduction and sexual activity were long-term or permanent in nature." ALJ's Report at 17, ¶18. This Conclusion of Law ignores evidence of Respondent's expectation when Debra Darr left work to undergo surgery, what her physical and mental condition was at the time she was laid off, and the long term effects of her Cancer and its treatment.

Mrs. Darr's Cancer was extremely destructive and harmful to her and apparent to Respndent when she returned to work two weeks after her surgery. Mrs. Darr could not stretch her arms out in front of her. Respondent would have observed that the chemotherapy treatments left Mrs. Darr very fatigued and experiencing a lot of nausea, and back and joint pain. The hair loss she

experienced was not only a vanity issue because she experienced loss of hair from all the places on her body, such as her nostrils, causing her significant discomfort. Tr. at 57-8.

The chemotherapy treatments caused her a serious allergic reaction that resulted in burn responses to her hands, feet, neck and forehead. She bled under her finger and toe nails and had sores in every orifice of her body. Tr. at 58-59. These outcomes made walking difficult and caused her both depression and anxiety. Tr. at 59-61.

It is apparent that the ALJ's Report relied in error on Mrs. Darr's activities in February of 2005, a year after her surgery and eight (8) months after she was terminated. Her calendar showed she had noted a major house and closet cleaning and assisted her husband in tearing out carpeting. Other activities in April and June of 2005 were equally irrelevant to the issues in this case. More than a year after her surgery and a year after her lay off, Mrs. Darr assisted in installing a screen door at her home. ALJ's Report at 18-19, paragraph 23.

The ALJ's Report ignored the substantial evidence in the record that there were significant continuing effects of her Cancer that continued long after the chemotherapy was discontinued. Mrs. Darr testified at the hearing that three years after her mastectomy, there remained tenderness and pain on her right side and discomfort when picking things up. The loss of lymph nodes interrupts the lymphatic system permitting lymphatic material to collect. Tr. at 50. The resulting condition, called Lymphedema, produces swelling in her right arm, requiring the wearing of compression sleeves and a hand gauntlet at times. Tr. at 48. Mrs. Darr must be cautious about lifting and has limited strength for lifting in her right arm. Tr. at 50; Ex. 17. With regard to household tasks, Mrs. Darr can not lift heavier pots and pans, take out the trash or go up and down the steps with a bucket of water. She can no longer lift her grandchild. Tr. at 52. Lymphedema is not a condition that improves over time. It can be expected to persist over the rest of her life. Tr. at 68.

Mrs. Darr testified she was being treated for anxiety and depression which she ascribes to

the medication she takes, the changes in her life, and the fear of recurrence of her Cancer, as well as the loss of her job. Tr. at 68. She understood that once the Cancer involves lymph nodes there can be microscopic Cancers that may not manifest themselves for a number of years, therefore she could not say she was Cancer free. Tr. at 99.

Mrs. Darr testified to back and hip pain and the discomfort that arises from the soft tissue damage to her feet and hands that she experienced. Tr. at 68. Mrs. Darr testified that:

> I have problems with my feet, the soft tissue in my feet from the effects of Taxotere. It did effect the soft tissue in my feet. It is called plantera fasceitis and I do suffer from side effects like I said from the Armidex. I have had back pain and hip pain since my chemotherapy and radiation and I still have this overt pain where my breast was and where the drainage tubes were to this day. Tr. at 100.

Mrs. Darr further testified to the effects of her expedited menopause brought on by the chemotherapy. She was left with the inability to reproduce [1] as well as numerous other side effects. These include hot flashes, loss of libido and pain that is an obstacle to a normal sex life. Tr. at 68.

Mrs. Darr's Cancer was substantially disabling and apparent to Respondent as they proceeded to lay her off. Therefore, it is apparent that Mrs. Darr was disabled and the ALJ's Report finding otherwise is in error.

B. Simply because there are people with Cancer who are not disabled does not undermine the conclusion that Mrs. Darr is disabled.

In determining that Debra Darr was not disabled, the ALJ's Report relies on case law that suggests that "there may be instances where Cancer is "not so pernicious in its effect to warrant a finding that a person afflicted with the disease is handicapped." ALJ's Report at 17, ¶16. That citation is totally inapplicable to Mrs. Darr based on the evidence of her limitations set forth above. While it is true that determining if someone is disabled must be analyzed on a case-by-case basis, the

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[1] The U.S. Supreme Court has ruled that limitations on the ability to procreate is a disability when it is a result of the dangers HIV-positive status imposed on a fetus in *Bragdon v. Abbott*, 524 U.S. 624, 641(1998).

facts of this case reveal that Ms. Darr is disabled.

In a case remarkably similar to the instant matter, where the plaintiff had returned to work after Cancer surgery but during her chemotherapy treatments, only to be terminated, the Ohio Supreme Court determined that evidence supported a finding that plaintiff's "ailment was an abnormal, diagnosable, long-term condition, and that her condition caused functional limitations resulting in significantly increased hardship and vulnerability to everyday obstacles and hazards." The court relied on testimony that the plaintiff had undergone numerous chemotherapy treatments over an extended period of time, that her employer was aware that she had received chemotherapy treatments and the treatments she received adversely affected her everyday living and working environment and supported a finding that the plaintiff was "handicapped" pursuant to former R.C. 4112.01(A)(13).[2] A similar outcome is mandated by this precedent in this case as well.

C. Respondent regarded Mrs. Darr as disabled

Even if Mrs. Darr's employer had not known how debilitating her cancer was, they certainly knew that she suffered from the physical impairment of Cancer. The ALJ's Report clearly recognizes this reality, but dismisses its significance. ALJ's Report, pp. 19-20, ¶25 Contrary to the ALJ's conclusion, this is sufficient to place Mrs. Darr within the definition of disability under the prong of "regarded as having an impairment." Decisions regarding Ohio law on this definition have held that this means perceiving that a person has an impairment, regardless of how limiting that impairment is believed to be.[3]

There is no dispute that Respondent observed Ms. Darr suffering from the effects and limitations imposed by her Cancer and its treatment, commented upon it, and referred to it during

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[2] *Hood v. Diamond Products, Inc.*, 74 Ohio St. 3d 298, 304 (1996).

[3] *Johnson v. Metrohealth Medical Center* (8th Dist. 2004), 2004-Ohio-2864, ¶¶9-16; *Tornichio v. City of Beavercreek*, (OCRC, 2006), Case No. 9503.

her return to work from her surgery and referred to it at the occasion of her lay-off by suggesting her availability for work during her subsequent treatments was a concern. As such, she meets the definition of disability pursuant to the "regarded as" prong.

D. Complainant's Cancer is among those conditions the Ohio Laws Against Discrimination define as a disability.

R.C. 4112.01(A)(16)(a)(iii) provides a list of conditions which are among those the law acknowledges are physical or mental impairments and on that list is Cancer.[4] One Ohio Court of Appeals determined that under this provision Cancer qualifies as a physical or mental impairment even if it does not limit a major life activity because it satisfies one of the other alternative definitions of "disability" in § 4112.01(A)(13). Under this alternative, the Commission need only show the Complainant had a "physical or mental impairment" defined in § 4112.01(A)(16), one of which is Cancer.[5]. The fact that Debra Darr has Cancer has never been in dispute. Therefore, under this analysis, her disability should equally be beyond dispute and the Commissioners must reverse the ALJ's Report with regard to this issue.

III. THE ALJ'S REPORT INCORRECTLY STATES THAT DEBRA DARR'S CANCER WAS NOT THE CAUSE OF HER TERMINATION.

A. The evidence in the record establish Respondent's awareness and concern regarding Debra Darr's disability.

Debra Darr testified about why she believed she was laid off because of her Cancer. Pam Forsea, one of the owners of Respondent Union Vision Center, had made the statement that she did

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[4] R.C. 4112.01(A)(16)(a) "physical or mental impairment", the statute includes any of the following:

> (iii) Diseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple scleroses, **cancer**, heart disease, diabetes, human immunodeficiency virus infection, mental retardation, emotional illness, drug addiction, and alcoholism. (emphasis added).

[5] *Johnson v. Metro Health Center*, 2004 Ohio 2864 at *P11 (8th Dist. 2004)

not want to watch Debra go through the suffering of Cancer and its treatment. Ms. Forsea had lost her father to Cancer. Tr. at 105-106. Having had that family experience appeared to influence Respondent's expectations regarding the outcome of Mrs. Darr's bout with Cancer. The belief that Mrs. Darr would not return to work was apparent from Debra Darr's testimony that when she did return to work within two weeks of her surgery, she found her personal items in her work space in the lab were no longer there. Tr. at 53.

At the time of her lay off, the most serious and debilitating effects of Debra Darr's Cancer were apparent to her employers as demonstrated by their statements at the time. Mrs. Darr was told that, due to her reaction to the chemotherapy and the fact that chemotherapy would be followed by radiation treatments, her employers weren't sure what hours she would be available to work. Mrs. Darr asked that, in light of her seniority based on 25 years of service, she be allowed to stay by taking over positions of persons more recently hired, Irene Francis or Robin Ricks. Don Rockhold, the other owner of Respondent Union Vision Center, said in response, "just give it up Deb". Tr. at 61, lines 18-20; Tr. at 115.

On a previous occasion when Pam Forsea asked how she felt and Debra Darr acknowledged she wasn't feeling well, Pam Forsea's response was, "well, maybe we should lay you off." Tr. at 107, lines 13-15. Don Rockhold told Mrs. Darr that she was making other employees uncomfortable by the way she looked ... there were a lot of women in the office and it brought it too close to home. Tr. at 117-119. Similar statements had been made by Ned Cabonor and Robin Ricks. Tr. at 120. These statements in the record establish that Debra Darr's Cancer was on everybody's mind, not the least of whom was Respondent.

B. Evidence in the record establish that Debra Darr's disability was a significant factor in her lay off.

The evidence in the record contradicts a finding that Debra Dar was not disabled and further contradicts a finding that, particularly when she was laid off, she was not regarded as

disabled. The evidence also establishes that Mrs. Darr's disability was the cause of her lay off. To succeed on this issue, the Commission need only show that disability, a protected classification, was in some part the basis for Respondent's decision. It is sufficient that her Cancer was one significant factor considered by the Respondent in dealing with Debra Darr.

Courts have recognized that, in order to show that an employer has acted with a discriminatory intent, the disabled employee is not required to demonstrate that the employer was motivated by a dislike for or an animosity towards persons with disabilities. Discrimination can also result from the employer's false and over-protective assumption about the needs of disabled persons or from unfounded fears of the difficulties or problems that might arise from a disabled person's condition.[6]

The record evidence in this case adequately shows that Respondent, while displaying much deserved sympathy regarding Debra Darr's Cancer, made comments about whether her apparent condition would be better served if she was laid off, that those around her were disturbed by watching her condition, and at the time of her lay-off, that Respondent's wasn't confident about her continuing availability for work. As such, the Commissioners should reject the ALJ's Report and find that Mrs. Darr's disability was one significant factor considered by Respondent in making its decision to end her employment.

IV. THE COMMISSIONERS MUST REJECT THE RECOMMENDATION THAT THE RESPONDENT'S FAILURE TO REHIRE MRS. DARR WAS NOT RETALIATORY FOR HER HAVING FILED A CHARGE WITH THE OHIO CIVIL RIGHTS COMMISSION

The ALJ's Report acknowledges that in March of 2005, ten months after Debra Darr's lay-off, two doctors who had worked for Respondent left and the employee who did the insurance billing and a receptionist went with them. The two positions of insurance billing and receptionist

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[6] *Ryan v. Ramsey,* 936 F. Supp. 417, 422 (S.D. Texas 1996).

were combined into one. Debra Darr contacted Respondent and let them know she was interested in returning to work. ALJ's Report at 34-35, ¶¶59-61. The ALJ's Report justifies Respondent's failure to consider Mrs. Darr for this new position because:

- "..on the date she was laid off, June 3, 2004, she had no computer experience." ALJ's Report at 36, ¶65.
- "..she never worked on a job where she had to use a computer or be proficient in using programs." ALJ's Report at 37, ¶66.
- "Complainant did not have recall rights to the position of insurance claims technician." ALJ's Report at 37, ¶67.

These are the facts in the record that the ALJ's Report failed to consider:

- The resignations and retirement opened up insurance billing and receptionist positions, responsibilities previously performed by Debra Darr over her 25 years of employment with Respondent. ALJ's Report at 5, ¶7; ALJ's Report at 6, ¶13.
- These vacancies, unlike previous ones, would be filled regardless of the Respondent's finances. ALJ's Report at 7, ¶21.
- Respondent had a history of providing employees computer training when their job responsibilities required it in the past, including the opportunity to attend a class at University of Akron and have the company whose program was being used provide in-house training. Tr. at 368.

The justifications given by Pam Forsea and Don Rockhold for their failure to recall Debra Darr in May of 2005 are in sharp contrast to the assurances given to Mrs. Darr the previous June that she was being laid off with the possibility of recall and that the lay off itself was a reluctant response to a precipitous financial crisis. Tr. at 61, lines 20-21. What occurred in the interim was Mrs. Darr's having filed a charge in July of 2004 and its result, the Commission's probable cause determination in December of that year.

R.C. §4112.02(I) states:

It shall be an unlawful discriminatory practice:

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or

> because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding or hearing under sections 4112.01 to 4112.07 of the Revised Code.

The evidence presented at the hearing shows that not only was the prospect of a recall was mentioned when informing Mrs. Darr that her termination was a lay off, but soon after her lay off, and in connection with her union grievance, there was a reference to "concessions," which again suggested that there might be some circumstances that would permit Mrs. Darr to return. Both of these events preceded Mrs. Darr's filing a charge on July 20, 2004.

When the job responsibilities of the two employees who resigned the following March needed to be filled, the correspondence between Union Vision Center and Mrs. Darr raised a series of challenges in order for Mrs. Darr to be considered. Presumptions about her lack of trainability on a computer became an insurmountable obstacle to Mrs. Darr's being considered for re-employment, even though she had performed both of the positions that were being combined. Despite this, in their April 18, 2005 letter, Respondent wrote, "[b]ecause you have no experience or qualifications for these positions, we do not believe you are a candidate." Comm. Ex. 25. In light of Mrs. Darr's 25 years of experience holding both positions of insurance clerk and receptionist, this statement is a self-serving exaggeration reflecting Respondent's retaliatory considerations. It is a reasonable presumption from these facts that Mrs. Darr's filing of the charge and the Commission's probable cause determination caused her to not be re-hired.

The law's protection of persons who file charges with the Commission is essential in order for employees to exercise their right to have the Commission undertake an investigation to determine if unlawful discrimination was a factor in the adverse action they experienced. No less than the U.S. Supreme Court has recognized that effectiveness of the laws against discrimination require a broad interpretation of the anti-retaliation provision. Anti-retaliation provisions, effectively enforced, secure the primary objective of combating discrimination by preventing an

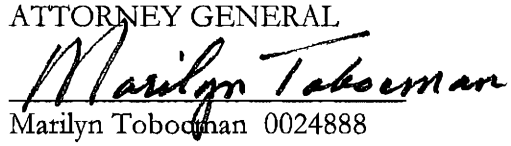
employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the law's basic guarantees.[7] In this case, Debra Darr's filing of a charge with the Ohio Civil Rights Commission was an attempt to secure or advance the enforcement of Ohio's laws that make discrimination based on disability unlawful. Others will not take that same risk if the Ohio Civil Rights Commission refuses to enforce the prohibitions against retaliation. Respondent's unwillingness to consider Debra Darr for an open position a year after her lay-off was more likely than not retaliation for her having exercised her right to file a charge.

V. CONCLUSION

The Commissioners should not adopt the ALJ's Report and instead find that Debra Darr was disabled by her Cancer and the aggressive treatments to overcome it, she was regarded as disabled and was terminated due to her Cancer. The Commissioners should also find that Respondent's refusal to consider Mrs. Darr for a return to work when a vacancy occurred was in retaliation for her having filed a charge of discrimination. The Commissioners should award Mrs. Darr back pay from the date of the decision to lay her off, June 3, 2004, to the date of the Cease and Desist Order to be issued, as well as ordering any and all relief needed to eliminate the effects of the discrimination and retaliation in order to make Mrs. Darr whole.

Respectfully submitted,

RICHARD CORDRAY
ATTORNEY GENERAL



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[7] *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 63 (2006)

Certificate of Service

An original of the foregoing Objections to the ALJ's Report was sent by regular U.S. Mail and E-Mail this 25th day of October, 2010 to:

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Ohio Civil Rights Commission
State Office Tower 5th Floor
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Chief of Enforcement and Compliance

And a copy was sent to:

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Administrative Law Judge

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Principal Assistant Attorney General

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NOV 4 2010

OHIO CIVIL RIGHTS COMMISSION
DIVISION OF HEARINGS

STATE OF OHIO
CIVIL RIGHTS COMMISSION

IN THE MATTER OF:	)	COMPLAINT NO. 9875 Complainant Debra M. Darr
UNION VISION CENTER OF MANCHESTER ROAD, INC. d.b.a. Co-Op OPTICAL	)	Chief Administrative Law Judge Denise M. Johnson
Respondent.	)	

RESPONDENT'S RESPONSE TO OBJECTIONS FILED BY COMMISSION'S COUNSEL TO THE ALJ'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

This matter started in July, 2004 when Complainant Debra Darr filed her Charge of Discrimination. The complaint was issued by the commission in December, 2005. The parties engaged in discovery and the matter proceeded to a full hearing in front of Administrative Law Judge Denise M. Johnson over two days on February 6-7, 2007.

The parties filed post hearing briefs summarizing their best evidence from the hearing transcript as well as fully briefing the applicable law in the matter.

Administrative Law Judge Johnson (hereinafter "ALJ") issued a 38 page report and recommendation on September 28, 2010. (hereinafter "Report") The Attorney General then filed objections on October 15, 2010.

The Attorney General alleges that the ALJ made incorrect findings of fact based on the evidence presented. The Attorney General does not argue that the standards of law applied were incorrect.

The main areas of objection are that 1. Darr was disabled; 2. She was regarded as disabled; 3 Cancer was the cause of Darr's termination and 4. Darr was retaliated against for filing a Charge of Discrimination.

1. Disability

The main objections to the findings of fact are that the ALJ found that Ms. Darr was not disabled under the applicable law. The objections focus on the subjective feelings of Ms. Darr regarding the things that she felt she could not do after the surgery and chemotherapy. For example, the loss of hair which caused her discomfort. Objection at page 4. Neither Complainant, nor the Attorney General ties this into how it prevents Complainant from performing her position or a similar position. Further, the evidence did not demonstrate that the cancer "substantially limits" her major life activities for the long term or permanently. Report at p. 17.

In making this determination, the ALJ relied not on Ms. Darr's subjective findings but on the objective findings of her personal physician. Dr. Elizabeth Connelly's testimony was that Complainant had no evidence of recurrence. Report at p. 17. Dr. Connelly also testified that there were no restrictions on Darr's ability to perform the duties of an optician or a similar position. Report at p. 18. Finally there were no medically imposed restrictions on walking, seeing, hearing, speaking, breathing, learning, working or sexual intercourse. Report at p. 18. While Ms. Darr may have felt that she was restricted in one or more of these activities, that subjective belief does not over-ride the sworn objective testimony of her own physician. Dr. Connelly testified that Ms. Darr had no restrictions, as such the ALJ was correct in determining that Darr was not disabled.

This is further supported by the evidence that Darr was able to perform heavy manual labor within one year of her surgery. As the ALJ correctly noted, limitations must be long term or permanent according to Toyota.[1] Report at p. 17. While the attorney general argues that these activities are irrelevant as they occurred a year after the alleged discrimination, the case law requires that the limitations must be long term. Therefore, the fact that Darr was able to perform the activities she claimed were impaired is relevant to the determination of her alleged disability.

The ALJ's finding that Darr's condition did not rise to the level of disability is supported by the objective testimony of her physician and should be adopted by the commission.

2. Respondent did not "regard" Darr as disabled.

Respondents owners were very sympathetic about Darr's condition. The testimony cited by the ALJ demonstrates that Donald Rockhold and Pamela Forsea were full of compassion for Darr. The fact that they "noticed" her condition and discussed it with her does not mean that they regarded her as disabled as argued by the Attorney General. The ALJ correctly noted that these instances were more of a personal compassion rather than illegal discrimination. Respondent never prevented Darr from working, never alleged she was unable to work, nor told her they believed she could not work. On the contrary, Respondent not only let Darr return to work as soon as she wished, they attempted to bring her back after the layoff if she would agree to the same concessions the other employees had taken.

[1] Toyota Motor Mfg. Kentucky, Inc. v. Williams (1992) 534 U.S. 184

3. Cancer was not the cause of Darr's termination.

Debra Darr believes she was laid off because of her cancer. No amount of evidence or facts will demonstrate otherwise to Darr. However, Darr's belief is not the standard which must be applied to determine the reason for her termination. The record demonstrates that small optical businesses such as Union Vision, are suffering. While Darr and the Attorney General may not find it significant, a $200,000.00 reduction in **gross sales** is significant. This $200,000.00 loss is not pretext. The Complainant cannot show that financial problems were not the real reason for her layoff. As the ALJ indicates, it is an unfortunate coincidence that the layoff happened during Darr's cancer but it was for valid, sound financial reasons. Report at p. 26. This finding is supported by evidence from the record, as cited to in the report on p. 25. Most notably, that employees were not replaced; they took a cut in hours; the owners loaned the business money; the owners cut their own salaries and discontinued all luxuries. Report at p. 25. Darr did not become a licensed optician and her position was therefore more expendable than the licensed opticians. Report at p. 26.

Finally, as the ALJ points out, Darr did not have re-call or bumping rights under the contract for the receptionist/billing position. Her classification was that of Apprentice Optician. Had Union Vision allowed her to bump other employees in other classifications they would have violated the union contract. Report at p. 34.

4. The Charge of Discrimination was not the cause of the failure to re-call Darr under the Union Contract.

Finally, in the Objections filed, the Attorney General argues that retaliation was the reason Darr was not recalled when Union Vision had open positions to fill. After Darr

was laid off in 2004, two doctors left Union Vision and took two employees with them to start a new practice. Report at p. 34. Obviously, this left Union Vision with an immediate need for experienced billing clerks as the insurance billing clerk was one of the employees who left. Report at p. 34-35.

Respondent Union Vision considered Darr for the merged position. Comm. Ex 25. However Respondent Union Vision did not need an Apprentice Optician, it needed an experienced billing clerk. Her qualifications did not meet the immediate needs for Union Vision and therefore she was not recalled. While, again arguing the factual dispute that her complete lack of computer experience was irrelevant, the facts are that at this stage, Union Vision needed someone who could do the job immediately. Insurance claims are how the business gets paid, if the person cannot immediately file the claims, no money comes into the business. It is true in the past that Union Vision had encouraged employees to take classes and become better trained for positions at the business. However, Darr had never taken advantage of those opportunities or she would have been qualified for this position. She hand wrote out claims in the early 1980's. Tr. at p. 82. This does not qualify her for today's computer assisted electronic billing. Other employees testified that it took 3-4 months to learn this skill. Tr. at p. 86, 87, 88. Tr. at p. 244-245. Clearly, Darr was not immediately qualified for this position and it cannot be stated that her charge of discrimination was the reason for her failure to be recalled. Union Vision had a valid, non-discriminatory reason for not re-hiring or recalling Darr. Darr could not do the job she claims she should be recalled to. As demonstrated by the 3-4 month training period for other employees, this was not a simple point and click job. It is complicated and requires someone who is proficient to

walk in and be immediately productive. Darr, with no real computer billing experience could not immediately fill this position. For a company with current financial problems, a long period of no cash flow would have been devastating. Therefore, the ALJ correctly found that the reasons offered were not pre-text and the Commission could not demonstrate retaliation.

Conclusion

The report and recommendation of Administrative Law Judge Johnson is supported by ample facts in the record. The ALJ's report is based on the objective facts in this matter rather than the subjective assertions of Ms. Darr offered by the Attorney General. The Commission should follow the recommendations of the ALJ and dismiss the Complaint in this matter.

Respectfully submitted,

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Certificate of Service

A copy of the foregoing was sent via U.S. Mail on this 3rd day of November, 2010 to:

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Tom Roberts
Rashmi N. Yajnik

G. Michael Payton, Executive Director

October 4, 2011

Debra M. Darr
8482 Manchester Avenue, N.W.
Canal Fulton, OH 44614

Re: *Debra M. Darr v. Union Vision Center of Manchester Road dba Co-OP Optical*
AKRB3060304 (28942) 07022004
22A 2004 03066C
Complainant No. 9875

The enclosed Order dismissing Complaint No. 9875 in the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting of September 8, 2011.

This case is closed.

FOR THE COMMISSION

Desmon Martin / cjs

Desmon Martin
Director of Enforcement and Compliance

DM:cjs
Enclosure

cc: Lori A. Anthony, Chief – Civil Rights Section
Denise M. Johnson, ALJ – Division of Hearings
Compliance [Martin – Kanney – Woods]
Robert J. Tscholl, Esq.

John Kasich, Governor

Debra M. Darr,	)	
	)	
Complainant,	)	
	)	
vs.	)	COMPLAINT NO. 9875
	)	
Union Vision Center of Manchester Road, dba Co-Op Optical,	)	
	)	
Respondent.	)	

FINAL ORDER

This matter came before the Commission upon the Administrative Law Judge's Report and Recommendation. After carefully considering the entire record, the report was adopted at the public meeting on November 18, 2010.

The Commission hereby incorporates the findings of fact and conclusions of law contained in the Administrative Law Judge's report as if fully rewritten herein. Therefore, it is **ORDERED** that Complaint No. 9875 be **DISMISSED** this 8th day of September, 2011.

Commissioner, Ohio Civil Rights Commission

NOTICE OF RIGHT TO JUDICIAL REVIEW

Notice is hereby given to all parties herein that Revised Code Section 4112.06 sets forth the right to obtain judicial review of this Order and the mode and procedure thereof.

CERTIFICATE

I, Desmon Martin, Director of Enforcement and Compliance of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the Order issued in the above-captioned matter and filed with the Commission at its Central Office in Columbus, Ohio.

DESMON MARTIN
Director of Enforcement and Compliance
Ohio Civil Rights Commission

DATE: 9/8/2011