Ohio Civil Rights Commission

Memo

To: Desmon Martin, Director of Enforcement and Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: September 29, 2011

Re: *Stacey R. Griffin v. Bridgestone/Firestone North American Tire*

(AKR) 73100604 (29221) 100804 22A–2005–00212C
Complaint No. 9919

(AKR) 73031405 (30146) 071405 22A–2005–03386C
Complaint No. 10022

CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT

ALJ RECOMMENDS DISMISSAL ORDERS

Report issued: September 29, 2011

Report mailed: September 29, 2011

**** Objections due: October 24, 2011**

DMJ:tg

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

STACEY R. GRIFFIN

Complainant

v.

BRIDGESTONE/FIRESTONE NORTH AMERICAN TIRE

Respondent

Complaint 9919
(AKR) 73100604 (29221) 100804
22A–2005–00212C

Complaint No. 10022
(AKR) 73031405 (30146) 071405
22A–2005–03386C

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

MIKE DeWINE
ATTORNEY GENERAL

Marilyn Tobocman
Principal Assistant Attorney General
Civil Rights Section
State Office Building, 11th Floor
615 West Superior Avenue
Cleveland, OH 44113-1899
216 – 787 – 3030

Counsel for the Commission

Todd L. Sarver, Esq.
McDonald Hopkins
41 South High Street, Suite 3650
Columbus, OH 43215-6190
614 – 458 – 0042

Counsel for Respondent

Edward L. Gilbert, Esq.
Slater, Zurz & Gilbert
National City Center, Suite 825
One Cascade Plaza
Akron, OH 44308-1135
330 – 376 – 8855

Counsel for Complainant

Stacey R. Griffin
682 Sylvan
Akron, OH 44306

Complainant

ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414
614 – 466 – 6684

INTRODUCTION AND PROCEDURAL HISTORY

Stacey R. Griffin (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (the Commission) on August 8, 2004 and July 14, 2005, respectively.

The Commission investigated the charges and found probable cause that Bridgestone Firestone North American Tire, LLC (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 complaints on August 25, 2005 and May 11, 2006.

Counsel for both parties filed a Joint Motion to Consolidate the Complaints on May 19, 2006. The Motion was granted.

The Complaints alleged that: (1) the Respondent subjected the Complainant to disparate terms and conditions of employment, and

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placed her on unpaid medical leave, for reasons not applied equally to all persons without regard to their sex; and (2) the Respondent subjected the Complainant to disparate terms and conditions of employment, and constructively discharged her, for reasons not applied equally to all without regard to their sex.

Respondent filed Answers to the Complaints on May 18, 2006 and May 4, 2007. 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 June 5-7, 2007 and September 10–14, 2007 at the Ohio Civil Rights Commission, Akron Government Building, Training Room 203, 161 South High Street, Akron, Ohio.

The record consists of the previously described pleadings: a transcript of the hearing consisting of 1,077 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on November 3, 2008; by

Respondent on January 23 2009; and a reply brief filed by the Commission on February 25, 2009.

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 sworn charge affidavits with the Commission on August 8, 2004 and July 14, 2005.

2. The Commission determined on May 26, 2005 and January 12, 2006 that it was probable Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve these matters by informal methods of conciliation. The Commission issued the Complaints after conciliation failed.

4. Respondent is engaged in the business of tire manufacturing and wholesale and original equipment sales across a broad line of products.

5. Respondent's facility in Akron, Ohio produces racing tires and, occasionally, experimental tires. (Tr. 701, 923-924)

6. Complainant began her employment with Respondent on March 17, 1997 as a custodian.

7. Complainant transferred into the Experimental Tech position in Respondent's Mixing Department (MD) on January 12, 1998.

8. Bill Biggs (Biggs) was a supervisor in the MD.

9. MD employees mix tire components to produce slabs of rubber which are eventually processed into tires in the Advanced Technology Workshop (ATW).

10. Biggs' responsibilities included overseeing the MD's production schedule, dividing up work assignments, and supervising department personnel. (Tr. 694-695)

11. Between six to nine employees reported to Biggs, depending on the production levels. (Tr. 695)

12. MD employees work Monday through Friday on three different lines: Line 1, Line 2, and Line 3. There are two shifts:

first shift is from 6:00 a.m. to 2:00 p.m. and second shift is from 2:00 p.m. to 10:00 p.m. (Tr. 697, 703)

13. In the MD there are three job functions the Experimental Technicians perform: Compounder, Operator, and Line Person.

14. Complainant worked the first shift.

15. Complainant was cross-trained so that she was able to perform all of the functions in the MD.

16. At Respondent's Akron facility employees are required to wear specific safety equipment daily. (Tr. 532)

17. The required daily equipment includes safety shoes, coveralls, gloves, goggles, and (at times) protective helmets.

18. Both the Occupational Health and Safety Administration (OSHA) and the American Conference of Governmental Industrial

Hygienists (ACGIH) have developed air quality thresholds at which respiratory protection is necessary. (Tr. 1007, 1027)

19. Respondent annually samples the air quality in the facility. (Tr. 515)

20. Employees can wear disposable dust masks or half-cartridge respirators. (Tr. 533)

21. In 1996 a specific, detailed policy was established at the Akron facility regarding the distribution and use of such equipment. (Resp. Ex. N)

22. Dust masks are intended to filter out particulates in the air. (Resp. Ex. O)

23. Half–cartridge respirators are intended to filter out fumes or odors, as well as particulates. (Resp. Ex. P)

24. If an employee wishes to obtain a half-cartridge respirator s/he has to have a medical evaluation performed by Respondent's Medical Department, followed by a fit test to custom fit the respirator to the employee, which is conducted by the respirator's manufacturer. (Tr. 537-538)

25. On October 5, 2004, Complainant worked as a first shift operator on Line 2. (Tr. 71, 159, 789)

26. Late in the shift, Complainant developed a nosebleed and reported to Biggs her belief that Line 2's dust collector was not working properly. (Tr. 117, 143, 790)

27. Biggs immediately informed Maintenance Supervisor Tom Juersivich (Juersivich) of the issue.

28. Maintenance performed an initial investigation and discovered that, while there was a minor internal malfunction with the dust collector, there was no impact on air quality. (Tr. 115, 150-153, 791, 898-900, 914)

29. The malfunction was immediately addressed by maintenance.

30. On October 6, 2004, Complainant was scheduled to work as the first shift Operator on Line 2. (Tr. 115, 147, 792)

31. Complainant again complained about the air quality on Line 2. She informed Biggs that either he do something to address the air quality issue or she would file a complaint with OSHA. (Tr. 802)

32. Biggs offered Complainant a dust mask or respirator. (Tr. 803)

33. Operations Manager George Schneider (Schneider) decided to shutdown Line 3 during the first shift and Line 2 during the second shift to replace the vibrating parts on the dust collectors. (Tr. 802, 942)

34. The next day, October 7, 2004, Complainant returned with a doctor's note indicating she had work restrictions. (Tr. 117)

35. The note restricted Complainant from working with chemicals, fumes or dust. (Tr. 117)

36. As there was no work fitting these restrictions, Respondent sent Complainant home for three (3) days.

37. Complainant returned to work on October 12, 2004 and did not experience any further problems. (Tr. 120)

38. On November 1, 2004, Complainant requested a half-mask respirator. (Tr. 120, 812, 983)

39. Complainant was instructed to go to Respondent's Medical Department for the respirator the same day.

40. On November 2, 2004, Complainant submitted to a physical in the Medical Department. (Tr. 123)

41. The staff physician requested Complainant return the next day for a pulmonary function test. (Tr. 570, 985-986)

42. Complainant did not show up for the test on November 3, 2004.

43. On November 3, 2004, Complainant reported to Biggs that she was not feeling well and left work early. (Tr. 127, 579)

44. She was off from work on Family and Medical Leave/Accident and Sickness Leave until January 6, 2005.

45. When the leave expired she requested and received an unpaid leave of absence from January 7, 2005 to March 15, 2005. (Tr. 582-583)

46. Complainant never returned to work. On March 14, 2005 she submitted a formal letter of resignation to Respondent. (Comm. Ex. 53)

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 that: (1) the Respondent subjected the Complainant to disparate terms and conditions of employment, and placed her on unpaid medical leave, for reasons not applied equally to all persons without regard to their sex; and (2) that the Respondent constructively discharged the Complainant, for reasons not applied equally to all without regard to their sex.

2. Specifically, the Commission alleges Complainant was subjected to the use of machinery which was a threat to her physical health and well being, along with other conduct by her supervisor which had the purpose or effect of unreasonably interfering with her ability to perform her job duties, creating an offensive, intimidating or hostile work environment.

3. These allegations, if proven, would constitute violations 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 ... sex, ... 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.

4. 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) and 4112.06(E).

5. 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 Title VII of the Civil Rights Act of 1964 (Title VII).

6. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. 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).

7. 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.[2]

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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 taking the employment action complained of by plaintiff; 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).

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.
>
> *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.

8. 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 placing Complainant on leave and sending her to the clinic to be fitted for a respirator mask 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.

9. Respondent met its burden of production with the introduction of evidence that the manner in which Complainant was treated by Biggs (discipline, monitoring work performance, work/safety issues) was no different than the way he treated her male co-workers under the same or similar circumstances.

10. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her sex. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for Complainant's discharge 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.

11. Thus, even if the Commission proves that 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 ... [sex] 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 that Complainant was, more likely than not, the victim of sex discrimination.

12. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated

reason for disciplinary actions taken against Complainant and requiring her to work on machinery that she believed to be a threat to her physical safety.

13. The Commission may directly challenge the credibility of Respondent's articulated reason by showing that 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.[3]
>
> *Hicks, supra* at 2749, 62 FEP Cases at 100 (emphasis added).

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[3] 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.

14. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reason are a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that 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.*

15. The Commission attempted to show pretext in this case by alleging disparate treatment.

16. Proof of disparate treatment requires similarly situated comparatives:

> Thus to be deemed "similarly situated", the individuals with whom ... [Complainant] seeks to compare ... her treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circum-stances that would distinguish their conduct or the employer's treatment of them for it.
>
> *Mitchell v. Toledo Hospital*, 59 FEP Cases 76, 81 (6th Cir. 1992) (citations omitted).

17. To be deemed similarly situated, "a precise equivalence in culpability" is not required; misconduct of "comparable seriousness" may suffice. *Harrison v. Metro. Gov't. of Nashville and Davidson Cty.*, 73 FEP Cases 109, 115 (6th Cir. 1996) (quotations omitted).

18. The Commission introduced the following evidence of disparate treatment:

- Complainant's discipline was harsher than that of male coworkers, citing her discipline for not properly filling out a NOT report, which discipline stated that future violations would "result in further disciplinary action up to and including dismissal" in contrast with Terry Johnson's NOT report discipline which stated that "disciplinary procedures [would begin] if he doesn't follow instructions." (Tr. 96).

- Women were "watched more closely" in a "hulking" manner more frequently that men. (Tr. 210, 370)

- Complainant had to continue running Line 2 without a requested respirator (Tr. 116), but when men on the next shift requested a respirator and could not received them, they were told to run Line 3. (Gray Tr. 390)

- Complainant was cross-trained on different aspects of the job under threat of being put back on the street if she did not learn the positions. (Tr. 55)

19. Respondent argues the Commission failed to prove Complainant was treated differently than similarly situated male employees. This argument is well taken.

20. Other than Complainant's self-serving statements, Jacky Childress (Childress), who investigated Complainant's claim regarding an alleged statement by Biggs that women should not be in mixing, said she was unable "to substantiate any of those comments". (Tr. 558)

21. With regards to discipline, Complainant testified the verbal discipline for the NOT report was the only discipline she received. (Tr. 182)

22. While Complainant was mentioned more frequently in Biggs' log, this was not a disciplinary measure. It was a personal record kept by Biggs. The person with the second highest number of notations was a male who was eventually terminated for absenteeism. (Resp. Ex. GG)

23. The Commission's assertion that Complainant was watched more frequently or in a manner different from males is weakened by *the many similar complaints males had regarding Biggs' style of management.* For example, Kiss testified that Biggs observed Stacey and Irma to a greater degree than he observed Kiss. In that same answer, however, Kiss testified that Mark, a male, was observed to a greater degree than was Kiss. (Kiss Tr. 370)

24. Biggs' "hulking" was also the reason given by William Crooks (Crooks) for an injury to a coworker named Mike Federonich (Federonich), a male. (Tr. 213)

25. Thomas Kent (Kent), stated that Jon, Bob, Don, and himself (all males), were among those employees who left because of their unhappiness with Biggs' management. (Tr. 686-688)

26. Gray credibly testified that men and women, "most everybody", had complained about Biggs' management and that Biggs "treated both men and women unfairly". (Tr. 391-392)

27. Gray, who was on the shift after Complainant's shift and did not have to work Line 2 on October 6, 2004, credibly testified the men on that shift demanded respirators and were told that none were unavailable. (Tr. 392)

28. George Schneider (Schneider) made the decision to move the men from Line 2 to Line 3 for reasons relating to production priority and a lack of personnel to run both Lines. (Tr. 942)

29. In addition, Gray's supervisor was Don Bennett (Bennett), not Biggs who supervised Complainant. (Gray Tr. 390)

30. Complainant's cross-training (along with two or three men) – which provided better pay, overtime opportunities, and job flexibility – was beneficial to her. (Tr. 60, 174-175)

31. Biggs' management of his employees was disliked by both male and female employees. (Tr. 252, 335; Kiss Tr. 365)

32. The Commission failed to meet its burden of proof and persuasion that Complainant was treated differently by Biggs because of her sex.

33. Normally, employees who are subjected to unlawful discrimination must remain on the job while they seek legal redress. *Brooms v. Regal Tube Co.*, 50 FEP Cases 1499 (7th Cir. 1989). However, an employee may be compelled to resign when confronted with an "aggravated situation beyond ordinary discrimination." *Id.*, at 1506 (citation omitted); *See also Yates v. AVCO Corp.*, 43 FEP Cases 1595, 1600 (6th Cir. 1987) ("proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other aggravating factors") (citation omitted).

34. When there is an allegation of constructive discharge, the fact-finder must examine "the objective feelings of [the] employee and the intent of the employer." *Wheeler v. Southland Corp.*, 50 FEP Cases 86, 88 (6th Cir. 1989), *quoting Yates, supra* at 1600. To meet the objective standard, the Commission must show the

"working conditions ... [were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Yates, supra* at 1600, *quoting Held v. Gulf Oil Co.*, 29 FEP Cases 837, 841 (6th Cir. 1982).

35. To meet the intent requirement, the Commission must show that a "reasonable employer would have foreseen that a reasonable employee (or this employee, if facts peculiar to her are known) would feel constructively discharged." *Wheeler, supra* at 89. In other words, an employer "must necessarily be held to intend the reasonably foreseeable consequences of its actions." *Hukkanen v. International Union of Operating Engineers*, 62 FEP Cases 1125 (8th Cir. 1993).

36. Complainant's last day at work was November 3, 2004, although she did not actually resign until March 14, 2005. (Tr. 127, 167)

37. November 3, 2004 was the day Complainant was to receive her pulmonary function test from Nurse Dimmerling. (Dimmerling Tr. 986)

38. Instead, she said she was not feeling well and went home early. (Tr. 125)

39. Since Complainant did not complete the process, she did not receive a respirator. (Childress Tr. 572) Of course, the events of that day cannot be viewed in a vacuum.

40. Additionally, the Commission has failed to meet its burden of proof and persuasion that conditions were so difficult and unpleasant as to make a reasonable person under those circumstances feel compelled to resign.

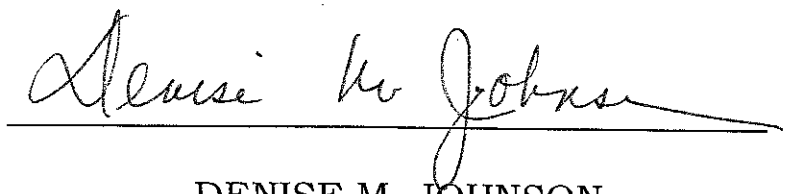
> To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment.
>
> *Landgraf v. USI Film Prods.*, 59 FEP Cases 897, 899 (5th Cir. 1992) (citations omitted).

> Part of an employee's obligation to be reasonable is an obligation not to assume the worst, and not to jump to conclusions too fast.
>
> *Garner v. Wal-Mart Stores*, 42 FEP Cases 1141 at 1144 (11th Cir. 1987).

41. After a complete review of the entire record, the ALJ concludes Complainant was not the victim of illegal sex discrimination or constructive discharge.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that Complaint No. 9919 and Complaint No. 10022 be dismissed.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

September 29, 2011