

Memo

To: Desmon Martin, Director of Enforcement and Compliance
From: Denise M. Johnson, Chief Administrative Law Judge 
Date: August 29, 2012
Re: *Karen Halstenberg v. Lucent Technologies, Inc.*
(COL) 7111192003 (30988) 03232004 22A-2004-01799C
Complaint No. 9847

**CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT
ALJ RECOMMENDS DISMISSAL ORDER**

Report issued: August 28, 2012

Report mailed: August 29, 2012

**** Objections due: September 21, 2012**

DMJ:tg



Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners

Leonard J. Hubert, Chairman
William W. Patmon III
Stephanie M. Mercado, Esq.
Tom Roberts
Rashmi N. Yajnik

G. Michael Payton, Executive Director

August 29, 2012

Karen Halstenberg Jorgensen
164 Greenbank Road
Gahanna, OH 43230-1773

Julie Badel, Esq.
Epstein, Becker & Green
150 N. Michigan Avenue, 35th Floor
Chicago, IL 60601-7553

Re: *Karen Halstenberg v. Lucent Technologies, Inc.*
(COL) 7111192003 (30988) 03232004 22A-2004-01799C Complaint No. 9847

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 Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **Friday, September 21, 2012**. *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, Director 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
Director of Enforcement and Compliance

DM:tg

Enclosure

cc: Lori A. Anthony, Chief – Civil Rights Section/Stefan J. Schmidt, Esq.
Denise M. Johnson, Chief Administrative Law Judge

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

KAREN HALSTENBERG

Complainant

v.

LUCENT TECHNOLOGIES, INC.

Respondent

Complaint No. 9847

(COL) 7111192003 (30988) 03232004

22A-2004-01799C

CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATION

MIKE DeWINE
ATTORNEY GENERAL

Stefan J. Schmidt, Esq.
Assistant Attorney General
Civil Rights Section
State Office Tower, 15th Floor
30 East Broad Street
Columbus, OH 43215-3428
614 - 466 - 7900

Counsel for the Commission

Julie Badel, Esq.
Epstein, Becker & Green
150 N. Michigan Avenue, 35th Floor
Chicago, IL 60601-7553
312 - 499 - 1418

Counsel for Respondent

ALJ'S REPORT BY:

Karen (Halstenberg) Jorgensen
164 Greenbank Road
Gahanna, OH 43230-1773

Complainant

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

Karen Halstenberg (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on March 23, 2004.

The Commission investigated the charges and found probable cause that Lucent Technologies, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve these matters by informal methods of conciliation. The Commission subsequently issued a Complaint and Notice of Hearing on March 17, 2005.

The complaint alleged that the Respondent terminated the Complainant's employment in retaliation for having engaged in activity protected by Revised Code Section (R.C.) 4112.02(I).

Respondent filed an Answer to the Complaint on April 18, 2005. Respondent admitted certain procedural allegations, but denied it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on May 12-13, 2009 at the Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, Ohio.

At the hearing, the Commission proceeded on the allegations that Complainant was retaliated against due to complaining about sex and age discrimination.

The record consists of the transcript of the hearing, consisting of 355 pages; exhibits admitted into evidence during the hearing; the trial deposition of Yssis Reyes (Reyes); and the post-hearing briefs filed by the Commission on May 13, 2010, by Respondent on June 25, 2010, and the Commission's reply brief filed July 6, 2010.

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 March 23, 2004.

2. The Commission determined on February 24, 2005 it was probable Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(I).

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

4. Respondent is an employer that is in the business of manufacturing telecommunications equipment.

5. Complainant began her employment with Respondent's predecessor, AT&T, in 1990 as a Contractor. (Tr. 18)

6. Complainant began working in the Messaging Group (MG) on March 8, 1993. (Tr. 18)

7. Complainant was hired by Respondent as a full-time employee on October 24, 1994. (Tr. 18)

8. By August 2003, Complainant was a Technical Writer in the MG and a Project Manager. (Tr. 20, 102)

9. During Complainant's last merit raise cycle she received a \$1,500.00 raise. (Tr. 25)

10. In August 2003, Complainant was making approximately \$58,800.00. (Tr. 108, 298; Comm. Ex. 24)

11. For approximately the last two (2) years of Complainant's employment with Respondent, Denise Gary was her immediate supervisor. (Tr. 21, 171)

12. Denise Gary was employed by Respondent since February 1982 until she was impacted by Respondent's Forced Management Program (FMP) in October 2005. (Tr. 250)

13. Denise Gary's husband, Joel Gary, also worked for Respondent. (Tr. 157)

14. Joel Gary worked for Respondent from November 1981 until he was affected by Respondent's FMP in November 2006. (Tr. 250)

15. In June of 2003, Denise Gary did Complainant's evaluation and noted she met or exceeded all expectations. (Tr. 38)

16. In August 2003, Denise Gary recommended Complainant for the Project Manager position in the Network Operating Software (NOS) group. (Tr. 173)

17. She recommended Complainant because Complainant had expressed interest and Denise Gary believed Complainant had the aptitude to do the job. (Tr. 253)

18. When Denise Gary recommended Complainant for the position, Denise Gary did not know that her husband had also been recommended for the same position. (Tr. 253-54)

19. Joel Gary had been recommended for the position by Diane Mayes (Mayes), Information, Products & Training (IP&T) Supervisor. Mayes recommended him because he consistently received ones (1's) on evaluations and was a "real go getter."¹ (Tr. 265-66)

20. In August 2003, Complainant and nine (9) other Messaging Writers (MW) were moved from the MG to IP&T. (Tr. 270)

21. On August 26, 2003, three (3) employees were laid off through Respondent's FMP. (Tr. 270)

22. Denise Gary stopped supervising Complainant and the others when they were moved to IP&T. (Tr. 209)

23. Mayes was Respondent's IP&T Supervisor since 1987. (Tr. 198)

¹ In evaluations, the highest score possible is a one (1) and the lowest is a five (5).

24. Joel Gary, Denise Gary's husband, received the Project Manager position. (Tr. 24)

25. Denise Gary was not involved in the final selection of a candidate for the Project Manager position. (Tr. 254)

26. There were no interviews conducted for the Project Manager position, nor was the position posted. (Tr. 160, 204)

27. On September 15, 2003, Complainant complained to Therese Kierl-Allen (Kierl-Allen), a Lucent Investigator and Equal Opportunity Action Group Investigator (EOAG Investigator), about feeling she was more qualified for the position than Joel Gary. (Tr. 59)

28. Kierl-Allen said she would investigate the matter and asked Complainant for permission to speak with Complainant's previous direct supervisor, Denise Gary. (Tr. 59)

29. On September 17, 2003, Denise Gary was contacted by Kierl-Allen about Complainant's complaint. (Tr. 159)

30. Due to funding cuts another FMP occurred in October 2003. (Tr. 272)

31. Mayes told her IP&T team, which included Complainant, there was going to be an upcoming FMP. Mayes decided to ask Denise Gary for input because Denise Gary had previously managed the team. (Tr. 206)

32. The ten (10) MWs who joined IP&T did not have applicable FMP ranking scores.

33. The NOS Writers, originally in the IP&T, had ranking scores from the prior FMP. Mayes, therefore, had to evaluate the ten (10) MW employees based upon the same skills appraisal as the NOS Writers from the previous FMP. (Tr. 273-274)

34. Mayes sent in the FMP scores on October 7, 2003.
(Tr. 275)

35. Complainant was laid off via FMP on October 21, 2003.
(Tr. 15)

36. Additionally, three (3) other people from the MG were
equally affected by Respondent's FMP. (Tr. 208)

37. After she was laid off, Complainant called Respondent's
hotline with concerns and allegations of inappropriate treatment.
(Reyes Depo., p.7)

38. Reyes was assigned Complainant's case. (Reyes Depo.,
p. 7)

39. Reyes worked full-time for Respondent since 1999 in
EOAG Investigations. (Reyes Depo., p. 5)

40. Reyes called Complainant on October 22, 2003. Complainant told Reyes about her employment concerns regarding her years of service, her title, changes to the IP&T organization, and that the Project Manager position had been given to Joel Gary. Complainant mentioned she had previously spoken to Investigator Kierl-Allen. (Reyes Depo., p. 8)

41. Reyes spoke with Mayes, Don Madieros (Madieros), and Denise Gary. (Reyes Depo., p. 22)

42. Madieros provided Reyes with information on why Joel Gary was more qualified for the Project Manager position. (Reyes Depo., p. 22)

43. Madieros told Reyes that Denise and Joel Gary were not on the same project team, nor did Denise Gary have anything to do with Complainant's FMP appraisal. (Reyes Depo., p. 22)

44. After speaking with Mayes, Denise Gary and Madieros, Reyes called Complainant on November 24, 2003 to inform Complainant she was looking into her allegations. (Reyes Depo., p. 22)

45. Reyes sent Complainant a letter in response to her allegations of unfair treatment. (Reyes Depo., p. 26)

46. In the letter Reyes made an error regarding Complainant's scores. The score listed for Complainant's communication skills was one (1). However, in the Forced Management Tool Program (FMTP) the score was three (3). (Reyes Depo., p. 26.)

47. Complainant wrote back to Reyes to point out the differences in scores. She believed the scores provided by Reyes were correct. (Reyes Depo., p. 28)

48. However, the correct scores are those in the FMTP. Reyes erroneously indicated a "1" in her correspondence, because her print-out of the FMTP screen printed in a way that cut off the communication skills score, making it look like a "1" instead of a "3". (Reyes Depo., p. 30).

49. After the investigation, Reyes concluded Complainant was not retaliated against. Age and gender were not factors used to select the Project Manager. (Reyes Depo., p. 27)

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 state 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 credit.²

1. The Commission alleged in the complaint Respondent terminated Complainant's employment in retaliation for having engaged in activity protected by Revised Code Section (R.C.) 4112.02(I).

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding a Fact.

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

It shall be an unlawful discriminatory practice:

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.

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(I) 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 findings of unlawful retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973) 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. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, 116 (1981). 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.

6. 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. In this 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 v. Atlantic Co., Inc., 80 FEP Cases 835 (6th Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

7. The retaliation provision under R.C. 4112.02(I) contains an opposition clause and a participation clause. Since courts have analyzed these clauses differently, it is important to focus on the nature of the alleged protected activity.

The distinction between employee activities protected by the participation clause and those protected by the opposition clause is important because federal courts have generally granted less protection for opposition than participation.

Aldridge v. Tougaloo College, 64 FEP Cases 708, 711 (S.D. Miss. 1994), *citing Brown v. Williamson Tobacco Co.*, 50 FEP Cases 365 (6th Cir. 1989).

8. Courts usually grant absolute protection for participation activities, such as filing a discrimination charge, testifying in civil rights proceedings, or otherwise participation in such proceedings. *Proulx v. Citibank*, 44 FEP Cases 371 (S.D. N.Y. 1987).

9. As a threshold matter, the Commission must prove Complainant engaged in activity protected by R.C. 4112.02(I).

10. A wide array of conduct, including verbal complaints to management, may constitute opposition to unlawful discrimination: *Reed v. A.W. Lawrence & Co., Inc.*, 72 FEP Cases 1345 (2d Cir. 1996) (employee engaged in protected activity by complaining about a coworker's allegedly unlawful conduct to an officer of company and maintaining same complaint throughout internal investigation); *EEOC v. Hacienda Hotel*, 50 FEP Cases 877 (9th Cir. 1989) (employee engaged in protected activity when she complained to management about her supervisor's refusal to accommodate her religious beliefs). Employees engaged in protected activity under the opposition clause when they oppose, in good faith, what they

reasonably believed at the time was unlawful discrimination on the part of their employer.

11. It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component.

A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful discriminatory practices, but also that his belief was *objectively* reasonable in light of the facts and record presented.

Little v. United Technologies, Carrier Transicold Div., 72 FEP Cases 1560, 1563 (11th Cir. 1997) (Emphasis added.)

An employee is engaged in protected activity if he or she opposes an employer's conduct that he or she has a good faith and reasonable belief is illegal.

EEOC v. Wilson Metal Casket Co., 58 FEP Cases 1523, 1528 (M.D. Tenn. 1992) (citations omitted).

12. In the instant case, Respondent was aware Complainant engaged in protected activity. Respondent knew of calls made to its EEO hotline, as well as calls made to the H.R. Department.

13. Complainant filed a complaint with the EOAG on September 15, 2003 and the FMP occurred on October 21, 2003.

14. Complainant was subjected to Respondent's FMP one (1) month after she complained of sex and age discrimination.

15. In determining whether a causal connection exists, the proximity between the protected activity and the adverse employment action is often "telling." *Holland v. Jefferson Natl. Life Ins. Co.*, 50 FEP Cases 1215, 1221 (7th Cir. 1989), quoting *Reeder-Baker v. Lincoln Nat'l Corp.*, 42 FEP Cases 1567 (N.D. Ind. 1986).

16. The closer the proximity between the protected activity and the adverse employment action, the stronger the inference of a causal connection becomes:

... a court may look to the temporal proximity of the adverse action to the protected activity to determine where there is a causal connection.

EEOC v. Avery Dennison Corp., 72 FEP Cases 1602, 1609 (6th Cir. 1997) (citation and quote within a quote omitted).

Temporal relationship between a plaintiff's participation in protected activities and a defendant's alleged retaliatory conduct is an important factor in establishing a causal connection.

Gonzales v. State of Ohio, Dept. of Taxation, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).

17. The Commission having established a *prima facie* case, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for its employment action. *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 254-555, 25 FEP Cases at 116, n.8.

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

18. Respondent met its burden of production with the introduction of evidence that Complainant's scores for the FMP skills assessment for the October 2003 FMP were low compared to the other ten (10) messaging employees whose skills were being assessed. Complainant and three (3) others were affected by the FMP on October 21, 2003.

19. Respondent having met its burden of production, the Commission must prove that Respondent retaliation 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 reasons for Complainant's discharge were not its true reasons, but were a "pretext for ... [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine*, 450 U.S. 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 was false, and that ... [unlawful retaliation] was the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

20. Thus, even if the Commission proves that Respondent’s articulated reasons are 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 for the factfinder to answer ...[.]

Id., at 524, 62 FEP Case at 106.

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

22. In order to show pretext, the commission may directly or indirectly challenge the credibility of Respondent’s articulated

reasons for Complainant's termination. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that the reasons had no basis in fact or they were 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 reasons 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 511, 62 FEP Cases at 100 (emphasis added).

23. The credible evidence introduced by Respondent is Complainant's scores from one FMP skills assessment to the other were due to Complainant being moved to messaging. Therefore,

² 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.

the October 2003 FMP skills assessment looked at different skills than the previous assessment.

24. These actions by Respondent do not constitute unlawful retaliation and Complainant is not entitled to relief as a matter of law.

RECOMMENDATION

For all of the foregoing reasons, it is recommended the Commission issue a Dismissal Order in Complaint No. 9847.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

August 28, 2012

Complainant's
Statement
of
Objections

164 Greenbank Road
 Gahanna, OH 43230-1773
 September 20, 2012

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

RECEIVED

SEP 20 2012

OHIO CIVIL RIGHTS COMMISSION
 COLUMBUS OFFICE

To whom it may concern:

I have received the copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendations (ALJ's Report), and as the Complainant object to the findings and conclusions contained in the aforementioned document for Case Number 9847. I disagree with the ALJ's Report conclusion in regard to the retaliation for participation in protected activity, and do not believe that the ALJ's Report addresses the issues raised in Mr. Schmidt's two post hearing briefs. I have attached both of Mr. Schmidt's briefs to this document as information that is pertinent to this objection. Please note that since this objection is being written without the benefit of legal counsel, I am unable to cite case law.

The final conclusion in the ALJ's Report Conclusions of Law and Discussion, Section 23, states:

The credible evidence introduced by Respondent is Complainant's scores from one FMP skills assessment to the other were due to Complainant being moved to messaging [sic]. Therefore, the October 2003 FMP skills assessment looked at different skills than the previous assessment.

The skills assessment scores were as follows, with a "1" being the highest rating available. The difference in the pre-complaint and the post-complaint scores was substantial:

April 25, 2003 Notification Pre-Complaint		October 21, 2003 Notification Post-Complaint	
Skill Category	Score	Skill Category	Score
Information Development Skills	1	Communication Skills, Written and Verbal	3
		Doc & Training Development (Note: Documentation and Training Development is Information Development which involves written and verbal skills.)	3
Initiative and Teamwork	1	relationship mgmt [sic]	3
Leadership Skills	1		
Problem Solving	1		
Product Knowledge	1	Technical / Function Skills	2
Productivity	1		
Pre-complaint Average	1	Post-complaint average	2.75
<p>A "1" is the highest attainable score on a scale of 1 to 5. The low post-complaint average of 2.75 placed the Complainant into the layoff category and she was subsequently laid off. A "3" was the lowest number used in this assessment. The Respondent's supervisor had to move scores of "4" to scores of "3." See Exhibit Notebook/Commission Exhibits 16 and 17.</p>			

The Complainant's skills assessment score history was as follows. The scale was from 1 to 5, with 1 being the highest, and a 5 being the lowest:

Notification Date*	Score	Comment
October 21, 2003	2.75	This was the post complaint score, as the complaint was made on September 15, 2003, This score was so low that it placed the complainant in the bottom ranking for layoff.
April 25, 2003	1	This was the pre-complaint score. This is the highest possible skills score available.
November 7, 2002	No ranking	According to the Respondent's record, the "function [was] not affected." Therefore, according to the Respondent, the Complainant was not assigned skills scores at this time.
October 3, 2002	1.88	
May 2, 2002	No ranking	According to the respondent's record, the "function [was] not affected." Therefore, according to the Respondent, the Complainant was not assigned skills scores at this time.
December 13, 2001	1.8	This is a skills assessment from the organization into which the Complainant and all members of the department in which she worked were being returned to on August 26, 2003. Although listed as "Hopmann" in the report sheet, the actual assignment was "Corporate Centers LLO (Craviso)" as shown on the Force Management Tool listing of reports (Tab #15). LLO was the "Lucent Learning Organization." This organization was later renamed to "IP&T" in 2003. Ralph Craviso was the VP who was copied on the Complainant's letter of January 4, 2004 that identified the score average as 2.25, not 2.75. (Exhibit Notebook/Commission Exhibit 4)
*This is the date that individuals were told if they were laid off. At the time, the skill scores were not shared with individual employees, but kept secret.		

The following concerns remain:

- The department in which the Complainant worked was being moved from the Messaging development organization (reporting structure) where they performed information development (documentation and training) to the Information Products and Training organization where they were to perform information development (documentation and training).
- The Respondent did not provide the April skills assessment definitions or demonstrate how they differed from the October skills assessment definitions.
- The Respondent did not demonstrate that a change in reporting structure necessitated different skills.
- The Respondent did not provide job descriptions for the writers being moved for either the old or the new reporting structure showing the skills requirements for each organization. Under the old reporting structure, the department performed information development (documentation and training). In the new reporting structure, the department was to perform information development (documentation and training).
- Not all members of the department were laid off. Individuals subject to layoff were selected.
- The Respondent did not demonstrate that any similar drops in skills scores occurred due to a change in reporting structure to any department member other than to the

Complainant who engaged in protected activity through a complaint to the Respondent's EO/AA hotline on September 15, 2003.

- The Respondent did not demonstrate that a lack of funding or other legitimate business reason necessitated the targeting/selection of the Complainant for layoff.
- The Complainant believed that the complaint was not about whether or not the Respondent had a legitimate business reason for laying off people: the case was about whether or not the Respondent used its business practice to retaliate against the complainant for engaging in protected activity.

Findings of Fact

Sections 37 through 49 in the Findings of Fact all cite evidence from the transcript of the Reyes Deposition, Pages 1 through 30, although the transcript continues for a total of 185 pages. Pages 1 through 30 are Yssis Reyes' answers to Ms. Badel's questions. Ms. Badel was the Respondent's attorney. Ms. Reyes was Lucent's EO/AA investigator/representative assigned to the Complainant's concerns during the last 3 months of 2003, the year the incidents took place.

By section:

Findings of Fact, Section 8

Section 8 states:

By August 2003, Complainant was a Technical Writer in the MG [Messaging Group] and a Project Manager. (Tr. 20, 102)

Complainant was actually an MA5, a Senior Technical Writer. (Exhibit Notebook/Commission Exhibit 30) The department being moved had two categories: MA4 and MA5. MA5s were the senior members of the department.

Findings of Fact, Section 15

Section 15 states:

In June of 2003, Denise Gary did Complainant's evaluation and noted she met or exceeded all expectations. (Tr. 38)

Concerning the content of the mid-year evaluation that the Complainant received, the following exchange occurred between Mr. Schmidt and Ms. Mayes. Ms. Mayes was the supervisor in the new reporting structure (Tr. 215 through 216):

Mr. Schmidt: Okay. And isn't it true that there was not one negative comment in Ms. Halstenberg's mid-year evaluation which was done just a few months prior to the skills assessment [that resulted in the complainant's being laid off]?

Ms. Mayes: Not in that one.

Mr. Schmidt: Okay. So the answer is no, there was not one negative comment in there?

Ms. Mayes: Not in that one.

Mr. Schmidt: Okay. And um can you answer the question yes or no?

Ms. Mayes: No.

Mr. Schmidt: Okay.

Ms. Mayes: (just starts laughing out loud).

Findings of Fact, Section 17

Section 17 states

She [Ms. Gary] recommended Complainant because Complainant had expressed interest and Denise Gary believed Complainant had the aptitude to do the job. (Tr. 253)

In recommending the complainant for the position, Ms. Gary described the complainant as an "excellent project manager" in an email dated August 12, 2003 (Exhibit Notebook/Commission Exhibit 23):

I would like to recommend one of my folks (one of Diana [sic] folks) for the new Project Management roles.

Karen Halstenberg is an excellent project manager. She project manages a variety of small projects. She has worked with outsource vendors, had contractors on projects, and currently is involved with development projects outsourced to India.

From what I have heard about the new roles, I believe she would be an asset.

Findings of Fact, Sections 20 and 22

Sections 20 and 22 state:

Section 20: In August 2003, Complainant and nine (9) other Messaging Writers (MW) were moved from the MG [Messaging Group] to IP&T. (Tr. 270)

Section 22: Denise Gary stopped supervising Complainant and the others when they were moved into IP&T. (Tr. 209)

Denise Gary stopped supervising the writers who were moved into IP&T on August 26, 2003. This is relevant as Ms. Mayes claimed that she had sufficient supervisory experience with the Complainant to be able to evaluate her performance. Ms. Mayes was on vacation the week following August 26, returning to the office September 8, giving her approximately 20 business days to work with the Complainant prior to the targeting the Complainant for layoff. Targeting the Complainant for layoff occurred approximately 15 business days after the September 15, 2003 complaint. Ms. Mayes was unable to refute an estimate of contact with the Complainant of approximately 4.5 hours from after her vacation to October 7, 2003 when the numbers were submitted. See the hearing transcript page 210 through 213 and Notebook Exhibit/Commission Exhibit 45.

Findings of Fact, Section 36

Section 36 states:

Additionally, three (3) other people from the MG [Messaging Group] were equally affected by Respondent's FMP (Tr. 208).

Tr. Page 208 does not appear to demonstrate any equality of effect: indeed, the Respondent never introduced any evidence to show that any other employee's scores dropped due to being moved into the IP&T organization. Complainant went from being rated with the highest scores possible in April, pre-complaint, to being rated at the bottom in October, post-complaint. These questions were trying to establish who was in the pool of candidates for layoff consideration. The transcript on Page 208 only appears to establish that 3 other people were laid off, not the entire department or that a lack of funding necessitated that certain people should be laid off:

Mr. Schmidt: The question I asked is isn't it true that this FMP only included the individuals from messaging and then you asked the question the October 21st FMP and I responded yes and then how did you respond?

Ms. Mayes: Yes, we'd just done an IMP and FMP in August so they had already been skill assessed.

Mr. Schmidt: Okay.

Ms. Mayes: I thought your question was referring to the people who were FMP'd. The people who were FMP'd in October were four people from messaging.

Mr. Schmidt: Okay. Isn't it true that Don Medeiros sent you an email saying that the only ones participating in the October FMP will be messaging?

Ms. Mayes: He sent the email but that was an incomplete email. What he intended was that we had taken in the messaging group. We had insufficient funding, so anybody who is going to be in the same universes and levels were going to have to be assessed and the bottom performers would be FMP'd, but that's a long way of saying it, so we all understood what he meant.

Findings of Fact, Sections 39 and 44

These sections state:

Section 39: Reyes worked full-time for Respondent since 1999 in EOAG Investigations. (Reyes Depo., p. 5).

Section 44: After speaking with Mayes, Denise Gary and Madieros, Reyes called Complainant on November 24, 2003 to inform Complainant she was looking into her allegations. (Reyes Depo., p. 22)

Section 39 does not reflect that Ms. Reyes was not continuing in Lucent's EO/AA organization. Reyes Deposition Page 5 reports the following:

Q. [Badel for Respondent] How long were you employed at Lucent?

A. As a full-time employee since 1999 through 2005.

Q. At present, who is your employer?

A. I work for a publishing company, McGraw Hill.

Q. How long have you worked for McGraw Hill?

Reyes Deposition Page 6 reports the following:

A. I have been there for a year and a half now.

Q. What is your position at McGraw Hill?

A. I work for the affirmative action team.

Q. In the fall of 2003, what position did you hold at Lucent?

A. Fall of '03 I worked in the EOAA investigations group, equal opportunity affirmative action.

Q. What were your duties essentially?

A. Essentially I was one of the equal opportunity specialists who looked into internal and external complaints and allegations of discrimination.

Q. Geographically, where did you work in the fall of 2003?

A. Geographically, in the fall, I worked out of the Murray Hill office. Murray Hill, New Jersey.

Later in the transcript, Reyes Deposition, Page 180, the following information appears:

Q. [Schmidt] Arvene Lorings. That you weren't in EO anymore?

A. Yes, I left the organization.

Q. When did you do that?

A. The first half of '04. I was already transitioning. That is why I said the last activity on this case was January '04 for me, so I was already in the recruitment organization. I moved. I lateraled into a different role within the organization.

About her activities as an employee in the Lucent EO/AA organization, Reyes responded as follows (Reyes Deposition, Page 152 through 155):

Q. [Schmidt] Have you ever been involved in an investigation where somebody has come out and admitted that I didn't give somebody a job because of their age or gender?

A. I mean there are times when you find folks have done and said things, but I don't know.

Q. Has anyone ever told you that, in your investigations, that I didn't give somebody a job because of their age or gender?

A. That they have told me that they didn't give somebody a job because of their age?

Q. Yes.

A. I don't know.

Q. You would know if somebody admitted that, wouldn't you?

A. You are asking things that are beyond the scope of what we are discussing right now, so I don't know, but again, looking at the skills assessment, I went by what was written and the information. I asked them about the ratings. I mean we can sit here and also look at the performance appraisals of everyone in the organization and do comparisons.

Q. But you didn't do that? Correct?

A. I didn't.

Q. How many previous investigations had you done?

A. I don't know off the top of my head.

Q. If you were forced to guess, what would you guess?

A. I mean I was with the organization for five years, so it would be close to a hundred or so, yes.

Q. In any of those investigations, did you ever issue a decision saying that Lucent had discriminated against someone?

A. I don't remember.

Q. Does Lucent have a policy called paying for performance?

A. They may have, I don't remember.

Q. Do you know what that means?

A. Salary based on performance.

Q. How about merit pay increases?

A. That is additional bonuses based on the performance as well as extra bonuses.

Q. Do you believe that merit pay increases are a sign of, I guess, performance?

A. If a person goes, you know, above and beyond, et cetera –what was your question? Do I believe?

Q. That a merit pay increase is a sign of, I guess, that pay for performance?

A. Yes.

Q. Okay. Were you aware that Ms. Halstenberg received a \$1500 merit pay increase in the last, I guess, raise cycle before she was FMP'd?

A. She may have pointed that out in her letter, I don't know.

Q. Would that have made any difference in your investigation?

A. I don't know.

On November 12, 2003, the Complainant received an overnight letter from Ms. Mayes dated November 11, 2003, 20 days after the layoff, asking for the return of equipment which she had previously said the Complainant could keep, equipment that had been returned in 2002 and scrapped, files on which the Complainant had never worked, and files of which Ms. Mayes already had copies and had been given copies of the day of the layoff.

The Complainant responded with a telephone call to Ms. Mayes and followed up with an email dated November 13, 2003 directed to Ms. Mayes, Ms. Mayes' supervisor, and Ms. Reyes. (Exhibit Notebook/Commission Exhibit 32). The last page in Exhibit 32 shows an email from 2002 reporting the return of some of the equipment in 2002 that the Respondent had in its possession. The Complainant's response to Ms. Mayes in Exhibit 32 identifies the equipment and the files. Ms. Reyes was copied on this communication.

The emails below, Exhibit Notebook/Commission Exhibit 12, show the lengths to which the Complainant was having to go to resolve the issue, and in the email response the the Complainant on November 18, 2003, Ms. Reyes states that she has completed "most of the investigation" and that she will "follow up with Diana Mayes regarding the return of equipment." Yet, Section 44 states that "...Reyes called Complainant on November 24, 2003 to inform Complainant she was looking into her allegations." Italics have been added to the following copy of Exhibit 12 for emphasis.

From: Karen Halstenberg [khalstenberg@worldnet.att.net]
Sent: Friday, November 21, 2003 3:47 PM
To: Reyes, Yssis (Yssis)
Cc: bpena@lucent.com; ethel@lucent.com
Subject: RE: Questions in re time frame and info in re Nov. 13 letter

Yssis:

I attempted to contact you by telephone several times today per your voice message to me and the email below, but was able to contact only your voice mail.

Please feel free to forward any information that you have to me via email or written letter.

I stand by my original allegations.

Karen Halstenberg
5738-B Hibernia Drive
Columbus, OH 43232-3520

-----Original Message-----

From: Reyes, Yssis (Yssis) [mailto:yreyes@lucent.com]
Sent: Tuesday, November 18, 2003 2:05 PM
To: Karen Halstenberg
Subject: RE: Questions in re time frame and info in re Nov. 13 letter
Importance: High

Karen,

I've completed most of the investigation and have not found any substantiating information that Lucent's EO policy has been violated. Your off-roll date has not changed. If you have

any questions regarding benefits, please contact 1888LucentHR and request the Benefits number for specific information relating to your health insurance. I will follow up with Diana Mayes regarding the return of equipment.

Thank you for bringing your concerns to the attention of EO/AA. (I will be out of the office on Wednesday and Thursday.) We can discuss the matter further during the end of the week.

Regards,

Yssis
Yssis Reyes, PHR
EO Consultant
Lucent Technologies
908-582-6170 (tel.)
908-582-7411 (fax)
yreyes@lucent.com

-----Original Message-----

From: Karen Halstenberg [mailto:khalstenberg@worldnet.att.net]
Sent: Tuesday, November 18, 2003 4:03 PM
To: yreyes@lucent.com
Subject: Questions in re time frame and info in re Nov. 13 letter

Yssis:

My off-roll date is November 19, 2003 and the 30-day completion date for the investigation, based upon business days, is approximately December 16, 2003. I have several quick questions:

Is the assumption that the time period is based on business days correct?

Does my off-roll date move in order to facilitate the completion of the investigation, or remain fixed?

Can Lucent continue to investigate after the off-roll date or are there other steps that I need to take?

Since I am not signing the FMP release statement, do I need to start paying the health insurance premiums immediately upon the off-roll date?

As an FYI, I returned miscellaneous, obsolete equipment to Lucent on Friday, November 14, per Diana Mayes' communication. At that time, I requested that Lucent security provide an officer to oversee the receipt of the equipment, and they did. I have signed receipts for the equipment, signed by both Diana Mayes and the security guard. In order to forestall any issues arising from the revoked permission to keep the equipment, I am working directly with Lucent security at my request. I was able to obtain copies of the signed materials passes from them, which Diana had not provided, and am working to close this issue. Remaining at issue are some power cords, obsolete tapes no longer in use, and a 13-year-old WGS6386 system that was turned back in under Denise Gary.

Yesterday, I spoke with George Hanna in person (614-860-6025), gave him copies of the receipts that I had obtained on Friday, and showed him the originals. Some of the tapes were scrapped with the WGS6386 system and some I believe to have been in my old office, along with the power cords. I was told on Monday that the office had been cleaned out, something that I was not told on Friday. George indicated to me that the tapes and the power cords "should not be a problem" and that he would talk to Diana Mayes. For the WGS6386 system, I am going to have to wait until November 25 when Dale returns (614-860-2165) to see if he has copies of email about the WGS6386 from the time of its return. While Dale is out, George is the delegate.

At this time, I have not received any response from Diana Mayes in regard to the questions that I raised in my letter dated November 13.

Please let me know if you would like any additional information from me.

Thank you for your help,

Karen

When questioned about the equipment in relation to the investigation (Reyes Deposition, pages 106 through 107, Commission Deposition Exhibit 12) the following occurs:

Q. [Schmidt] On the second page of this document, about the middle of the page down, it is talking about some revoked permission to keep equipment.

A. Okay.

Q. In the retaliation claim that you investigated, one of the things that she [the Complainant] was saying is that they were retaliating against her by asking her to give back equipment, old equipment that she [Ms. Mayes] had said she could keep. Did you investigate that?

Ms. Badel [for the Respondent]: Objection, again, to the characterization. But go ahead and answer if you can.

A. If they were requesting equipment that was company property, I mean they can ask for that. I mean I didn't look into specifically anything about the equipment or anything like that. I don't think so. There is other HR folks who also look into, you know, these types of matters that are not specific to claims of discrimination. You know, if returning of assets is an issue, then, you know, they may have spoken with other people, but I wasn't involved in anything about equipment or anything like that. Not that I, based upon what I see.

Q. Do you know of anyone else who, I guess, was asked to return scrapped equipment after they had been told that they could keep it?

A. I don't know.

Ms. Reyes also never responded to the December 1, 2003 email that asked on what David Presley based his assessment that stated that the Complainant was less qualified. The email was as follows (Exhibit Notebook, Commission Exhibit 13):

From: Karen Halstenberg [khalstenberg@worldnet.att.net]
Sent: Monday, December 01, 2003 9:11 AM
To: yreyes@lucent.com
Subject: Further question

Yssis:

Having gone from a "meets/exceeds" and an "excellent project manager" to a layoff due to skills, I am still reviewing the situation. My notes from our conversation last Monday indicate that David Prestly (sp?) stated that I was less qualified, and this gives rise to another question. On what was he basing his assessment?

I hope that you had a wonderful Thanksgiving and long weekend. I am looking forward to speaking with you again sometime later in the week.

Sincerely,

Karen Halstenberg

From the Reyes Deposition, page 108 through 109:

Q. [Schmidt] Okay. In it, she is saying that you told her that a David Pressley stated that she was less qualified. Do you recall that conversation?

A. I don't recall.

Q. Do you know who David Pressley is?

A. It must be someone in the management chain or within the organization that had that type of authority to make that statement.

Q. Isn't it true - -

A. I think I saw that name somewhere in here. That is why I am flipping through. Okay. Decision-makers Don Madeiros, David Pressley, Diane Hazen, so that name Diana Mayes mentioned David.

Q. And Mr. Pressley, he didn't supervise Ms. Halstenberg, did he?

A. I don't know.

Q. Before telling Ms. Halstenberg that he stated that she was, I guess, less qualified, did you do any investigation to see whether he would know whether she was qualified or not qualified?

A. I didn't speak with David Pressley. He was noted as a decision-maker, you know, during the reorg discussion, but I didn't speak with him.

Findings of Fact, Section 42

Section 42 states:

Madieros provided Reyes with information on why Joel Gary was more qualified for the Project Manager position. (Reyes Depo., p.22)

Later in the deposition, the following occurs (Reyes Deposition, page 92):

Q. [Schmidt] Could you describe the project manager position that Joel Gary received?

A. I can't describe it.

Q. Do you know what job duties went along with that position?

A. I can't describe the job duties.

Findings of Fact, Section 43

Section 43 states

Madieros told Reyes that Denise and Joel Gary were not on the same project team, nor did Denise Gary have anything to do with Complainant's FMP appraisal. (Reyes Depo., p. 22)

Yet later on in this same deposition, Reyes Deposition, pages 82 through 84, in regard to the document marked LUC 01112, Ms. Reyes' notes, the following exchange between Mr. Schmidt and Ms. Reyes occurred:

Q. [Schmidt] There it is saying about a third of the way down that Denise [Ms. Gary, Joel Gary's wife] had input into the skills assessment, correct?

A. At the bottom of 1112 where it says Denise became Karen's supervisor in summer '01?

Q. No, I think at the top maybe the third set of writing down.

A. Denise had input into skills assessment.

Q. Okay. What input did she have into the skills assessment?

A. From my interpretation of these notes, she provided input into what she felt were Ms. Halstenberg's strengths and weaknesses in those areas, so basically she provided input into the rating of those skill areas.

Q. Didn't she provide an earlier skills assessment that had been done in April?

A. I don't know.

Also, in regard to the statement in Section 43 that "nor did Denise Gary have anything to do with Complainant's FMP appraisal," Reyes wrote in a letter dated December 12, 2003 to the Complainant (Commission Exhibit, Tab #1):

Diana Mayes, your most recent manager, as well as your previous manager, Denise Gary, gave input into your skills assessment.

Additionally, Section 31 of the Findings of Fact reports "Mayes decided to ask Denise Gary for input because Denise Gary had previously managed the team. (Tr. 206)

The Respondent had tried to argue that the skills assessment scores that led to the complainant's layoff were the responsibility of Ms. Mayes and that the former supervisor, the wife of the successful male candidate for the project manager position had no input. It was the assignment of this project management position that was the subject of the September 15, 2003 complaint to the EO/AA hotline.

Lucent's Attorney, Larry Hurley stated in a letter dated March 16, 2004 (Exhibit Notebook, Commission Exhibit 43):

Similarly, the skill assessment that led to the FMP of your client was made by Ms. Mayes, not by Ms. Gary....In short, it was Ms. Mayes, not Ms. Gary who skill assessed your client.

This letter was accompanied by a signed affidavit from Ms. Gary, and others, that stated that she had read the letter and affirmed "that the description in the letter regarding the selection of Joel Gary over Karen Halstenberg for the Project Manager position is true to the best of my knowledge, information and belief." However, in her deposition on March 30, 2009, Ms. Gary stated (Gary Deposition, pages 214 through 215, emphasis added):

214

1 Q. [Schmidt] And some of the stuff in this letter quite
2 simply isn't true. Is that accurate? The third
3 paragraph, first sentence.

4 A. [Gary] It would depend on your interpretation of
5 the sentence. "The skills assessment that led to the
6 FMP of your client was made by Ms. Mayes, not by
7 Ms. Gary."

8 Diana was officially responsible for
9 entering in the tool and for signing off on it. That
10 is a true statement.

11 Q. Second page, first full paragraph, aren't
12 you the one who skills assessed Ms. Halstenberg?

13 A. "In short, it was Ms. Mayes, not Ms. Gary,
14 who skills assessed your client."

15 I reviewed with Diana. *I provided the*
16 *initial input*, but Diana had the final say, entered
17 it into the tool and was ultimately responsible for
18 this. That's what I believe this says.

19 Q. Another sentence below that, "Neither
20 Ms. Gary nor the Sabol, Snow, Medeiros team changed
21 any of Ms. Halstenberg's scores," that's not true
22 either, is it?

23 A. Diana entered them into the system. I did
24 not go into the system and change that. That's what

215

1 I believe this says.

The Witness Statement from OCRC's interview with Lucent's EO/AA representative Yssis Reyes, signed by Christine Hodge and dated September 15, 2004 (Exhibit Notebook/Commission Exhibit 27), contains the statement:

Reyes stated that she could not clarify that Charging Party's recent manager Diana Mayes and Denise Gary gave input into her skills assessment. Reyes stated that it was too long ago and there aren't notes pertaining to the issue.

This statement occurred less than a year after Ms. Reyes' contact with and correspondence to the complainant on December 12, 2003 (Commission Exhibit, Tab #1) in which she stated:

Diana Mayes, your most recent manager, as well as your previous manager, Denise Gary, gave input into your skills assessment. You raised the concern that your previous manager, Ms. Gary may have given biased input in both your skills assessment and questions regarding your job performance that was used for job selection. Although you perceive that her input is biased, Ms. Gary was your supervisor up to the end of August when the IP&T organization reorganized. Thus, since you spent a greater length of time reporting to Ms. Gary, her insights into your skills are relevant.

This letter did not go on to explain how reporting to Ms. Gary for a longer length of time precluded bias or retaliation. Ms. Gary was the wife of the man to whom the project management position was awarded, the project management position that was the subject of the complainant's inquiry to EO/AA on September 15, 2003.

Further, during Ms. Reyes' deposition in New Jersey the following occurred, and Ms. Reyes reviewed her notes, although the OCRC Witness Statement reported that "Reyes stated that it was too long ago and there aren't notes pertaining to the issue" (Reyes Deposition, pages 7 through 8):

Ms. Badel: I am going to ask the court reporter to mark this as Respondent's Exhibit 1. (Respondent's Exhibit 1, Notes from fall of 2003 relating to allegations of discrimination, was so marked for identification.)

Q. Can you identify Respondent's Exhibit 1 for us?

A. These are notes that I took back during the fall of '03 relating to the allegations of discrimination.

Q. Did you make these notes on or around the dates that are indicated in them?

A. Absolutely. That day. Yes. Specific days and times were noted.

Findings of Fact, Section 44

See above, especially in reference to the statement that "...Reyes called Complainant on November 24, 2003 to inform Complainant she was looking into her allegations" against Reyes' email dated November 18, 2003.

Findings of Fact, Section 45

Section 45 states:

Reyes sent Complainant a letter in response to her allegations of unfair treatment. (Reyes Depo., p. 26)

The summary of the written, non-email correspondence between the Complainant and the Respondent is

Date and Exhibit	Originator	Recipient(s)	Summary
October 28, 2003 Exhibit Notebook, Commission Exhibit 6	Complainant: Halstenberg	Respondent: Reyes	Identified the contacts with Lucent's EO/AA investigator Therese Kierl-Allen for the September 15 complaint with permission to speak to the Complainant's supervisor and the Complainant's supervisor's supervisor. States the belief that the Complainant's layoff was in retaliation for the EEO/AA (Equal Employment Opportunity/Affirmative Action) inquiry/investigation. Provides layoff demographics and states the belief that the Complainant has higher skill levels than individuals who were not laid off.
December 12, 2003 Exhibit Notebook, Commission Exhibit 1	Respondent: Reyes	Complainant: Halstenberg	Respondent acknowledges Complainant's concerns of biased skills assessment leading to termination, termination of older employees, selection of a male employee, and retaliation. Provides skills assessment scores with a score later alleged to be a "typo." Concludes "After looking into your concerns, EO did not find that management's actions were inconsistent with Company policy with regard to age and gender. Again, thanks for bringing your concerns to our attention." There is no mention of retaliation in the conclusion, only in the statement mid-way through page 2: "There is no indication that retaliation for your prior unsubstantiated inquiry played any role in the force management decision."
January 9, 2004 Exhibit Notebook, Commission Exhibit 4	Complainant: Halstenberg	Respondent: Reyes Craviso	Contains the sections: <ul style="list-style-type: none"> • Skills Assessment for the Retaliatory Layoff : Wrong Average and Artificially Low Scoring • Experience in Relevant Process and Tools • Summary (Contains the belief that corrective action is warranted; Complainant continues to identify the layoff as retaliatory.)
January 29, 2004 Exhibit Notebook, Commission Exhibit 2	Respondent: Reyes	Complainant: Halstenberg	Identifies the reason for the mathematical error of the average as a "typographical error." Concludes: "The rest of the information contained in the December 12 letter addresses the additional concerns you raised to EO. Again, the Company appreciates your bringing your concerns to our attention. However, EO did not find that management's actions were inconsistent with Company policy with regard to age and gender." Other than to identify that the Complainant "stated that there were inconsistencies with the skills assessment, which resulted in a retaliatory layoff," there is no mention of retaliation in the conclusion.

Findings of Fact, Section 46

Section 46 states:

In the letter Reyes made an error regarding Complainant's scores. The score listed for Complainant's communication skills was one (1). However, in the Force Management Tool Program (FMTP) the score was three (3). (Reyes Depo., p. 26)

There is nothing on Reyes Deposition page 26 to support the conclusion that the score in the Force Management Tool Program (FMTP) was a three (3). See below, Section 48.

The scores were hand-written on the printed out reports dated 11/17/2003, reports that were printed out prior to the December 12, 2003 letter from Ms. Reyes to the Complainant. The note on the report is from 1/22/2004 in Reyes' handwriting which she claims to have made in January. (Reyes Deposition, pages 30 through 31, page 33, Exhibit Notebook/Commission Exhibit 15)

Findings of Fact, Section 47

Section 47 states:

Complainant wrote back to Reyes to point out the differences in scores. She believed that the scores provided by Reyes were correct. (Reyes Depo., p. 28).

The actual wording of the Complainant's letter to the Respondent dated January 9, 2004 was as follows. The Complainant ***did not*** believe that the ***scores*** provided by Reyes were correct (Exhibit Notebook, Commission Exhibit 4):

Two problems exist with the skills assessment:

- Wrong average
- Artificially low scoring

Wrong Average

Your letter reports a score of 2.75. The mathematically correct average is 2.25, as follows:

$$1 + 2 + 3 + 3 = 9, 9/4 = 2.25$$

An incorrect average places an individual in the wrong position in a layoff order ranking. This incorrect average is higher than the actual average of the scores reported, giving me a lower ranking for layoff determination in order to facilitate a retaliatory layoff. What this also means is that all of the 20 remaining individuals all must have skills assessment scores of 2.24 or higher.

This section of the letter dated January 9, 2004, "Wrong Average," was immediately followed on page 1 of the letter by the section "Artificially Low Scoring."

Examples of testimony in relation to the April skills assessment scores that assigned scores of all 1s to the Complainant's skills, the highest available scores include the following (Reyes Deposition, page 84):

Q. [Schmidt] Did you look at that April skills assessment to see how Ms. Halstenberg had done on that?

A. I may have. Again, I have to look at what was in the file.

Q. Wouldn't that have been important to look at to see if her allegations that she was being I guess –

A. I mean I am sure that I looked at various documents.

Q. Would you agree with me that that is one of the documents that you should have looked at, the most previous FMP?

Ms. Badel: Objection. There has been no testimony about her looking at a previous FMP.

Q. Did you look at her previous FMP?

A. I'm sorry. Her previous FMP?

Q. Force management plan, the skills assessment that went into the force management plan.

A. I don't know.

Q. When it says "I gave the April skills assessment list and input to Diana for messaging," did you look at that document?

A. I don't know.

Q. Would you agree with me that that is a document that you should have looked at?

A. Yes.

From the Reyes Deposition, Page 86 through 87:

Q. (Schmidt) Did you investigate to see if the skills assessment was accurate?

A. During my conversations with management, based on their assessment of their employee skill set, I believed it was an accurate assessment since they were managing her skills.

Q. Maybe a better way to put it. Did you take management's words for it that the skills assessment was done correctly, or did you do independent investigation?

A. I looked at the information that was on the force management tool and took that as being, you know, accurate, and I spoke with management and explained to them that Karen had raised concerns about being selected for termination, based on the skills assessment, and I asked who gave input, you know, who saw her work, who managed her, and they all gave input into that final rating, so management was giving that. I mean I wasn't - - yes, it was a valid assessment of her work.

From the Reyes Deposition, Page 93 through 97:

Note: According to Section 26, no interviews were conducted for the Project Manager position, and the position was not posted per Tr. 160, 204.

Q. But you are the individual investigating that to make sure that it was done properly, right?

A. I did investigate.

Q. And Ms. Halstenberg wasn't even interviewed for the position, was she?

A. I don't think that she was contacted, because I think what I read before was one of the managers said, you know, get your resume ready, you may be contacted, and I think somewhere else there was a mention that, you know, one of the managers was contacted about Karen and gave input.

Q. Mr. Gary wasn't interviewed either, was he?

A. I don't know.

Q. No one was actually interviewed? Do you know that?

A. I don't know.

Q. Can you explain why Mr. Gary was more qualified for the project manager position than Ms. Halstenberg?

A. I don't know.

Findings of Fact, Section 48

Section 48 states:

However, the correct scores are those in the FMTP [Force Management Program Tool]. Reyes erroneously indicated a "1" in her correspondence, because her print-out of the FMTP screen printed in a way that cut off the communication skills score, making it look like a "1" instead of a "3". (Reyes Depo., p. 30)

The Respondent did not provide evidence that the scores themselves were actually correct skills assessment scores. These numbers discussed here were the numbers that were hand-written onto a printout of a report screen. There were no numbers printed for skills assessment scores on the system's report page from the printouts dated 11/17/2003. (Exhibit Notebook Commission Exhibit 15) The Respondent did produce a printout of the numbers during the Reyes deposition, but the printout was from January, almost 3 months after the layoff.

It does not logically follow that since numbers were entered into a computer system those numbers were correct or were assigned without intent to retaliate. This group of numbers, the numbers used to layoff the Complainant, fall outside of the range of the other skills assessment scores reported in the system, assessment scores that ranged from 1 to 1.88.

The printout did not cut off the communications skills score as stated in Section 48—the report had no individual skills scores printed out on it—no skills assessment scores at all, other than the average that appeared on the Respondent's printout.

The Respondent did not explain why the skills assessments for April 25, 2003, October 3, 2002, and December 13, 2001 printed out showing the skills scores while the October 21, 2003 assessment, the post-complaint assessment, failed to print out showing any scores other than the average. The scores on the Respondent's report for October 21, 2003 are handwritten.

When the April 25, 2003 skills assessment report is examined against the October 21, 2003 report, the fact that the no "1" appears is evident. The "smudge" or "1" is directly opposite the category "Skill Name." The reports that show scores show the word "Rating" directly opposite the category "Skill Name." The reports that list the scores list them under the "R" in the word "Rating." (Exhibit Notebook/Commission Exhibit 15)

The following is copied from the April 25, 2003 pre-complaint skills assessment report. Please note that the Performance Rank is not directly correlated with the Skill Average:

Hire Date: 10/24/1994

Factor for Consideration: Skills Rank Order
Decision: Retained
Reason: Higher Performance and/or Skills

Performance Rank: 3
Skill Average: 1

Skill Name	Rating
Information Development Skills	1
Initiative and Teamwork	1
Leadership Skills	1
Problem Solving	1
Product Knowledge	1
Productivity	1

Powered by  PBNSM

Close Window

Copyright. © 2002,2003. Clarke & Associates, LLC. All Rights Reserved.
Contains content proprietary to third party. PBN Terms of Service and PBN Privacy Statement.
v2.0.07.03192

LUC 01100

<https://www.fmp-transition.com/smp/report/default.asp?r=48>

11/17/2003

The following is a copy of the relevant portion of the October 21, 2003 report. All of the scores on this report (Exhibit Notebook/Commission Exhibit 15, LUC 01105) are handwritten. This report has the same print date of 11/17/2003 as the report above.

Hire Date: 10/24/1994	
Factor for Consideration: Skills Rank Order	
Decision: To Be Terminated	
Reason: Lower Performance and/or Skills	
Performance Rank: 3	
Skill Average: 2.75	
Skill Name	
Communication Skills, Written and Verbal	1
Doc & Training Development	3
relationship mgmt	3
Technical /Function Skills	3
	2

AS on the final screen

1/20/04 not a done

Powered by **pbm™**

Close Window

Copyright. © 2002, 2003. Clarke & Associates, LLC. All Rights Reserved.
Contains content proprietary to third party. PBN Terms of Service and PBN Privacy Statement.
v2.0.07.03192

Further in the deposition, the transcript shows the following concerning altering scores and how the scores were reported to the Complainant (Reyes Deposition, pages 124 through 134):

Q. [Schmidt] Before we go through these exhibits, what prompted me to do that is you testified that there were no changes to, I guess, the skills assessment scores.

A. I didn't make any changes, and I didn't know of anybody else who had made changes.

Q. Is that something you would have wanted to know if changes were being made to the skills assessment scores?

A. Yes, I would have, and I also wanted to note that the skill average was 2.75. You know, from when I printed it out in January, so I mean I didn't know of any changes. The skill average never changed.

Q. Okay. It sounds like you are saying that you would have wanted to know if there were changes to the skills assessment, correct?

A. Yes.

Q. And nobody ever told you there were changes to the skills assessment, right?

A. Not to my knowledge, no. I don't know of any.

Q. Here are some documents that I am going to be showing you.

A. Okay.

Q. And the first one I think is 16, and that is the one, this, I guess, e-mail first of all, it comes from Don Madeiros, right?

A. Um-hum.

Q. Okay. And the second page of this particular document is a skills assessment with ratings on it, and, at the bottom of that, you have Ms. Halstenberg listed, correct?

A. Yes.

Q. And there she has got a 3, a 3, a 4, and a 2.

A. Okay.

Q. Okay? Thin, if you look at the next one, Commission Exhibit 17, and this one is from Ms. Mayes to Ms. Zabel [sic].

A. Okay.

Q. And, if you flip to the second page of that document.

A. Um-hum.

Q. And there Ms. Halstenberg's scores are changed. Now she has a 3, a 3, a 3 and a 2. It is changed, correct?

A. Correct.

Q. Now, if you flip to the next document, this e-mail is from Mr. Madeiros to Ms. Mayes and on the front he explains what it is, and he is saying here is the individuals impacted in yellow that are going to be I guess impacted.

Then it looks like there is for whatever reason a blank page is 2, and then on 3 it has individuals listed, and this is a photocopy, so they are not in yellow, but they are in dark. Do you see those?

A. Yes.

Q. And there are five individuals listed. Who are those individuals?

A. Davis, Stull, Liska, Smith and Halstenberg.

Q. Okay. Then, if you will flip to the next document.

A. Okay.

Q. Mr. Smith is no longer on the list of individuals to be FMP's?

A. That's correct.

Q. It changed again?

A. Is it Jerry Smith?

Q. Jerry Smith.

A. Okay. Yes.

Q. Do you know why he is no longer being FMP'd?

A. I do not.

Q. If you had known that changes were being made to the FMP skills assessment, would that have changed the way in which you investigated the case?

A. I would have wanted to know more about the changes, the rationale for changing it, was - - why management made the changes essentially, yes.

Q. And the dates on those e-mails were in the beginning of October, correct?

A. They are.

Q. And your investigation didn't, I guess, start until the end of October, right?

A. Correct.

Q. So these documents clearly were in existence while your investigation was going on, correct?

A. And I did not see them.

Q. And you talked to Don Madeiros,

A. Yes, and I was not aware of any changes at that time.

Q. And you talked to Ms. Mayes, and she didn't tell you there were changes either?

A. No. These changes may have taken - - well, they took place obviously during the decision-making time, and Mr. Madeiros would be able to explain based on his assessment of the individuals why those scores were changed for those individuals, but I was not aware of these changes.

Q. Okay. Then you talked about to go back for a moment to Exhibit 15, and I think it is the same you were looking at a single page out of that where you had made the handwritten notes on the side.

A. Yes.

Q. And you talked about the reason - - well, more than talked about, you testified that the reason that you wrote the, I guess, December 12 letter wrong with that 1 instead of 3 because you said that there was a smudge on it that you thought was a 1?

A. Well yes. Let me show you the reason why I printed it Landscape was because that page wasn't printing completely, so, when I went back into the tool in January and printed the page Landscape, I noticed the skill name had that dark highlighting on it, which didn't show in the Portrait printout of the tool, and I am actually looking for that. Okay.

So I thought, and, if you look at where this 1 appears - - what I interpreted as a 1 was right next to the title skill name to when I printed the document in Landscape form, I thought, well, it may have been the highlighting on the title skill name, because I interpreted to be a 1 wasn't next to a particular skills, so then, when I printed it in Landscape, I saw the highlighting there.

Again, and then I saw the averages. The averages were the same back November as well as in January, and I went in and wrote what was on the system for communication being a 3 which I thought was a 1 when I initially wrote that letter because I looked above my mistake.

Q. And, using what I guess Ms. Badel marked as Respondent's Exhibit 7, if you could look at that previous document, it is the one that you printed out when we talked about the smudge.

A. Yes, this one.

Q. There is no smudge anywhere near the 3, right?

A. Because it is in Landscape format. I mean this is how I interpreted it. It is in Landscape, so it is kind of rectangular as opposed to square.

Q. Okay. If I understood what you testified before with Ms. Badel, you looked at that smudge and you thought it was a 1, is that accurate?

A. When I got - - yes, when I realized that it was a mistake on even the calculations, I look at what did I see? I looked at the printout? I'm like, oh, look, I interpreted that to be a 1, and I went back on the tool just to verify that I printed that page, and I did, and I noticed that, when I printed it in Landscape, it showed the complete section of the screen.

Q. But, if I am understanding what you testified to, you then went through, and you thought, well, it started with a 1, and then you went through and you wrote in the rest of the scores?

A. Because those didn't print out clearly either.

Q. But that is not what it shows. On your handwriting notes, it shows a 1, which you are saying is a smudge.

A. And that is why I wrote not a 1, because I had interpreted that to be a 1.

Q. And then it has a 3?

A. And a 3, 3, 2.

Q. Another 3?

A. Yes, handwritten.

Q. And then a 2?

A. Yes.

Q. All right. So - -

A. As it was on the FMP screen.

Q. If you thought that that was a 1, then the letter you wrote to Ms. Halstenberg, shouldn't it have been a 1, 3, 3, 3, because you are going down the list, and isn't that what you thought it said?

A. This is what I wrote on the letter mistakenly.

Q. But that is not what you wrote on the letter. Let's look at the letter.

A. Okay. What did I write on the letter?

Q. I think it is Exhibit 1.

A. Okay.

Q. You might want to look at it.

A. That is fine.

Q. You wrote - -

Mr. Schmidt: Are you okay with this? She would like to look at my copy.

Ms. Badel: Sure. It is number 5 that we talked about initially.

A. I got it. Fine.

Q. There you wrote 1, 3, 3, 2, right?

A. I did.

Q. So why did you do it that way if you thought that the smudge was a 1, and then it was followed by three 3's and then a 2? Where did the 2 come from?

Ms. Badel: I'm sorry. I directed you to the wrong exhibit. That is not the right one. It is Exhibit 3. You are talking about the December 12 letter, correct?

Mr. Schmidt: Yes.

A. I have it. That is what I am looking at. Okay.

Q. And you said that you thought or I believe you testified that you thought the smudge was a one, and then you went down, and you wrote the numbers, and there are three 2's or there are three 3's that are here, and you didn't write three 3's in that letter, correct?

A. That's correct. I wrote a 1 instead of a 3, because I misinterpreted this little whatever you want to call it. When I referenced this, when I looked, I interpreted that little line to be a 1 next to communication skills, but when obviously the calculations don't add up to 2.75, and, when I went again to verify what I had done, I noticed that communication skills written and verbal was a 3, and then, even when you look at this printout where that smudge is right by skill, again this 1 should have been a 3, because this lines up with skill name, it doesn't line up with --

Q. So what happened to the other 3?

A. I don't really know. What other 3, sir?

Q. You have three 3's in a row, and on your December 12 letter you don't have three 3's in a row anymore.

A. Right, because I mistakenly wrote a 1.

In the hearing itself, another issue of altered numbers appeared as Mr. Schmidt questioned Ms. Mayes in regard to a change between two documents: (Tr. 329)

Mr. Schmidt: Okay, then the answer to my question is that Ms. Halstenberg got a higher percentage raise than Ms. St. Pierre did correct?

Ms. Badel: Objection. Asked and answered and counsel is badgering the witness your Honor.

Mr. Schmidt: It's non-responsive your Honor. We did the math and she refuses to acknowledge what the math said.

Judge Johnson: I'm going to have to sustain the objection because if it is a closed end, if it is yes or no, then that's the answer that would be responsive to the question and Ms. Badel would have an opportunity to ask you questions on redirect if there's a need to go into that area of um with you for the record. So -

Mr. Schmidt: Did you say that the objection was sustained?

Judge Johnson: I'm sustaining.

Mr. Schmidt: Pardon?

Judge Johnson: Oh, no, my mistake. I'm overruling the objection. Sorry.

Mr. Schmidt: So yes or no.

Ms. Mayes: Repeat your question please.

Mr. Schmidt: Sure. Ms. Halstenberg got a higher percentage raise than Ms. St. Pierre did?

Ms. Mayes: Yes.

Mr. Schmidt: Thank you. Why did you change the uh, that Exhibit 67?

Ms. Mayes: Ms. Badel asked me to rerun -

Ms. Badel: Objection. Attorney/Client privileged.

Findings of Fact, Section 49

Section 49 states:

After the investigation, Reyes concluded Complainant was not retaliated against. Age and gender were not factors used to select the Project Manager. (Reyes Depo., p. 27)

In regard to the retaliation, Ms. Reyes did report in a letter dated December 12, 2003 to the Complainant the following:

There is no indication that retaliation for your prior unsubstantiated inquiry played any role in the force management decision.

This, however, needs to be examined against Ms. Reyes' testimony in her deposition as to how she reached this conclusion. Additionally, Ms. Reyes never addressed the scrapped equipment demand issue or the issue of being asked to provide files on which the Complainant had never worked. See above.

Conclusions of Law and Discussion

The objections/comments in regard to the Conclusion of Law are as follows:

Conclusion of Law and Discussions, Section 12

Section 12 states:

In the instant case, Respondent was aware Complainant engaged in protected activity. Respondent knew of calls made to its EEO hotline, as well as calls made to the H.R. Department. [No source citation.]

The complainant made no calls to the H.R. department prior to layoff. All calls were to the EE/OA hotline, and then to the assigned EE/OA counselors. After layoff, the complainant made 1 call to Lucent's Human Resources department to ask how to handle Ms. Mayes' demands for the return of signed-out equipment that had already been returned.

Conclusion of Law and Discussions, Section 17

This section cites case law and implies that the as long as the employer's action is non-discriminatory, it cannot be retaliatory, that is, it automatically precludes any finding of retaliation without a finding of discrimination. Therefore, the Commission would have to prove that the employer's action in the layoff was **both** discriminatory and retaliatory:

... 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 etc.)

The presumption of unlawful retaliation created by the establishment of a prima facie case "drops out of the picture" when the employer articulates a legitimate, non-discriminatory reason for its employment action. (Hicks, etc.)

Conclusion of Law and Discussion, Section 18

Section 18 states:

Respondent met its burden of production with the introduction of evidence that Complainant's scores for the FMP skills assessment for the October 2003 FMP were low compared to the other ten (ten) messaging employees whose skills were being assessed. Complainant and three (3) others were affected by the FMP on October 21, 2003.

The Complainant's scores were so low that the Complainant was laid off—the fact that the scores were so low suggested retaliation to the Complainant. The burden of production appears to have been the contested scores. See letters to the Respondent from the Complainant dated January 9, 2004, Notebook Exhibit/Commission Exhibit 4, and October 28, 2003, Notebook Exhibit/Commission Exhibit 6. The October 28, 2003 letter reads in part:

During the layoff notification meeting with Diana Mayes, I was informed that the layoff was based upon a skills assessment for which Denise Gary had provided the input, and that the input had been forwarded to Don Meridos. I have never seen a copy of this performance evaluation tool, and I believe that, given my job performance and accomplishments, I have higher skill levels than individuals who were not laid off. (Notebook Exhibit/Commission Exhibit 6)

This conclusion does not address the assignment or the legitimacy of the scores, or validate that the scores themselves were non-retaliatory, provide an explanation of the Respondent's attempt to argue that Ms. Gary did not provide input into the skills assessment scores, explain why individuals were shifted off the list and scores apparently arbitrarily changed, or highlight the alleged differences between the skill definitions used between the April 2003 and the October 2003, the pre-complaint and post-complaint assessments. Indeed, the Respondent never articulated the differences in skill definitions between the April and the October assessments.

Conclusion of Law and Discussion, Section 22

Section 22 again calls for a finding of discrimination, that is, inferred intentional discrimination, and states the condition under which additional evidence of unlawful discrimination is not required. This section does not state how it relates to retaliation, or if therefore, a finding of retaliation requires a finding of discrimination, as in Section 17.

Section 22 states in part:

Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reasons 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. (Hicks, etc.)

Conclusion of Law and Discussion, Footnote, Page 24

The footnote at the bottom of the page labeled 2 does not correlate to any footnote reference presented on page 24. As with Section 17, above, it requires a finding of discrimination presumably to allow for a finding of retaliation, and not just participation in protected activity. This footnote states:

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, etc.)

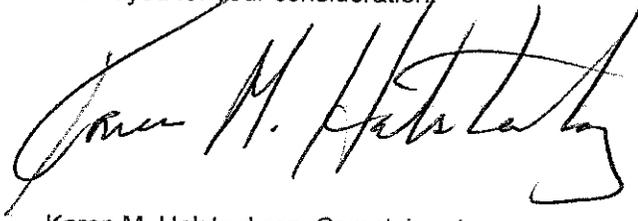
Conclusion of Law and Discussion, Section 23

The ALJ conclusion in Section 23 that

The credible evidence introduced by Respondent is Complainant's scores from one FMP skills assessment to the other were due to Complainant being moved to messaging [sic]. Therefore, the October 2003 FMP skills assessment looked at different skills than the previous assessment.

See above.

Thank you for your consideration/

A handwritten signature in black ink, appearing to read "Karen M. Halstenberg". The signature is fluid and cursive, with a large initial "K" and "H".

Karen M. Halstenberg, Complainant

September 20, 2012

STATE OF OHIO
CIVIL RIGHTS COMMISSION

KAREN HALSTENBERG,

Complainant,

vs.

LUCENT TECHNOLOGIES, INC.,

Respondent.

) COMPLAINT NO. 9847
)
) CHIEF ADMINISTRATIVE LAW JUDGE
) DENISE M. JOHNSON

) Received – Hearings:
)

) May 13, 2010
)

POST-HEARING BRIEF OF THE
OHIO CIVIL RIGHTS COMMISSION

RICHARD CORDRAY
ATTORNEY GENERAL

JULIE BADEL
Epstein, Becker & Green
150 N. Michigan Ave., 35th Floor
Chicago, IL 60601-7553
Phone: (312) 499-1418
Fax: (312) 845-1998
Email: jbadel@ebglaw.com

Counsel for Respondent
Lucent Technologies, Inc.,

STEFAN J. SCHMIDT
Assistant Attorney General
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215-3428
Phone: (614) 466-7181
Fax: (614) 466-2437
stefan.schmidt@ohioattorneygeneral.gov

Counsel for Complainant
Ohio Civil Rights Commission

I. INTRODUCTION

Karen Halstenberg is the kind of person who will complain about something that she thinks is unfair and Lucent Technologies, Inc., is the kind of company that doesn't like complainers. In the late-nineties Ms. Halstenberg complained about her job duties being given to a younger male co-worker and her supervisor retaliated against her by threatening never to promote her. Later, Ms. Halstenberg was associated with a group of female employees who complained that there was gender discrimination ongoing in Lucent's layoff process. Finally, in September of 2003, she was again complaining about sex and age discrimination when another younger male employee, whom she believed was less qualified than her, received a project manager position that she was in the running for.

She called Lucent's EEO hotline and left a message complaining yet again about sex and age discrimination. Lucent's HR department processed the complaint, contacted employees, conducted an investigation, made a determination that there was nothing wrong, and told Ms. Halstenberg to just let it go, all within the course of less than two days. Unfortunately, Ms. Halstenberg couldn't just let it go and she kept asking questions that Lucent didn't want to hear. When she was told that Joel Gary was more qualified for the position she questioned his qualifications. When she was told that her skills assessment scores were the lowest, she claimed that her scores were artificially lowered by her supervisor Diana Mayes with input from Denise Gary, Mr. Gary's wife, her previous supervisor. When she pointed out that even with the artificially low scores that Lucent gave her that her skills assessment score still did warrant her being laid off, Lucent told her that there was a typographical error in the numbers. Finally, when it was apparent that Ms. Halstenberg was never going to stop complaining it was determined that her skills were so low that it justified

her being laid off. This was despite the facts that less than six months earlier she had been scored as having the highest skills possible and that two months earlier she had been described as being an excellent project manager by Ms. Gary.

The question becomes what happened in those two months that resulted in Ms. Halstenberg going from being one of the best employees to being the worst. The answer is that she engaged in protected activity by continuing to complain about sex and age discrimination.

II. STATEMENT OF THE CASE

Karen Halstenberg (hereinafter "Complainant" or "Ms. Halstenberg") filed a charge of discrimination with the Ohio Civil Rights Commission (hereinafter "Commission") on March 23, 2004. In her charge affidavit, Ms. Halstenberg alleged that she was being retaliated against by her employer Lucent Technologies, Inc., (hereinafter "Respondent") for engaging in statutorily protected activity when she complained about sex discrimination. On September 15, 2003, Ms. Halstenberg complained about sex discrimination when she was passed over by Respondent for a position in favor of a less qualified male and on October 21, 2003, she was told that she was going to be laid-off. Based on these facts, on February 24, 2005, the Commission found that Ms. Halstenberg was discriminated against by Respondent for engaging in protected activity in violation of Revised Code Section 4112.02(I).

The Commission endeavored to eliminate such practices by informal methods of conference, conciliation, and persuasion, but was unsuccessful. As such, a Complaint and Notice of Hearing were issued on March 17, 2005, in which the Commission alleged "[t]hat the Respondent terminated the Complainant's employment in retaliation for having engaged in activity protected by Revised Code Section 4112.02(I)." On April 18, 2005, Respondent filed an Answer to the Commission's Complaint.

A two-day hearing on the merits was held on May 12th and May 13th, 2009, before Chief Administrative Law Judge Denise M. Johnson, an impartial and duly appointed Administrative Law Judge. The record consists of the hearing transcript, which is 355 pages, the trial deposition of Yssis Reyes, and the exhibits, which were admitted at the hearing. At the conclusion of the hearing, counsel for both the Commission and Respondent reserved the right to submit post-hearing briefs.

III. STATEMENT OF THE FACTS

Ms. Halstenberg began her employment with Respondent's predecessor, AT&T, in 1990 as a contractor (Transcript of the Hearing held before Chief Administrative Law Judge Denise M. Johnson on May 13, 2009, hereinafter "Tr. at ___" 18). Ms. Halstenberg began working in the messaging group on March 8, 1993, and was hired by Respondent as a full-time employee on October 24, 1994 (Id.). The messaging group was responsible for functions like storing and processing information for voice messaging systems and network connectivity for Respondent's clients (Tr. at 19-20).

Ms. Halstenberg worked her way up the ranks during the next ten years and in August of 2003 she was working as a technical writer in the messaging group and a project manager (Tr. at 20, 102). At the time Ms. Halstenberg was one of the most senior employees in the messaging group (Tr. at 102). Throughout her employment with Respondent, Ms. Halstenberg received good evaluations and significant merit pay increases (Tr. at 25, 42-43, 217-218; Commission Exhibit 24). Respondent had a policy called "pay for performance" which meant that the more of a raise that you received the better your performance, and during Ms. Halstenberg's last merit raise cycle she received a \$1,500.00 raise (Tr. at 42-43, 172, 217-218;

Commission Exhibit 24). In August of 2003, Ms. Halstenberg was making approximately \$58,800 (Tr. at 108, 298; Commission Exhibit 24).

As part of her job duties Ms. Halstenberg was responsible for providing training materials for some of Respondent's trainers (Tr. at 39). Virginia Czikra was one of Respondent's technical trainers who taught Respondent's training courses throughout the world including in Singapore, China, Japan, Europe, Azerbaijan and Canada (Tr. at 134-136, 142, 176). Some of the projects that Ms. Halstenberg and Ms. Czikra worked on together included the CA/Sierra line, Messaging Link, the Customer Application Migration Application and the Status Log Interpretation Guide (Tr. at 33-36, 39-41, 136-138). Ms. Halstenberg was also responsible for working with individuals all over the world including Elizabeth Butlear and Simon Fowler in the United Kingdom (Tr. at 31-32, 147, 176). In describing Ms. Halstenberg, Ms. Czikra said she was "fantastic" and that Ms. Halstenberg made her job "very easy" (Tr. at 135, 143, 145, 147). Ms. Czikra also went on to explain an innovation that Ms. Halstenberg came up with which greatly improved the training process (Tr. at 141-142).

For approximately the last two years of her employment Ms. Halstenberg's immediate supervisor was Denise Gary (Tr. at 21, 171). Ms. Gary's husband Joel Gary also worked for Respondent (Tr. at 157; Transcript of Yssis Reyes April 8, 2009, Trial Deposition hereinafter "Reyes at ___" 22). Ms. Gary and Ms. Halstenberg had a good working relationship (Tr. at 21). While Ms. Gary was Ms. Halstenberg's supervisor she consistently received evaluations which said that she met or exceeded expectations (Tr. at 26-30; Commission Exhibits 20, 21, 22). Ms. Gary described Ms. Halstenberg as being "an excellent writer," "highly respected among her peers" and "very, very knowledgeable" (Tr. at 28, 161; Commission Exhibit 21). Ms. Gary testified that she never gave Ms. Halstenberg any disciplinary action and that she

never placed anything negative in her personnel file (Tr. at 161-162). Ms. Gary only used the term "excellent" in the performance evaluations of three of the messaging writers including Ms. Halstenberg (Tr. at 167).

Ms. Gary also recommended Ms. Halstenberg for a \$1,500.00 merit pay raise which she received on October 21, 2002, and further testified that she would not give someone a merit raise if she did not think they were doing a good job (Tr. at 25, 172, 217-218; Commission Exhibit 24). Ms. Gary also described Ms. Halstenberg as her subject matter expert (Tr. at 175). Ms. Gary testified that she would not describe all ten of her messaging writers as subject matter experts (Tr. at 176).

Ms. Halstenberg and Ms. Gary also engaged in Respondent's social activities together including the weekly Wednesday social lunch and the Ladies Night Out group (Tr. at 21). In April of 2003, Ms. Gary did a skills assessment of Ms. Halstenberg and she was rated a 1 which was the highest score that an employee could get (Tr. at 26, 180; Reyes at 80; Commission Exhibit 15, pg 2). In June of 2003 Ms. Gary did Ms. Halstenberg's evaluation and noted that she met or exceeded all expectations (Tr. at 38; Commission Exhibit 22).

Ms. Gary was so impressed with Ms. Halstenberg that in August of 2003 she recommended her for a position as a project manager in the network operating software group (Tr. at 22, 44-45, 122, 173, 253). Ms. Gary testified that she would not recommend someone for a job if she did not think that they were a good employee (Tr. at 173). Prior to recommending her for the position, Ms. Gary asked Ms. Halstenberg if she was interested in the project manager position, and after being told she was, she recommended her for the position (Tr. at 22, 44, 253). Ms. Gary went out on a limb for Ms. Halstenberg and recommended her to her supervisors Diana Hazum and Christine Troianello (Tr. at 22, 45;

Commission Exhibit 23). In her recommendation to Ms. Hazum and Ms. Troianello she described Ms. Halstenberg as an “excellent project manager” and testified that she would not have said it if it was not true (Tr. at 22, 46, 173-174, 214-215; Reyes at 151; Commission Exhibit 23). She also sent the recommendation to Ms. Mayes, a supervisor in the Information Products & Training (IP&T) division (Commission Exhibit 23). Ms. Gary did not recommend any of her other subordinates for the position because she thought Ms. Halstenberg “had the aptitude to do the job” and she felt that none of the other messaging writers “would be a good project manager” (Tr. at 253).

Unbeknownst to Ms. Gary at the time she recommended Ms. Halstenberg for the project manager position, her husband, Mr. Gary was also recommended for the same position (Tr. at 158, 253-254). Mr. Gary was recommended for the position by Ms. Mayes (Tr. at 158, 198). Although there were no interviews conducted it was determined that Mr. Gary was the most qualified individual for the job (Tr. at 198). There was also no announcement that Mr. Gary had been given the job as was customary with previous positions that Respondent had filled and Ms. Halstenberg learned that Mr. Gary had been given the position by a co-worker who asked her if she had heard that Mr. Gary had gotten the position (Tr. at 23-24, 158).

Ms. Halstenberg was deeply troubled by what she felt was yet another instance of sex and age discrimination by Respondent (Tr. at 24, 67-68, 79-80). In addition to being Ms. Gary’s husband, Mr. Gary was younger than Ms. Halstenberg (Tr. at 24, 257). Ms. Halstenberg also felt that she was substantially more qualified for the position than Mr. Gary (Tr. at 24). Ms. Halstenberg had experience in messaging while Mr. Gary did not (Tr. at 198-199). She also had a Master’s Certification in project management that neither Mr. Gary nor any of the other individuals in the messaging group had (Tr. at 55-56, 176, 216; Commission

Exhibit 25). Previously, in 1997, Ms. Halstenberg had been in a similar situation where her job duties had been taken away and given to a younger male employee, Roy Sargent, who she felt she was more qualified than (Tr. at 67-68, 79-80). Accordingly, on September 15, 2003, she called Respondent's EEO hotline and left a message complaining of sex and age discrimination (Tr. at 24, 158-160, 202; Reyes at 55, 74-75, 80; Commission Exhibit 8).

A few weeks before Ms. Halstenberg called Respondent's EEO hotline, her messaging group was moved into the IP&T division (Tr. at 26, 219-220). In the new section, although all of the messaging writers stayed the same, Ms. Mayes replaced Ms. Gary as the supervisor (Tr. at 26, 49, 220, 263). Ms. Mayes became Ms. Halstenberg's supervisor on August 26, 2003 (Tr. at 23, 209-210).

Shortly after Ms. Halstenberg called Respondent's EEO hotline complaining about sex and age discrimination, Respondent determined that another force management plan (FMP), Respondent's version of a reduction in force or layoff, was necessary and that this FMP would involve Ms. Halstenberg's messaging group (Tr. at 206; Reyes at 42). Respondent had several FMPs during the last few years, but Ms. Halstenberg was not concerned because she had always been ranked during the previous FMPs as one of Respondent's top performers (Tr. at 21).

In December of 2001, Respondent had an FMP which involved Ms. Halstenberg and the messaging group and she was ranked a 1.8 (Tr. at 51, Commission Exhibit 15 pg. 3). The individuals who are ranked, are ranked from 1 to 3 with 1 being the best ranking that an individual could get and 3 being the worst (Tr. at 49, 51, 180; Reyes at 40-41). In the December 2001 FMP Ms. Halstenberg received 1s in "Results" and "NOS Technical Knowledge", 2s in "Communications" and "GROWS" and a 3 in "Optical Technical

Knowledge” (Commission Exhibit 15, pg 3). In October of 2002, Ms. Halstenberg was ranked a 1.88 (Tr. at 51, Commission Exhibit 15, pg 5). She received 1s in “Teamwork” and “Tools”, 2s in “Communication”, “Document Development”, “Leadership/Initiative”, “Product Knowledge” and “Research/Interview/Analysis” and a 3 in “Training Development” (Commission Exhibit 15, pg 5). In April of 2003, less than five months before she called Respondent’s EEO hotline to complain about sex and age discrimination, she was ranked a 1, the highest ranking that Ms. Gary could give her (Tr. at 26, 49, 180; Reyes at 114; Commission Exhibit 15, pg 2). In this FMP she received 1s in “Information Development Skills”, “Initiative and Teamwork”, “Leadership Skills”, “Problem Solving”, “Product Knowledge” and “Productivity” (Tr. at 49; Commission Exhibit 15, pg 2). During the last FMP before she complained, Ms. Gary told her that she didn’t need to worry about further FMPs because she was one of her top performers (Tr. at 51).

On the same day that Ms. Halstenberg called Respondent’s EEO hotline, Respondent’s HR department began an investigation and contacted Ms. Mayes (Tr. at 158, 203; Commission Exhibits 8, 47). Within two days of beginning their “investigation” Respondent’s HR department determined that there was nothing improper about Mr. Gary getting the position that Ms. Halstenberg was complaining about (Tr. at 53; Reyes at 61). According to Respondent’s tracking system forty-two minutes were spent investigating Ms. Halstenberg’s complaint (Reyes at 54, 175-176). On or about September 17, 2003, Ms. Gary was also contacted by Respondent’s HR department about Ms. Halstenberg’s complaint (Tr. at 159-160). Shortly thereafter Ms. Mayes did another skills assessment of Ms. Halstenberg for the October 21, 2003, FMP (Tr. at 206).

Because Ms. Mayes had only been Ms. Halstenberg's supervisor for thirty-nine days and had only approximately six and a half hours of total interaction with her she sought input from Ms. Gary as to Ms. Halstenberg's performance (Tr. at 96, 177-179; Reyes at 14-15). Ms. Gary admitted that she "gave [Ms. Mayes] input on how I thought the team would be graded on that chart. The ones, the twos and threes" (Tr. at 177-178; Reyes at 62). Ms. Gary also admitted that she was "angry at Ms. Halstenberg *** for her complaining about [her] husband getting the project manager position instead of her" (Tr. at 157-158). Now Ms. Halstenberg who had recently been skills assessed as being one of the best employees, was skills assessed as being the worst employee (Tr. at 26, 215). Previously she was skills assessed as being a 1 the best you could get, and now she was skills assessed as being a 2.75 the worst that anyone received (Tr. at 26, 180; Reyes at 114; Commission Exhibit 15, pgs 2, 7). Ms. Halstenberg received the worst possible scores in "Communication Skills, Written and Verbal", "Doc & Training Development" and "Relationship Mgmt" (Reyes at 34; Commission Exhibit 15, pg 7). She also received a 2 in "Technical/Function Skills" (Id.). Gone were all the 1s that she had received prior to engaging in the protected activity which Respondent's own policies provided for (Tr. at 26, 300; Reyes at 114).

Based upon her now being ranked as the worst employee, Ms. Mayes informed Ms. Halstenberg on October 21, 2003, that she was going to be FMPed effective November 19, 2003 (Tr. at 80, 215). Understandably, Ms. Halstenberg was shocked at her going from being the highest possible ranked employee to the lowest all in the span of a few months (Tr. at 21, 80). Ms. Halstenberg's bewilderment was compounded by the fact that she had never been told about any alleged deficiencies by her new supervisor, Ms. Mayes, and by the fact that a

few weeks earlier that she had been described as an “excellent project manager” by her previous supervisor, Ms. Gary (Tr. at 22, 25, 46, 174; Commission Exhibit 23).

Accordingly, she asked Ms. Mayes why she was being FMPed, and Ms. Mayes told her that the work was being outsourced to Poland (Tr. at 82, 86, 224; Commission Exhibit 31, pg 3). During the hearing Ms. Mayes admitted that the majority of the work was not outsourced to Poland (Tr. at 225). Ms. Halstenberg was not satisfied with the questionable explanation that Ms. Mayes gave her and she continued to inquire about the real reason for her being FMPed (Tr. at 224-225). Eventually, Ms. Halstenberg was told that she was being FMPed because she was scored lowest on the skills assessment which was done in October of 2003 (Tr. at 53, 225). Again, Ms. Halstenberg knew that this could not be correct because she knew that less than six months ago she was skills assessed with a perfect score of 1 (Tr. at 26; Commission Exhibit 15, pg. 2). Accordingly, she asked for the skills assessment scores so that she could see how the score was calculated (Tr. at 53, 83).

At first she was told that there was nothing wrong with the scoring and that she should just let it go (Tr. at 53). Ms. Halstenberg persisted however and eventually received a letter from Ms. Reyes on December 12, 2003, which indeed showed that the scores were not correct (Tr. at 54; Commission Exhibit 1). In Ms. Reyes’ letter she wrote that Ms. Halstenberg received a 1 in “Communication Skills (Written and Verbal)”, a 2 in “Technical/Function Skills” and 3s in “Documentation and Training Development” and “Relationship Management” for a skills average score of 2.75 (Reyes at 38-39; Commission Exhibit 1). Ms. Reyes testified that Don Medeiros reviewed the letter for accuracy before she sent it out (Reyes at 38-39). Ms. Halstenberg wrote back on January 9, 2004, showing that the skills assessment average was incorrect, and that she had been given incorrectly low scores in several of the

skills assessments (Tr. at 101-105; Reyes at 28; Commission Exhibit 4). She noted that even using the incorrectly low scores that they had given her, that her correct skill average was 2.25, which showed that she should not have been one of the four individuals to be FMPed (Tr. at 101-102; Reyes at 47-48; Commission Exhibit 4). When Ms. Reyes was confronted with this information, she decided that the 1 that Ms. Halstenberg had received in “Communication Skills (Written and Verbal)” was really a 3 and that it was just a “typographical error” (Tr. at 106-107; Reyes at 28; Commission Exhibit 2).

As proof of the typographical error, Respondent provided a copy of the Force Management Tool with handwritten numbers on it dated “1/22/04” where the printed numbers should have been saying “1, 3, 3, 3, 2” and saying that in reference to the “3, 3, 3, 2” that it was “as on the FMP screen” and in reference to the “1” that it was “not a one” (Commission Exhibit 2; Commission Exhibit 15, pg. 7). Interestingly, although all these documents were printed on 11/17/2003, only the document containing the alleged typographical error had handwritten numbers on it (Commission Exhibit 15, pg 7). Also, interestingly, the word “Rating” appears to have vanished from this form as if it were covered up by the handwritten notes.¹

During the October 21, 2003 meeting, after Ms. Mayes admitted that she was FMPing Ms. Halstenberg because of her low skill ranking on the skills assessment, Ms. Halstenberg was given a packet of information explaining how to go about getting her severance pay (Tr. at 83). Ms. Halstenberg was upset during the meeting and was getting more upset by the minute as she pressed Ms. Mayes for information as to who had conducted the skills assessment (Tr. at

¹ The word “Rating” appears on the Force Management Tools for the April 25, 2003, December 13, 2001, October 3, 2002, and the November 7, 2002, FMPs but not on the October 21, 2003, FMP. Compare Commission Exhibit 15, pages 2, 3, 5 and 6 with page 7.

87, 226-227). At first Ms. Mayes told Ms. Halstenberg that she conducted the skills assessment, but as Ms. Halstenberg continued to force the issue she admitted that she and Ms. Gary did it, and Don Medeiros reviewed it (Tr. at 83-84, 87; Commission Exhibit 31, pg 3). This made Ms. Halstenberg even more upset because on October 7, 2003, she had contacted Therese Kierl-Allen of Lucent's Equal Opportunity section after receiving an email saying that Ms. Gary was going to be giving input into the upcoming skills assessments and explained that she was worried about Ms. Gary's ability to give an unbiased skills assessment of her because of the complaint she filed concerning Ms. Gary's husband (Tr. at 89; Reyes at 159).

In the packet that Ms. Halstenberg was given it said that she was being FMPed because of her low ranking on a skills assessment with no mention of the work going to Poland (Tr. at 83). The letter explained that if she wanted her severance pay of over \$15,000.00, that she would have to sign a release saying that Respondent did nothing wrong and agreeing to waive any rights she might have (Tr. at 83, 86-87; Commission Exhibit 33). Ms. Halstenberg refused to agree to sign the release and never received her severance pay (Reyes at 10).

After leaving Ms. Mayes' office, Ms. Halstenberg contacted Respondent's HR department again and was now complaining about the FMP (Tr. at 88, 230; Reyes at 80). As Ms. Halstenberg continued to complain, Respondent continued to try and stop the complaints. Previously, Ms. Halstenberg had been given outdated equipment such as a keyboard and an old monitor which Respondent was going to throw away and during the October 21, 2003, FMP meeting with Ms. Mayes, she told Ms. Halstenberg that Respondent didn't want the keyboard or monitor back (Tr. at 87-88). However, as Ms. Halstenberg continued to complain about the unfairness of the FMP, Respondent sent a letter to her home on November 12, 2003, demanding the return of any of Respondent's equipment and demanding to know the

whereabouts of certain files within three days (Tr. at 90-91; Commission Exhibit 32, pgs. 10-11). Several of the pieces of equipment had already been returned years ago, and many of the files were files that Ms. Halstenberg had already told Ms. Mayes where they were, or they were for projects Ms. Halstenberg had never worked on (Tr. at 92-94). One was an old PC and monitor which Respondent's own records show was returned in May of 2002 (Tr. at 92). The significance of these requests for items that Respondent knew Ms. Halstenberg did not have access to was so that they could then withhold her final paycheck and the payment of any unused vacation which Ms. Halstenberg had accrued, and also to encourage her to quit complaining about the FMP process (Tr. at 93-95).

There were ten messaging writers who were skills assessed including Dennis Murphy, Brian Harroff, Carol Layton, Casey Davis, Mike Mayville, Marianne Lisska, April Stull, Kathylynn St. Pierre, Jeremiah Smith and Ms. Halstenberg (Tr. at 97-98).² Of all these individuals, Ms. Mayes said that Ms. Halstenberg was the worst (Tr. at 215). Ms. Mayes made this determination despite Ms. Gary recently saying that Ms. Halstenberg was an excellent project manager and her giving her a perfect score on her last skills assessment (Tr. at 22, 46, 174, 214-215; Commission Exhibit 15, pg. 2; Commission Exhibit 23). Ms. Mayes gave several individuals scores which did not agree with previous assessments or even common sense. Ms. Mayes gave Ms. Layton a perfect skills assessment score of 1 despite her being on a leave of absence for several months during the assessment period (Tr. at 180-182). She also gave Mr. Harroff a higher score in "Communication Skills" than Ms. Halstenberg despite his telling inappropriate jokes at work (Tr. at 236).

² It appears that throughout the exhibits and transcripts that Marianne Lisska and Kathylynn St. Pierre's names are spelled inconsistently but in their performance evaluations they are spelled "Marianne Lisska" and "Kathylynn St. Pierre" (Commission Exhibits 37, 41).

Two additional individuals who benefited from Ms. Mayes' assessment scores were Mr. Smith and Ms. St. Pierre who were so convinced that they were the one's who were going to be FMPed that they had already cleaned out their offices (Tr. at 80-81). Mr. Smith was ranked more favorably despite his performance evaluation noting that he had a problem with showing up late or not at all for meetings, and Ms. Gary's acknowledgment that he was having issues where he needed to do more testing on his procedures prior to turning them over to development to try and cut down on the number of modification requests he was receiving (Tr. at 168-170; Commission Exhibit 40). During the last merit raise cycle, Mr. Smith was only given a \$700.00 raise from Ms. Gary while she gave Ms. Halstenberg a \$1,500.00 raise (Tr. at 172, 218; Commission Exhibit 24). Indeed, Ms. Mayes admitted that she raised Mr. Smith's score just a little to spare him from being FMP'd (Tr. at 222, 313; Reyes at 126). Ms. St. Pierre also appeared to have benefited from Ms. Mayes' assessment by being ranked better than Ms. Halstenberg despite her having problems with her training and development skills (Tr. at 237). Indeed, Ms. St. Pierre appears to have been spared from a previous FMP by Ms. Gary where she took her on her team to avoid her being FMPed (Tr. at 185-186; Reyes at 51).

Ms. Gary admitted that this was not the first time Respondent had moved employees to protect them from the results of an FMP (Tr. at 183). In particular, Ms. Gary admitted that previously Dean Hester had told her to take April Stull, Marianne Lisska, CeCe Zimmerman, Kathylynn St. Pierre and Jackie O'Keefe on to her team as writers because if they stayed where they currently were as testers, they would be ranked at the bottom based on the skills list, and would be FMPed (Tr. at 185-186; Commission Exhibit 5, pg 2). It also appears that in the October 21, 2003, FMP that there were discussions among Ms. Gary, Ms. Mayes and Ms. Hazum to transfer individuals who could be adversely affected by the FMP to deployment (Tr.

at 189; Commission Exhibit 42, pg 2). It also appears that Mr. Gary himself was the beneficiary of a preventative move when the project he was working on was moving to India, and the funding was drying up, so it was determined that although the supervisor was sorry to lose Joel from the team because he was a key member, it was more important to find him a more secure role within a solid IP&T group (Tr. at 243-244) Mr. Gary was able to find another position in the IP&T division, the position that he and Ms. Halstenberg were both vying for, which resulted in her calling the EEO hotline on September 15, 2003 (Tr. at 244).

Just like Respondent manipulated the FMP process to protect some employees, it also used the process to get rid of Ms. Halstenberg whom Ms. Mayes acknowledged was a complainer (Tr. at 244). Ms. Gary denied that Ms. Halstenberg was a complainer, but acknowledged that she was “angry at Ms. Halstenberg *** for her complaining about [her] husband getting the project manager position instead of her” (Tr. at 157-158, 183).

Respondent has an Electronic Case Management System (ECAMS) which it uses to track employee complaints and Ms. Mayes used that system after Ms. Halstenberg called the EEO hotline on September 15, 2003, to see what other things she complained about (Tr. at 227-228, 244; Reyes at 75-76, 168-169). Ms. Mayes determined that “there is a few cases for Karen in ECAMS” some of which went back to the late-nineties (Tr. at 227-228, 244). She also went through her personal file and determined that “she had made other claims when she didn’t get what she wanted” (Tr. at 227). Ms. Mayes was also told “that she [Ms. Halstenberg] was going to see a lawyer” and that Ms. Mayes expected that she would pursue legal action against Respondent (Tr. at 226-227). She sent an email to Sheri Sabol saying that “I kind of thought this might happen” (Tr. at 226-227; Commission Exhibit 49). Previously, Ms. Mayes had been involved in an investigation concerning gender and project manager discrimination where she

believed that Ms. Halstenberg was “the only one [she] knew of that was complaining of it.” (Tr. at 240).

Ms. Mayes believed that Ms. Halstenberg improperly blamed others for her not getting the project manager position that Mr. Gary received and for being FMPed (Tr. at 245-246; Commission Exhibit 50). Ms. Mayes also believed that Ms. Halstenberg’s improper blaming of others manifests itself by her continuing to file legal actions (Tr. at 246).

As the above facts demonstrate Respondent used the FMP process to get rid of Ms. Halstenberg because she was a complainer who was never going to just let it go.

IV. LAW AND ARGUMENTS

THE OHIO CIVIL RIGHTS COMMISSION HAS PROVEN WITH RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE THAT RESPONDENT RETALIATED AGAINST KAREN HALSTENBERG FOR COMPLAINING ABOUT SEX DISCRIMINATION IN VIOLATION OF R.C. 4112.02(I).

Ohio Revised Code Chapter 4112.02(I) provides, in pertinent part, that 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.

A violation of R.C. 4112.02(I) must be established by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(E), (G). In proving a violation under Chapter 4112, federal case law may be used, since the analytical framework is the same as Title VII.

Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm. (1991), 61 Ohio St.3d 607.

To prove a violation under Chapter 4112, absent direct evidence of discrimination, the Commission must prove a *prima facie* case of discrimination by a preponderance of the evidence. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248. Once the Commission establishes its *prima facie* case, a rebuttable presumption of discrimination is created. *Burdine*, 450 U.S. at 254.

If Respondent articulates a “legitimate non-discriminatory” reason for its actions, the burden is on the Commission to establish that Respondent’s offered reasons are pretextual and that the real reason for Respondent’s actions is illegal discrimination. *Griffiths v. Cigna Corp.* (3rd Cir. 1993), 988 F.2d 457.

In the case at hand, the Commission presented reliable, probative, and substantial evidence showing that Ms. Halstenberg was retaliated against in violation of R.C. 4112.02(I). In order to establish a *prima facie* case of retaliation under R.C. 4112.02(I), a complainant must establish the following set of facts: (1) the 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. *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App.3d 715, 727; *Wille v. Hunkar Lab., Inc.* (1998), 132 Ohio App.3d 92, 107-108; *Chandler v. Empire Chem., Inc., Midwest Rubber Custom Mixing Div.* (1994), 99 Ohio App.3d 396, 402; *Glaser v. HLS Bonding dba SMD/HLS Bonding Company* (July 31, 2006), Commission Complaint No. 9496 at 11-12 (copy attached). A causal connection can be shown by the alleged retaliatory action following complainant’s participation in the protected activity sufficiently close in time to warrant the inference of retaliatory motivation. *Glaser* at 19.

Utilizing the above analysis, it is apparent that Ms. Halstenberg was retaliated against by Respondent for engaging in protected activity. Under the first prong of the retaliation test, it is apparent that Ms. Halstenberg engaged in protected activity when she called Respondent's EEO hotline and left a message complaining of sex and age discrimination on September 15, 2003 (Tr. at 24). Ms. Halstenberg also continued to engage in protected activity when she kept calling Respondent's HR department and continued disputing the questionable answers that they were giving her concerning her allegations of sex and age discrimination (Tr. at 88-89). It is also relevant that Ms. Halstenberg had engaged in protected activity in the past when she called to complain about perceived sex and age discrimination on her supervisor's part when her job duties were again taken away from her and given to a younger male co-worker (Tr. at 67-68, 79-80). Finally, it is also relevant that Respondent suspected that it was Ms. Halstenberg who was complaining about gender and project manager discrimination (Tr. at 240). All these factors demonstrate that Ms. Halstenberg was engaging in protected activity on September 15, 2003, and afterwards, when she again learned that she had been passed over for a position in favor of a less qualified younger male as had happened in the past. These facts also demonstrate that Ms. Halstenberg had engaged in protected activities in the past of which Respondent was well aware.

Under the second prong of the retaliation test, it is also apparent that the Respondent was well aware of Ms. Halstenberg's engaging in the protected activity and her propensity to exercise her rights when she thought the company was engaging in sex or age discrimination. It is undisputed that Ms. Halstenberg called into Respondent's EEO hotline on September 15, 2003, after discovering that she had been passed over in favor of another younger male (Tr. at 24). Likewise, it is undisputed that on the same day that Ms. Halstenberg called Respondent's

EEO hotline, that Respondent's HR department called Ms. Mayes and told her about Ms. Halstenberg's complaint (Tr. at 158, 203; Commission Exhibit 8). Approximately two days later Respondent's HR department contacted Ms. Gary and told her about Ms. Halstenberg's complaint (Tr. at 159-160). As these facts demonstrate Respondent was well aware of Ms. Halstenberg's engaging in protected activities.

Also relevant in this case is that Respondent was well aware that Ms. Halstenberg had engaged in protected activity in the past and that she was likely to continue to do so in this case. Ms. Mayes testified that once she was told that Ms. Halstenberg was complaining again that she used Respondent's ECAMS system and reviewed her personal file to see what other types of things she had complained about before she determined that "she had made other claims when she didn't get what she wanted" (Tr. at 227, 244). Ms. Mayes also testified that she was told "that she [Ms. Halstenberg] was going to see a lawyer" and that she expected that she would pursue legal action against Respondent and that she "kind of thought this might happen" (Tr. at 226-227; Commission Exhibit 49). Finally, she testified that she knew that Ms. Halstenberg had previously complained about gender and project manager discrimination (Tr. at 240). These facts show that Respondent knew that Ms. Halstenberg had engaged in protected activity and would never just let it go. Respondent knew that she was going to continue asking questions that they did not want to answer.

Under the third prong of the retaliation test, it is also apparent that Respondent subjected Ms. Halstenberg to adverse employment actions shortly after she engaged in the protected activities. Ms. Halstenberg complained of sex and age discrimination on September 15, 2003, and approximately one month later, on October 21, 2003, she was told that she was going to be FMPed (Tr. at 24, 80). Respondent also retaliated against Ms. Halstenberg by giving her a

substantially worse rating on her skills assessment than her performance warranted as Ms. Mayes was doing the assessment on or about October 7, 2003, a mere three weeks after she called the EEO hotline (Tr. at 89). Ms. Halstenberg's true performance was reflected by her receiving a perfect score in the April 2003 skills assessment, a June performance evaluation which showed that she met or exceeded all expectations and an August recommendation to become a project manager by her supervisor who described her as an "excellent project manager" (Tr. at 22, 26, 38, 44-45, 46, 122, 173, 214-215, 253; Commission Exhibit 15, pg 2, Commission Exhibits 22, 23).

Respondent also engaged in less apparent but equally vindictive retaliation after it became apparent that Ms. Halstenberg would not sign a release exonerating Respondent simply to get her severance pay (Tr. at 83, 86-87; Reyes at 10; Commission Exhibit 33). During the October 21, 2003, FMP meeting, Ms. Mayes told Ms. Halstenberg that she could keep an old keyboard and monitor which she had been given that was going to be thrown away by Respondent (Tr. at 87-88). After the meeting, Ms. Halstenberg contacted Respondent's HR department again and was now complaining about the FMP and she refused to sign the release (Tr. at 88; Reyes at 10). Upon learning this, Respondent further retaliated against Ms. Halstenberg by sending a certified letter to her home on November 12, 2003, giving her three days to return any of Respondent's equipment and demanding to know the whereabouts of numerous files (Tr. at 90-91; Commission Exhibit 32, pgs. 10-11). Many of the files were files that Ms. Halstenberg had already given to Ms. Mayes or were for projects that Ms. Halstenberg never worked on and several of the pieces of equipment had already been returned years ago (Tr. at 92). The true purpose behind the demand was to punish Ms. Halstenberg for not signing the release and for complaining about the FMP by withholding her final paycheck until she

complied with what Ms. Mayes thought was an unperformable task (Tr. at 93-95).

As the above facts demonstrate Respondent subjected Ms. Halstenberg to multiple adverse employment actions shortly after she engaged in protected activities.

Under the fourth prong of the retaliation test there is a strong causal connection between Ms. Halstenberg's engaging in the protected activities and Respondent's retaliatory actions that is sufficient to warrant an inference of retaliatory motivation. The strongest causal connection is that approximately one month after Ms. Halstenberg engaged in protected activity she went from being one of the best employees to being the worst (Tr. at 26, 215). The causal connection is further strengthened by the fact that Ms. Gary, the wife of the individual that Ms. Halstenberg was complaining about, was now involved in determining her fate under the guise of a skills assessment where she was now going against her previous two years worth of assessments (Tr. at 26, 38, 215, 253; Commission Exhibit 15, pg 2, Commission Exhibits 20, 21, 22). The causal connection between Ms. Halstenberg's complaints and the adverse actions that Respondent subjected her to is further strengthened by the attention that Ms. Mayes paid to Ms. Halstenberg's previous complaints in the ECAMS system and in her personal file and the ease with which she dismissed all the positive assessments that Ms. Gary had previously given (Tr. at 227-228). This factor was addressed by Judge Johnson when she inquired "[s]ince you disagreed with Ms. Gary's appraisal of Ms. Halstenberg and you had only been in a position to observe her for a very short period of time, what about Ms. Halstenberg's ... I mean when did you have the opportunity to assess her performance and make the determination that Ms. Gary's evaluation or appraisal of Ms. Halstenberg was inaccurate based on your observation of Ms. Halstenberg?" and Ms. Mayes vague response that she "just was not getting any feeling for what work she was actually accomplishing" (Tr. at 228-229).

Apparently, Ms. Gary had a feeling for what Ms. Halstenberg was accomplishing when she gave her a perfect skills assessment score in April, an evaluation saying that she met or exceeded all her expectations in June and a recommendation for a project manager position where she described her as an excellent project manager in August (Tr. at 22, 26, 38, 44-46, 122, 173, 214-215, 253; Commission Exhibit 15, pg 2; Commission Exhibits 22, 23).

As the above demonstrates there is a strong causal connection between Ms. Halstenberg's engaging in the protected activities and Respondent's retaliatory actions.

Respondent's retaliatory motive is also evidenced by the testimony of their employees where they expressed distain for anyone who dared to complain about the company. Ms. Gary testified that she was "angry at Ms. Halstenberg *** for her complaining about [her] husband getting the project manager position instead of her" (Tr. at 157-158, 183). Ms. Mayes testified that Ms. Halstenberg was a complainer who made "claims when she didn't get what she wanted" (Tr. at 227, 244). Ms. Mayes went so far as to say that Ms. Halstenberg's improper blaming of others manifests itself by her continuing to file legal actions (Tr. at 246). Indeed, Ms. Mayes testified that she believed that Ms. Halstenberg's September 15, 2003, complaint to the EEO hotline was nothing more than her "setting a foundation to pursue legal action" (Tr. at 305-306).

As the above demonstrates, the Commission presented reliable, probative, and substantial evidence showing that Respondent retaliated against Ms. Halstenberg for engaging in protected activity in violation of R.C. 4112.02(I). In doing so, the Commission has established a *prima facie* case of discrimination. However, even assuming *arguendo* that the Commission had not established a *prima facie* case, the need to do so is eliminated where the Respondent articulates

a legitimate, non-discriminatory reason for their action. *United States Postal Service Bd. of Governors v. Aikens* (1983), 460 U.S. 711.

In the case *sub judice*, Respondent's alleged legitimate, non-discriminatory reason for FMPing Ms. Halstenberg was the score that she allegedly received on the skills assessment. Ms. Mayes when prompted by counsel's question "Um, you told us that you were aware that Ms. Halstenberg made a complaint to EEOAA when she didn't get the project manager's job because you were contacted by Therese Kierl-Allen. Did that complaint play any role in how you assessed her for purposes of the FMP?" responded "No" (Tr. at 304). Obviously, this calls for a credibility determination by this Court. As the following demonstrates neither Ms. Mayes nor Ms. Gary is credible on this issue.

Ms. Mayes, is one of Respondent's supervisors who has worked almost her entire adult life, 23 years, for the company and her testimony reflected that bias (Tr. at 198). The credibility of her assertion that Ms. Halstenberg's complaints of sex discrimination had no bearing on the scores that she was given on the skills assessment must be viewed in the totality of all the testimony that she presented during the hearing.

Ms. Mayes admitted that she initially told Ms. Halstenberg that she was being FMPed because the work was going to Poland and that it wasn't until after Ms. Halstenberg questioned her about this that she told her that she was being laid off based on low skills and performance (Tr. at 225). During the hearing after being forced to read her deposition testimony into the record she finally acknowledged that the bulk of Ms. Halstenberg's project was still in Columbus and not Poland (Tr. at 224-225).

During the hearing Ms. Mayes testified that "the FMP involved universes and levels that effected all MA4, MA5, Creation Writers in Columbus" to make it appear as if everyone

in the IP&T division was being skills assessed and not just Ms. Halstenberg's messaging group (Tr. at 207, 270). However, when again confronted with her deposition and an email from her boss, Donald Medeiros, which said "In our meeting today it looks like the only ones participating in the Oct FMP Date will be Messaging. This would be 5 people in Columbus" she eventually acknowledged that that's what the document said but argued that it was just "short hand" and everyone "understood what he meant" (Tr. at 207-209; Commission Exhibit 44).

During the hearing Ms. Mayes also tried to change her deposition testimony that she could not refute Ms. Halstenberg's assertion that as of October 7, 2003, the date that Ms. Mayes claimed to have done the skills assessment scoring that she and Ms. Mayes had only worked together for a total of 4½ hours (Tr. at 210-211). She also alleged that in the brief time that she spent working with Ms. Halstenberg that she felt that Ms. Halstenberg was not qualified to do project management and that she was not qualified for the position (Tr. at 200-201). Ms. Gary, who had been Ms. Halstenberg's supervisor for over two years, testified that Ms. Halstenberg was an "excellent project manger" and that she "had the aptitude to do the job" and that she would not have said it if it was not true (Tr. at 22, 46, 173-174, 253; Reyes at 142-143, 151; Commission Exhibit 23). Ms. Mayes further testified that Ms. Gary was wrong when she said that Ms. Halstenberg was qualified for the position (Tr. at 200-201).

Ms. Mayes also tried to manufacture performance problems for Ms. Halstenberg where none existed going so far as to say that she made inappropriate comments about people from India (Tr. at 309). However when she was pressed on this issue she admitted that she never disciplined her for this alleged incident and perhaps even more telling claimed that she never even talked to her to say that's inappropriate claiming instead that she "was going to continue

to work the issues over time” (Tr. at 310). Ms. Mayes never talked to Ms. Halstenberg about this incident because it never happened. Ms. Mayes did reluctantly admit that she never wrote Ms. Halstenberg up for any performance issues but claimed that the reason for her not writing her up was that “she didn’t have time to” (Tr. at 218).

Ms. Gary, who had plenty of time to address any performance issues if they really existed, testified that she never gave Ms. Halstenberg any disciplinary actions, never placed anything negative in her personal file and never gave her any negative comments in her evaluations (Tr. at 161-162; Commission Exhibits 20, 21, 22). In fact, in the two performance evaluations that Ms. Gary did for Ms. Halstenberg she noted that she was “an excellent writer” and that she “did an excellent job keeping [her] informed of project status” and finally that she “did an excellent job bringing [her teammates] up to speed” (Commission Exhibits 21, 22). Ms. Gary’s evaluations of Ms. Halstenberg placed Ms. Mayes in the absurd position of trying to say that for Respondent the term “excellent” only means okay performance (Tr. at 215). The Court later questioned Ms. Mayes on this assertion after she herself said that Brian Harroff “was excellent at keeping everybody on track, making assignments um, helping people out” (Tr. at 236, 238). There Judge Johnson asked Ms. Mayes about her previous testimony that the term excellent doesn’t mean so much to which Ms. Mayes responded that outside of the performance appraisal write ups that the term excellent really did mean outstanding (Tr. at 238).

Ms. Mayes also tried to minimize Ms. Gary’s favorable comments about Ms. Halstenberg by saying that Ms. Gary was an easy rater (Tr. at 293). Ms. Gary testified that she was not an easy grader (Tr. at 162).

Ms. Mayes' credibility was also lacking on the mechanics and integrity of the FMP process. Ms. Mayes was asked if Ms. Halstenberg's scores changed during the course of the FMP and she responded "no" (Tr. at 220). She was then forced to look at versions of the FMP for October 6th and October 7th and forced to admit that the scores that Ms. Halstenberg had on October 6th were not the same scores that she had on October 7th (Tr. at 220- 221; Commission Exhibits 16, 17).

Ms. Mayes was also asked if Respondent had ever moved anyone to avoid their being FMPed and she again responded "no" (Tr. at 302). Ms. Gary had previously testified that Respondent had moved employees to protect them from the results of an FMP and produced an email and attached document which said "**March 2002** – Dean Hester told me that I needed to take the following people onto my team as Writers or they would be FMPed (they were currently testers, and were ranked at the bottom based on a skills list). 1. April Stull 2. Marianne Liska [sic] 3. CeCe Zimmerman 4. Kathylyne St Pierre 5. Jackie O'Keefe" (Tr. at 183, 185-186; Commission Exhibit 5, emphasis in original).

Ms. Mayes was specifically asked the following questions:

Ms. Badel: Um, Ms. Gary testified yesterday as to a time in 2002 when she was told to bring some employees into her group so that they would not be FMP'd – have you ever experienced that in your years at Lucent?

Ms. Mayes: No.

Ms. Badel: During the FMP that affected Ms. Halstenberg were you aware of anyone who was moved to a different position to avoid an FMP?

Ms. Mayes: No.

(Tr. at 302). The email containing the document was sent to Ms. Mayes by Ms. Gary with the note "I think this is what you need" (Commission Exhibit 5). Ms. Gary received another email

from Ms. Hazum which was copied to Ms. Mayes which said "In the meantime you and Diana and I need to set up a meeting to discuss your FMPs and possible transfers to deployment if anyone falls in this category (Tr. at 189; Commission Exhibit 42, pg 2). Despite this, Ms. Mayes testified that Ms. Gary's testimony on Respondent's moving someone to avoid an FMP was incorrect (Tr. at 302).

Perhaps the most disturbing credibility issue involving Ms. Mayes concerns her altering of an exhibit shortly before trial to make it appear as if Ms. Halstenberg and Ms. St. Pierre received the same percentage of raise for the fiscal year ending September 30, 2002, when they clearly did not (Tr. at 323-330; Commission Exhibit 51; Respondent's Exhibit 67). A comparison of Commission Exhibit 51 and Respondent's Exhibit 67 shows that on the previous version of the chart that Ms. Halstenberg received a 2.6% raise while Ms. St. Pierre only received a 2.5% raise but on the newer version it shows that both Ms. Halstenberg and Ms. St. Pierre received 2.6% raises (Commission Exhibit 51; Respondent's Exhibit 67). Ms. Mayes steadfastly refused to acknowledge that Ms. Halstenberg got the higher percentage raise until she was forced to take out a calculator and run the numbers which showed that Ms. Halstenberg received a 2.6178% raise while Ms. St. Pierre only received a 2.55591% raise (Tr. at 325-327). She then explained that she rounded Ms. Halstenberg's percentage down while she rounded Ms. St. Pierre's percentage up (Tr. at 327-328). While the mathematical difference may seem insignificant it speaks loudly about the credibility of the mathematician.

As the above demonstrates the testimony Ms. Mayes gave at crucial times during the hearing lacked credibility. Ms. Mayes was contradicted by Ms. Gary, by Respondent's own documents and by her own testimony. Accordingly, this Court should not find her assertion that Ms. Halstenberg's complaint did not play any role in how she assessed her credible.

Ms. Gary gave far more credible testimony than did Ms. Mayes, but on a few occasions when prompted, she too gave questionable testimony. When prompted by the question “you testified earlier today that Ms. Halstenberg was an excellent writer. Was she the best writer among the employees who reported to you in the messaging group?” she responded “No” (Tr. at 251). She was then asked who was the best writer and if there was anyone else that was exceptionally good and she answered Brian Harroff and Carol Layton (Tr. at 251). When confronted with Mr. Harroff and Ms. Layton’s performance evaluations, which she wrote, she acknowledged that she never wrote that they were good writers in the performance evaluations (Tr. at 258-259; Commission Exhibits 35, 36). Then when prompted by the question “Um, Ms. Gary in doing performance reviews to the individuals who reported to you in the messaging group, do you ever recall putting down a comment that someone was a good writer?” she replied, “In those that we reviewed today, I don’t believe I saw that in any of them” (Tr. at 260-216). However, when again confronted with a previous evaluation that she did and asked “If [she] could look at Commission Exhibit 21 and didn’t you say that Karen was an excellent writer?” she admitted “Yes I did in this evaluation” (Tr. at 261; Commission Exhibit 21).

On the issue of who made recommendations on who should be FMPed Ms. Gary also gave inconsistent testimony. Ms. Mayes said that Ms. Gary did not recommend to her which individuals should be FMP’d (Tr. at 243). Accordingly, Ms. Gary said that she did not tell Ms. Mayes which four individuals should be FMP’d (Tr. at 188). Ms. Gary was then confronted with her own document which said:

October 2003

During this time, I worked with Diana on the FMP list, based on the 2004 outlook, there was going to be a very large budget cut.

I recommended to Diana that the following people be FMP'd based on the Technical Writing skills assessment.

Casey Davis
April Stull
Marianne Liska
Karen Halstenberg

Diana used this information to make her final decision.

(Tr. at 188; Commission Exhibit 5, emphasis in original). After being confronted with this document the following questioning took place:

Mr. Schmidt: Okay. And in this document [Commission Exhibit 5] at the bottom, which you wrote by the way right?

Ms. Gary: Yes.

Mr. Schmidt: Okay. It says I recommended to Diana that the following people be FMP'd based on the technical writing skills assessment and then you listed Davis, Stull, Lisska and Halstenberg, correct?

Ms. Gary: Yes.

Mr. Schmidt: And during your deposition I asked you if you told Ms. Mayes which four individuals should be FMP'd and your answer was no, correct?

Ms. Gary: Correct.

Mr. Schmidt: Okay. And that answer was not accurate correct?

Ms. Gary: When I wrote this email summary that was way after the fact so whether I did or did not actually give her those four names, I don't remember.

(Tr. at 188).

As the above demonstrates Respondent's witnesses who contradicted one another and who were contradicted by Respondent's own documents lacked credibility. Accordingly, this Court should reject Ms. Mayes' assertion that Ms. Halstenberg's complaints of sex and age discrimination had no bearing on the scores that she was given on the skills assessment and determine that it was mere pretext to hide its retaliatory actions against Ms. Halstenberg who

dared to engage in protected activity. This is especially true given that Respondent's own documents and even Ms. Gary, their our witness, support Ms. Halstenberg's contention that prior to complaining about sex discrimination on September 15, 2003, she was consistently rated as one of their best employees and after complaining she was now ranked as their worst.

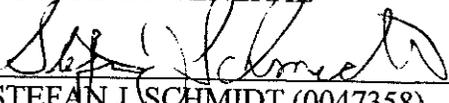
As the above demonstrates, Respondent's articulated reasons lacked credibility and were simply pretext for unlawful retaliation against Ms. Halstenberg. As the Supreme Court held in *St. Mary's Honor Center v. Hicks* (1993), 113 U.S. 2742, disbelief of an employer's proffered justification, in and of itself, can be sufficient to prove intentional discrimination.

V. CONCLUSION

The Commission has proved by reliable, probative, and substantial evidence that Respondent violated R.C. 4112.02(I) where it retaliated against Ms. Halstenberg for engaging in protected activities. Accordingly, it is respectfully requested that the Chief Administrative Law Judge recommend to the Ohio Civil Rights Commission that Ms. Halstenberg be awarded reinstatement to her former position with Respondent, back pay with statutory interest, and any other relief that the Chief Administrative Law Judge deems appropriate.

Respectfully submitted,

RICHARD CORDRAY
ATTORNEY GENERAL


STEFAN J. SCHMIDT (0047358)

Assistant Attorney General

Civil Rights Section

30 East Broad Street, 15th Floor

Columbus, Ohio 43215-3428

(614) 466-7181

stefan.schmidt@ohioattorneygeneral.gov

Counsel for the Ohio Civil Rights Commission

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

MARK GLASER

Complainant

v.

**HLS BONDING D/B/A
SMD/HLS BONDING COMPANY**

Respondent

Complaint No. 9496
(COL) 71053102 (29621) 081202
22A – A2 – 03805

**ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

**JIM PETRO
ATTORNEY GENERAL**

Stefan J. Schmidt, Esq.
Assistant Attorney General
Civil Rights Section
State Office Tower, 15th Floor
30 East Broad Street
Columbus, OH 43215-3428
614 – 466 – 7900

Counsel for the Commission

David A. Whitcomb, Esq.
William R. Post, Esq.
Baker & Hostetler
2100 Capital Square
65 East State Street
Columbus, OH 43215-4260
614 – 228 – 1541

Counsel for Respondent

ALJ'S REPORT BY:

Mark Glaser
5379 Ulry Road
Westerville, OH 43081

Complainant

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
1111 East Broad Street, Suite 301
Columbus, OH 43205-1379
614 – 466 – 6684

INTRODUCTION AND PROCEDURAL HISTORY

Mark Glaser (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on August 12, 2002.

The Commission investigated the charge and found probable cause that HLS Bonding LLC d/b/a SMD/HLS Bonding Company (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on April 10, 2003.

The Complaint alleged that Respondent changed Complainant's terms and conditions of employment, and terminated him, in retaliation for having engaged in activity protected by Revised Code 4112.02(I).

Respondent filed an Answer to the Complaint on June 6, 2003. Respondent admitted certain procedural allegations, but denied that it

engaged in any unlawful retaliatory practices. Respondent also pled affirmative defenses.¹

A public hearing was held on September 2, 2004 at the Ohio Civil Rights Commission's Central Office in Columbus, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (285 pages), exhibits admitted into evidence during the hearing, and the post-hearing briefs filed by the Commission on June 3, 2005, by Respondent on July 8, 2005, and a reply brief filed by the Commission on July 20, 2005.

¹ On September 5, 2003, Respondent filed a Motion for Summary Judgment, the Commission filed a Memorandum in Opposition on September 23, 2003, and Respondent filed a Reply on September 30, 2003. The Administrative Law Judge (ALJ) denied Respondent's Motion for Summary Judgment.

The Commission filed a Motion to Amend the Complaint on November 24, 2003, and Respondent filed a Memorandum in Opposition on December 9, 2003. The Commission's Motion to Amend was granted. Respondent filed an Amended Answer on January 24, 2004.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the ALJ's 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 August 12, 2002.

2. The Commission determined on April 10, 2003 that it was probable Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(I).

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

4. Respondent is a bail bonds business located at 571 South High Street in Columbus, Ohio.

5. Respondent is owned and operated by Harvey Handler (Handler) and Lowell Fox (Fox).

6. Complainant began his employment with Respondent on May 27, 1991, working as a part-time data clerk while he was still attending college.

7. After Complainant completed his undergraduate degree he became a licensed bail bondsman and began working full-time for Respondent.

8. Respondent also made Complainant the office manager. Complainant received a substantial pay raise that compensated him for the additional duties.

9. Complainant was responsible for keeping the books, which involved writing checks, paying bills, [including bills for health insurance premiums], making deposits, and doing most of the other internal office paperwork.

10. During Complainant's attendance at a Continuing Education Class in late 2001, he learned that if an employer provided health insurance, then it should be provided to all of its employees, not just some of the employees.

11. Complainant told Michael English (English), [the only African-American employee and Complainant's long-time friend and coworker], that it was "just not right" that Respondent was not giving him insurance benefits like they were for some of the other employees. Complainant recalls first telling English sometime in late November or early December 2001. (Tr. 88-89)

12. During a discussion that Complainant had with Handler regarding Complainant buying into the business, Complainant asked Handler when he was going to provide health insurance benefits to

English. Handler told Complainant that he (and Lowell) "could handle Mike English, don't worry about it". (Tr. 85-86)

13. English filed a charge of discrimination with the Commission on April 22, 2002. Complainant's name was listed on the charge as a Caucasian employee whose health insurance benefits were being paid for by Respondent.

14. On April 23, 2002, Handler was contacted by the Commission and informed that English had filed a charge of discrimination. (Tr. 19, 56-57)

15. By letter dated April 25, 2002 Respondent was notified English had filed a charge of discrimination.

16. A couple of days after English told Complainant that he had filed a charge of discrimination, Handler and Fox called Complainant into their office. They told Complainant that he was no longer going to be doing office manager duties and that Complainant needed to concentrate on his duties at the courthouse.

17. By memo dated May 3, 2002, regarding "New Employee Business Practices", the employees were apprised of new practices and policies:

Finally, and perhaps most unfortunately, current circumstances have caused us to determine that effective July 1, 2002, H.L.S. Bonding Company will no longer provide healthcare benefits for any employee, regardless of full-time or part-time status.

(Comm. Ex. 3)

18. By memo dated May 10, 2002, Complainant received a written job description. Under "Hours of Employment" and "Compensation" the memo set forth the following:

HOURS OF EMPLOYMENT

(...) The employee is expected to be at Arraignment Court during all scheduled arraignment court hours. All other employment hours are to be spent at the Employer's office doing necessary office work including writing bonds, answering telephones, verifying information, research and other reasonable and necessary office business required by the Employer.

COMPENSATION

Seven hundred dollars (\$700) a week payable weekly.

(Comm. Ex. 4)

19. On May 31, 2002, Complainant was terminated for cause.

The memo stated:

As a result of your recent conduct, including your unwillingness to carry out the responsibilities of your position, your refusal to comply with the terms of your Employment Contract and the May 10, 2002 memorandum, and your insubordination, your employment with H.L.S. Bonding Company is immediately terminated for cause.

(Comm. Ex. 10)

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.²

1. The Commission alleged in the Complaint that Respondent changed Complainant's terms and conditions of employment, and terminated him, in retaliation for having engaged in activity protected by R.C. 4112.02(I).

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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:

- (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.

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(I) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 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 retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973) 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. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, 116, (1981). 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.

6. 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. In this case, the Commission may establish a *prima facie* case of unlawful retaliation by proving that:

- (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 v. Atlantic Co., Inc., 80 FEP Cases 835 (6th Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

7. The retaliation provision under R.C. 4112.02(I) contains an opposition clause and a participation clause. Since courts have analyzed these clauses differently, it is important to focus on the nature of the alleged protected activity.

The distinction between employee activities protected by the participation clause and those protected by the opposition clause is important because federal courts have generally granted less protection for opposition than participation.

Aldridge v. Tougaloo College, 64 FEP Cases 708, 711 (S.D. Miss. 1994), *citing Brown v. Williamson Tobacco Co.*, 50 FEP Cases 365 (6th Cir. 1989).

Courts usually grant absolute protection for participation activities such as filing a discrimination charge, testifying in civil rights proceedings, or otherwise participating in such proceedings. *Proulx v. CitiBank*, 44 FEP Cases 371 (S.D. N.Y. 1987).

8. As a threshold matter, the Commission must prove that Complainant engaged in activity protected by R.C. 4112.02(I). A wide array of conduct, including verbal complaints to management, may constitute opposition to unlawful discrimination. See *Reed v. A.W. Lawrence & Co., Inc.*, 72 FEP Cases 1345 (2d Cir. 1996) (employee engaged in protected activity by complaining about a coworker's allegedly unlawful conduct to an officer of company and maintaining same complaint throughout internal investigation); *EEOC v. Hacienda Hotel*, 50 FEP Cases 877 (9th Cir. 1989) (employee engaged in protected activity when she complained to management about her supervisor's refusal to accommodate her religious beliefs). Employees engage in protected activity under the opposition clause when they oppose, in good faith, what they reasonably believed at the time was unlawful discrimination on the part of their employer.

It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful discriminatory practices, but also that his belief was *objectively* reasonable in light of the facts and record presented.

Little v. United Technologies, Carrier Transicold Div., 72 FEP Cases 1560, 1563 (11th Cir. 1997) (Emphasis added.).

An employee is engaged in protected activity if he or she opposes an employer's conduct that he or she has a good faith and reasonable belief is illegal.

EEOC v. Wilson Metal Casket Co., 58 FEP Cases 1523, 1528 (M.D. Tenn. 1992) (citations omitted).

9. In the instant case Respondent argues that it did not have knowledge of Complainant opposing a discriminatory practice or engaging in a protected activity prior to his termination.

10. The Commission, on the other hand, asserts that Respondent was aware of Complainant's opposition to discriminatory practices when he questioned Handler about when health insurance benefits were going to be provided to English. Additionally, the Commission asserts that Respondent was aware of Complainant's participation in the Commission's proceedings because Complainant's name was on the charge as one of the Caucasian employees who was receiving health insurance from Respondent.

11. Complainant testified that he attended a seminar in late 2001 where he learned that it was state law that if an employer was providing

insurance benefits to some of its employees then the benefits should be provided to all employees.

12. Complainant approached Handler about health insurance benefits and when they were going to be provided to English.³

13. English was the only African-American employee working for Respondent and Complainant was aware, through the payment of health insurance premiums, that English was not receiving health insurance from Respondent.

14. Because there was no express declaration to Handler or Fox by Complainant that he believed what was happening to English was because of his race, there is no legal support for the Commission's assertion.

³ Other than Handler and Fox, Complainant, as office manager, was the only other individual privy to which employees received health insurance from Respondent. Handler and Fox kept the employees' insurance records in locked file cabinets, and they kept the keys. (Tr. 108, 113)

15. Courts have consistently held that there is no “protected activity” when there is no discussion of or allegation of discriminatory conduct (see *Smith v. Wayne County Dept of Human Serv.*, 2003 Ohio App. LEXIS 386, *Jackson v. Champaign Nat'l. Bank & Trust Co.*, 2000 Ohio App. LEXIS 4390, *Gate v. Cincinnati Bell Telephone Co.*, 898 F. 2d 153 (6th Cir. 1990).

16. Complainant testified that the first time that he approached Handler about the issue he did not know why English was not receiving health insurance:

Q: Do you know why Mr. English wasn't offered health insurance benefits?

A: At that particular time, no, I really didn't know why. But after being in the – the room with Lowell and Mike English approaching Lowell about the – the banana issue, then my opinion changed.

(Tr. 86)

17. English testified that after he received the information from Complainant he asked Handler and Fox for health insurance benefits. Complainant testified that he was in the room with English and that he knew that English was wearing a hidden recording device.

18. After English approached Handler and Fox, Handler started writing the checks for the health insurance premiums.

19. Soon after Respondent received notice of the charge of discrimination dated April 23, 2002,⁴ wherein Complainant was listed as one of the Caucasian employees receiving health insurance, actions were taken to relieve Complainant of his duties as office manager, and Respondent reduced his salary.

20. Handler testified that Complainant had asked to be relieved of his duties sometime in early 2002 because he did not like to manage people. Complainant denied he asked to be relieved of his management duties.

21. I find Handler's testimony lacking in credibility because he admitted that he had asked Complainant to buy into the business in April of 2002, approximately one month before Complainant was terminated.

⁴ Handler testified that he was contacted by the Commission on April 23, 2002 and informed that English had filed a charge of discrimination against them. (Tr. 56-57)

(Tr. 70, 83) Both Handler and Fox testified under cross-examination that they would not let a bad employee become one of their partners. (Tr. 31, 69, 70, 71)

22. A reasonable inference can be drawn that Handler and Fox knew that Complainant participated in English's charge of discrimination from the following conduct:

- Complainant's questioning of Handler about English's receipt of health insurance benefits;
- English's request for health insurance benefits;
- Complainant's change in responsibilities regarding the writing of checks for health care premiums; and
- Complainant's name on the April 22, 2002 charge of discrimination.

I find that Respondents Handler and Fox were aware of Complainant's participation in English's charge of discrimination.

CAUSAL CONNECTION

23. In determining whether a causal connection exists, the proximity between the protected activity and the adverse employment action is often "telling." *Holland v. Jefferson Natl. Life Ins. Co.*, 50 FEP Cases 1215, 1221 (7th Cir. 1989), quoting *Reeder-Baker v. Lincoln Nat'l Corp.*, 42 FEP Cases 1567 (N.D. Ind. 1986). The closer the proximity between the protected activity and the adverse employment action, the stronger the inference of a causal connection becomes. See *Johnson v. Sullivan*, 57 FEP Cases 124 (7th Cir. 1991) (court held that plaintiff showed causal connection and established *prima facie* case of retaliation where plaintiff was discharged within days of filing a handicap and race discrimination lawsuit); *Waddell v. Small Tube Prods., Inc.*, 41 FEP Cases 988 (3d Cir. 1986) (court properly inferred retaliatory motive from evidence that defendant's decision to rehire plaintiff was rescinded one day after the defendant received notice that state FEP agency had dismissed plaintiff's charges of discrimination).

24. A causal connection may be established with evidence that the adverse employment action closely followed the protected activity. *Holland v. Jefferson National Life Ins. Co.*, 50 FEP Cases 1215 (7th Cir. 1989).

... a court may look to the temporal proximity of the adverse action to the protected activity to determine where there is a causal connection.

EEOC v. Avery Dennison Corp., 72 FEP Cases 1602, 1609 (6th Cir. 1997) (citation and quote within a quote omitted).

Temporal relationship between a plaintiff's participation in protected activities and a defendant's alleged retaliatory conduct is an important factor in establishing a causal connection.

Gonzales v. State of Ohio, Dept. of Taxation, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).

25. By memo dated May 3, 2002 to employees entitled "New Employee Benefits", Respondent stated the following in the first paragraph:

As a result of recent events, and in complying with the advice of our corporate counsel, we wanted to advise you that we will begin immediately implement(ing) [sic] certain new business practices that will affect all employee, both full time and part-time positions, regarding your employment at H.L.S. Bonding Company. (...)

Comm. Ex. 3

26. Respondent changed Complainant's job duties and reduced his pay pursuant to a memo dated May 10, 2002. (Comm. Ex. 4)

27. Handler testified that when he and Fox responded to English's charge of discrimination they became aware that there was an Ohio insurance law that requires small employers to offer insurance to all employees if they offered it to any employee. (Tr. 24) This testimony was offered as a reason for the May 3, 2002 memo wherein Respondent notified employees that it would no longer be paying for employee health insurance benefits. I find this testimony to lack credibility.

28. The testimony by Complainant was credible regarding his attending a seminar in late 2001 and finding out about the law related to health insurance benefits. Complainant's testimony that he approached Handler in late 2001 about when English was going to receive health care benefits is also credible.

29. Complainant's acquired knowledge (state law) became the catalyst for raising the issue to Handler. Handler's response to Complainant ["We can handle Mike English, don't worry about it."] and his

failure to take corrective action led Complainant to disclose information to English about who was and who was not receiving health insurance coverage. (Tr. 43-44)

30. The Commission having established a *prima facie* case, the burden of production shifted to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action. *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 of unlawful retaliation 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.

31. Respondent met its burden of production with the introduction of evidence that Complainant's job performance had declined and that Handler was threatened by Complainant's conduct during a meeting.

32. Respondent having met its burden of production, the Commission must prove that Respondent retaliated against Complainant because he engaged in protected activity. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for Complainant's discharge were not its true reasons, but were a "pretext for ... [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, quoting *Burdine*, 450 U.S. 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 was false, *and* that ... [unlawful retaliation] was the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

33. Thus, even if the Commission proves that Respondent's articulated reasons are 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 for the factfinder to answer ...[.]

Id., at 524, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, a victim of unlawful retaliation.

34. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for Complainant's termination. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that the reasons had no basis *in fact* or they were *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 reasons 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.⁵

Hicks, supra at 511, 62 FEP Cases at 100 (emphasis added).

35. I found Handler's testimony regarding the reasons for Complainant's termination to lack credibility. On cross-examination Handler could not be specific about having a conversation with Complainant about his declining job performance. In April of 2002 Handler asked Complainant about becoming a partner in the business, something he admitted he would not ask of an employee with poor performance.

36. English testified that on the day and time when Handler allegedly felt threatened by Complainant at the courthouse, Handler's outward demeanor did not indicate that he was feeling threatened or upset.⁶ (Tr. 45-46) I found English's testimony to be credible.

⁵ 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.

⁶ Complainant and English were on the fourth floor of the courthouse when Handler told Complainant that he wanted to talk to him. Handler and Complainant went to the ninth floor. After the discussion with Handler, Complainant went back to the office per Handler's instructions, and Handler returned to the fourth floor.

37. After a careful review of the entire record, the ALJ disbelieves the underlying reasons that Respondent articulated for Complainant's reduction in pay and discharge and concludes that, more likely than not, they were a pretext for unlawful retaliation.

38. These actions by Respondent constitute unlawful retaliation and entitle Complainant to relief as a matter of law.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 9496 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of office manager. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same

wage he would have been paid had he been employed as an office manager at the salary of \$800.00 per week on May 31, 2002 and continued to be so employed up to the date of Respondent's offer of employment; and

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the offer of employment a certified check payable to Complainant for the amount that he would have earned had he been employed as an office manager at the salary of \$800.00 per week on May 31, 2002 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits he would have received, less his interim earnings, plus interest at the maximum rate allowed by law.⁷



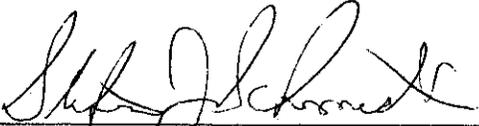
DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

July 31, 2006

⁷ Any ambiguity in the amount that Complainant would have earned during this period or benefits that he would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Post-Hearing Brief of the Ohio Civil Rights Commission* was sent by regular U.S. Mail to counsel for Respondent, Julie Badel, Epstein, Becker & Green, P.C., 150 North Michigan Avenue, 35th Floor, Chicago IL 60601-753; and upon Complainant, Karen Halstenberg, 164 Greenbank Road, Gahanna OH 43230-1773, this 13th day of May, 2010.



STEFAN J. SCHMIDT (0047358)
Assistant Attorney General
Civil Rights Section

STATE OF OHIO
CIVIL RIGHTS COMMISSION

KAREN HALSTENBERG,

Complainant,

vs.

LUCENT TECHNOLOGIES, INC.,

Respondent.

) COMPLAINT NO. 9847
)
) CHIEF ADMINISTRATIVE LAW JUDGE
) DENISE M. JOHNSON
)
)
)
)
)

REPLY BRIEF OF THE
OHIO CIVIL RIGHTS COMMISSION

RICHARD CORDRAY
ATTORNEY GENERAL

STEFAN J. SCHMIDT
Assistant Attorney General
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215-3428
Phone: (614) 466-7181
Fax: (614) 466-2437
stefan.schmidt@ohioattorneygeneral.gov

Counsel for Complainant
Ohio Civil Rights Commission

JULIE BADEL
Epstein, Becker & Green
150 N. Michigan Ave., 35th Floor
Chicago, IL 60601-7553
Phone: (312) 499-1418
Fax: (312) 845-1998
Email: jbadel@ebglaw.com

Counsel for Respondent
Lucent Technologies, Inc.

Received - Hearings:

July 6, 2010



On June 25, 2010, the Ohio Civil Rights Commission ("Commission") received Lucent Technologies, Inc.'s ("Respondent") Post-Hearing Brief, and does hereby reply.

Respondent's main argument appears to be that the Commission failed to establish a prima facie case of retaliation claiming that Karen Halstenberg did not engage in protected activity and further claiming that Denise Gary did not have knowledge of any alleged protected activity (Respondent's brief at 15). Respondent acknowledges that in order to establish a prima facie case of retaliation that the Commission must show that (1) the claimant engaged in protected activity, (2) the employer was aware that the claimant engaged in that activity, (3) the employer took an adverse employment action, and (4) there was a causal connection between the protected activity and the adverse action. *Id.*¹ Respondent argues that Ms. Halstenberg did not engage in protected activity when she called their internal EEO hotline on September 15, 2003, and left a message complaining about sex and age discrimination that she believed she was subjected to when a younger male received a position that she was being considered for.

Respondent argues that Ms. Halstenberg's internal complaint amounts to a vague charge of discrimination and cites several cases for the premise that a vague charge of discrimination is not enough to invoke the protections of Ohio's anti-retaliatory statute (Respondent's brief at 15-17). Respondent's assertion is not in accordance with recent U.S. Supreme Court precedence and the cases upon which it relies are clearly distinguishable. In *Crawford v. Metro. Govt. of Nashville and Davidson Cty., Tennessee* (2009), 129 S.Ct. 846, 172 L.Ed.2d 650, 2009 U.S. Lexis 870, the U.S. Supreme Court held an employee's filing of

¹ Respondent appears to concede the third and fourth prongs of the retaliation test in that Ms. Halstenberg suffered an adverse employment action when she was laid off and that there was a causal connection between the protected activity and the adverse employment action.

an internal complaint with an employer constitutes protected activity under the opposition clause of Title VII's anti-retaliatory provision. See also, *Hughes v. Miller* (Mar. 5, 2009), 181 Ohio App.3d 440; 2009 Ohio App. LEXIS 836. Accordingly, Ms. Halstenberg's filing of an internal complaint with Respondent's EEO hotline is protected activity under R.C. 4112.02(I).

Respondent's reliance upon lower authority is in error where the employees' actions in those cases only amounted to vague references of alleged discrimination because those cases are clearly distinguishable from the case at hand where Ms. Halstenberg filed an internal complaint with Respondent's EEO hotline. In *Coch v. GEM Industrial, Inc.*, (June 17, 2005), 2005 WL 1414454 (copy attached to Respondent's brief) the complainant merely held a conversation with the minority electrician regarding employees who had been on light duty which was later used in the employee's discrimination charge. In *Lockett v. Marsh USA, Inc.*, (Dec. 3, 2009), 2009 WL 4412326 (copy attached to Respondent's brief) the complainant wrote a report while doing another employee's performance review concluding that the employee had been discriminated against on the basis of her gender and national origin. *Id.* at 10. In *Fox v. Eagle Distributing Co., Inc.* (6th Cir. 2007), 510 F.3d 587, the complainant made a passing comment to a store manager that he was suing a previous store manager for \$10,000,000.00 and that it was something that would get their attention. *Id.* at 589. In *Edwards v. State of Ohio Dept. of Health*, Commission Complaint No. 5050, (copy attached to Respondent's brief) the complainant filed a grievance about a younger male employee talking disrespectfully to her and blocking her access to a doorway where there was no allegation that her gender or age, were the reasons for his actions. *Id.* at 5. In *Canady v. Rekau & Rekau, Inc.*, (Sept. 22, 2009), 2009 WL 3021764 (copy attached to Respondent's brief) the complainant only complained generally about job conditions without even alleging that they were due to a

protected class. Id at. 9-10. Finally, in *Valentine v. Westshore Primary Care Assoc.*, the complainant again only complained about not getting along with a co-worker with no allegations whatsoever of disparate treatment. Id. at 15-16. As these cases demonstrate they are factually dissimilar from the case sub judice where Ms. Halstenberg called Respondent's EEO hotline to complain that she was passed over for a position which was given to a younger male.

Respondent also argues that the Commission failed to establish a prima facie case of retaliation because "it failed to prove that Denise Gary was aware of a complaint about discrimination" (Respondent's brief at 17). This position is not supported by the facts in the record or by the law upon which they rely. The knowledge requirement found in the second prong of the retaliation test only requires that the decision maker have knowledge of the protected activity. Everyone involved in the decision making process does not have to have knowledge of the protected activity. *E.E.O.C. v. St. Michael Hosp. of Franciscan Sisters* (E.D. Wis. 1998), 6 F.Supp.2d 809, 823.

In this case, Ms. Mayes was the decision maker with input from Ms. Gary and there is no question that Ms. Mayes was aware of Ms. Halstenberg's participation in protected activity. (Tr. at 203; Commission Exhibit 8). Ms. Mayes was asked "How did you find out about the internal complaint?" and testified that "Therese Kierl-Allen called me." (Tr. at 203). When further asked "Isn't it true that you were told about Ms. Halstenberg's internal complaint the day it was filed?" she responded "I believe so." (Tr. at 203). Ms. Kierl-Allen's notes also clearly show that Ms. Mayes was contacted early on in the investigation (Commission Exhibit 8). Logic also dictates that Ms. Mayes would have been contacted about a position that Ms. Halstenberg was complaining about not receiving when Joel Gary, the individual Ms. Mayes

recommended for the position, was awarded the position (Tr. at 158, 198). Likewise, there is no credible argument that Ms. Gary was unaware of Ms. Halstenberg's participation in the protected activity. The following testimony shows that Ms. Gary was "certain" that she knew about Ms. Halstenberg's internal complaint on September 17, 2003:

Mr. Schmidt: And who did you hear that she filed the complaint with?

Ms. Gary: I was contacted by a um EO investigator. ***

Mr. Schmidt: And isn't it true that you were contacted during the investigation of Ms. Halstenberg's complaint on or about September 17th, 2003?

Ms. Gary: I do not know if that was the date.

Mr. Schmidt: Do you remember me taking your deposition?

Ms. Gary: Yes sir. ***

Mr. Schmidt: And starting on ... I guess in order for it to make sense, I asked you the question does that refresh your recollection as to when you talked to this individual and then you responded well I don't see any date next to my name so I'm not sure if that 9/17 applies to my name or not. And then I asked you do you think it was on or about September 17th and how did you respond there? ***

Ms. Gary: I said I'm sure or it was on or about. So I didn't say that it was on that day. I said it was on or about that day.

Mr. Schmidt: Well don't the words that you say there are I'm sure. I feel certain that it was on or about?

Ms. Gary: It was on or about.

Mr. Schmidt: And you said I feel certain, correct?

Ms. Gary: Yes sir.

(Tr. at 158-160). Likewise, Ms. Kierl-Allen's notes also indicate that Ms. Gary was spoken to (Commission Exhibit 8). Finally, logic also dictates that Ms. Kierl-Allen in investigating why Mr. Gary received the position over Ms. Halstenberg would not have only talked to the

individual who recommended Mr. Gary, Ms. Mayes, but also to the individual who recommended Ms. Halstenberg, Ms. Gary (Tr. at 173, 253; Commission Exhibit 23).

Respondent also argues that Ms. Halstenberg's previous complaints of sex and age discrimination in 1998 and April of 2003 are too far removed to be the causal connection to her layoff announcement in October of 2003 (Respondent's brief at 18-19). Respondent's argument fails to understand that the Commission is not arguing that Ms. Halstenberg's previous stands against sex and age discrimination in 1998 or April of 2003 were the trigger that led to her being laid off in October. The trigger to Ms. Halstenberg being placed on the layoff list in early October 2003 was her filing an internal complaint of sex and age discrimination with Respondent's EEO hotline on September 15, 2003. The earlier references to Ms. Halstenberg's complaints of discrimination were introduced to show that Respondent knew that Ms. Halstenberg was a complainer as Ms. Mayes testified to (Tr. at 244).

Respondent also erroneously argues that "asking a former employee to return company property cannot constitute an adverse employment action" (Respondent's brief at 20). Asking an employee to return equipment which they were previously told that they could keep is evidence of further retaliatory behavior where the demand comes shortly on the heels of the employee's continued complaints of discrimination (Tr. at 90-91). Likewise, Respondent's demanding Ms. Halstenberg to return equipment that she had previously returned or to produce files that she did not have while threatening to withhold her final paycheck until she did shows that Respondent was still looking for ways to punish Ms. Halstenberg for continuing to exercise her rights and an attempt to force her to sign the waiver and take whatever severance pay they were offering (Tr. at 93-95). Interestingly, Respondent does not even attempt to refute Ms. Halstenberg's assertions that she was given permission to keep the equipment that

she had or that she was being asked to produce files that she was not responsible for (Tr. at 90-95).

Perhaps the greatest flaw in Respondent's brief is their assertion that it was Ms. Halstenberg's performance rating of 3, which they maintain was an indication of average performance, that led to her being laid off (Respondent's brief at 2, 3, 8, 10, 12, 21, 22, 23, 28). If Respondent's argument were true there would have been no need for a skills assessment and layoffs would have been based on an employee's previous performance rating. Respondent's previous layoffs refute their assertion that an employee's annual performance rating was indicative of their susceptibility to being laid off (Tr. at 51; Commission Exhibit 15). Ms. Halstenberg, along with approximately 70% of Respondent's employees had a performance rating of 3 when she received a skills assessment score of 1.8 in December of 2001, and a 1.88 in October of 2002 (Tr. at 51; Commission Exhibit pgs. 3, 5; Respondent's Exhibit 36). More importantly however Ms. Halstenberg had that same performance rating of 3 when she received a skills assessment of 1, the best an employee could get, in the April 2003, lay off (Tr. at 26, 49, 180; Reyes at 114; Commission Exhibit 15, pg. 2; Respondent's Exhibit 36).

Respondent's desire to minimize the importance of the skills assessment process is understandable given that they can not credibly explain what happened between April and October of 2003 to explain how Ms. Halstenberg's performance went from a 1 on the skills assessment, the best score you could get, to a 2.75, the worst that anyone received (Tr. at 26, 180; Reyes at 114; Commission Exhibit 15 pgs 2, 7). The obvious answer as to what happened between April and October is that Ms. Halstenberg filed an internal EEO complaint alleging sex and age discrimination in September (Tr. at 24, 158-160, 202; Reyes at 55, 74-75, 80;

Commission Exhibit 8). Respondent's attempt to explain this away by claiming that Ms. Gary was a much more lenient grader than Ms. Mayes is refuted by the fact that Ms. Gary had input into the assessment and did not comment on the fact that approximately five months before she was giving Ms. Halstenberg the highest score possible now she was agreeing that she deserved the lowest score of anyone (Tr. at 28, 180; Reyes at 114; Commission Exhibit 15 pgs 2, 7). Respondent's emphasis on the previous performance rating as opposed to the previous skills assessment is simply an argument they concocted when they were unable to explain away the April 2003 skills assessment much like their newfound assertion that Ms. Halstenberg's September 15, 2003, internal EEO complaint was merely "a way to insulate herself from the upcoming FMP" (Respondent's brief at 3, 9).

Respondent argues that the Commission has shown no evidence of pretext to refute its argument that Ms. Halstenberg was simply laid off as the result of a skills assessment and that her internal complaints of sex and age discrimination had nothing to do with its decision (Respondent's brief at 20-21). Respondent's argument fails to acknowledge or address the evidence presented by the Commission during the hearing which shows that the scores that Ms. Halstenberg was given on the October skills assessment were not accurate and were simply pretext to hide their discriminatory motives.

As previously stated, the most striking evidence of pretext is that less than six months before she was skills assessed as having the lowest skills assessment of anyone she was skills assessed as having the best skills assessment possible (Tr. at 26, 180; Reyes at 114; Commission Exhibit 15 pgs 2, 7). Respondent tries to explain away this inconsistency in a single paragraph where they assert that Ms. Halstenberg's skills assessment score of 1 is inconsistent with earlier skills assessments and insinuate that it did not accurately reflect Ms.

Gary's assessment (Respondent's brief at 22-23). Ms. Halstenberg's skills assessment score of 1 is consistent with her previous skills assessment scores of 1.8 and 1.88, and it is the 2.75 score that represents a wild deviation from the previous scores (Commission Exhibit 15, pgs 2, 3, 5). Likewise, Respondent's assertion that Ms. Halstenberg's skills assessment score of 1 is just another in a series of mistakes to explain everything from why their December 12, 2003, letter had typos in it to their electronic recordkeeping system not being accurate is simply not believable (Respondent's brief at 7, 13, 14, 15, 22, 25, 26).

The pretextual nature of the 2.75 skills assessment score is also shown by the performance evaluations that Ms. Halstenberg received which said that she met or exceeded expectations and described her as being "an excellent writer," "highly respected among her peers" and "very, very knowledgeable" (Tr. at 26-30, 161; Commission Exhibits 20, 21, 22). Respondent attempts to belittle these evaluations by again claiming that the word excellent does not really mean excellent and creating a chart which shows that two other employees besides Ms. Halstenberg, Brian Harroff and Mike Mayville, had the word excellent written in their performance evaluations (Respondent's brief at 4, 26-27). Respondent in its brief then trivializes the word "excellent" by saying that it was just a superlative "used in the written appraisal, where language was selected to motivate employees" (Respondent's brief at 4). However, its charts show that Mr. Harroff and Mr. Mayville, the only two other employees with the word excellent in their reviews, were among the highest ranked employees in the October 2003 skills assessment and in the 2002 performance rating (Respondent's charts on pgs 8 and 27 of its brief).

Finally, the pretextual nature of the 2.75 skills assessment score is also shown by Ms. Gary's recommendation of Ms. Halstenberg for a project manager only a few weeks before she

was involved in a skills assessment that rated her as the worst employee (Tr. at 22, 44-45, 122, 173, 253). In her recommendation, Ms. Gary told her supervisors that Ms. Halstenberg was an “excellent project manager” yet a few weeks later she was agreeing that she was the worst employee in messaging (Tr. at 22, 46, 173-174, 214-215; Reyes at 151; Commission Exhibit 23). Respondent again attempts to trivialize Ms. Gary’s recommendation by arguing that “[n]o one else in Gary’s group expressed any interest in the position.” (Respondent’s brief at 4). In reality, it was Ms. Gary who approached Ms. Halstenberg because she felt that she “had the aptitude to do the job” and testified that none of the other messaging writers “would be a good project manager” (Tr. at 253).

As the above demonstrates there was reliable, probative and substantial evidence presented by the Commission during the hearing showing that Respondent’s articulated reason for laying Ms. Halstenberg off, a low score on the skills assessment, was pretext to hide their retaliation of Ms. Halstenberg for her engaging in protected activities. In trying to explain away the evidence which the Commission presented Respondent asserts that all the evidence contra was just a series of mistakes in an unwieldy layoff process (Respondent’s brief at 7, 13, 14, 15, 22, 25, 26). Respondent argues that the spreadsheets for the skills assessment were never changed by Ms. Mayes, and that she only “realized that there were errors in the spreadsheet” and that “one employee was misclassified (Respondent’s brief at 7, 25). Respondent claims that the higher ratings that Ms. Reyes initially noted in the December 12, 2003, letter that she and Don Medeiros reviewed were the result of typographical errors (Respondent’s brief at 13). Respondent asserts that Ms. Reyes’ errors were the result of “a smidgen of ink” and that she also simply “skipped the first 3 altogether” (Respondent’s brief at 14). Respondent offered no explanation for why Mr. Medeiros missed the multiple errors in

his review of the letter. Respondent argues and Ms. Reyes testified that Respondent's tracking system was obviously not accurate when it noted that she only spent 42 minutes investigating Ms. Halstenberg's allegations (Respondent's brief at 15; Reyes at 54, 175-176). Finally, Respondent argues that its last minute changes to the raise comparison chart were simply the result of a rounding error (Respondent's brief at 26). Respondent's assertion that its skills assessment process was plagued with mistakes and innocent errors is simply not believable and further evidence of its discriminatory intent.

Finally, Respondent asserts that Ms. Halstenberg did not refute any of the assertions of her alleged performance problems (Respondent's brief at 24). Respondent's assertion is simply incorrect and not only did she give specific examples of her work performance and qualifications which showed that she did not have the alleged performance problems she specifically noted that the April 2003 skills assessment, her most recent evaluations and Ms. Gary's August 2003 recommendation of her for the project manager position all supported her assertion that she was one of Respondent's best employees. Ms. Halstenberg's testimony was also supported by the testimony of Ms. Czikra, the most unbiased of any of the witnesses that either of the parties presented, who testified that Ms. Halstenberg was "fantastic" and made her job very easy (Tr. at 135, 143, 145, 147).

As has been demonstrated above and in the Commission's Post-Hearing Brief, the Commission has proved by reliable, probative and substantial evidence that the Respondent retaliated against Ms. Halstenberg for engaging in protected activity in violation of R.C. 4112.02(I) and that Respondent's arguments to the contrary are mere pretext. Accordingly, it is respectfully requested that the Chief Administrative Law Judge recommend to the Ohio Civil Rights Commission that Respondent be ordered to stop retaliating against its employees

and that Ms. Halstenberg be awarded reinstatement to her former position with Respondent, back pay with statutory interest, and any other relief that the Chief Administrative Law Judge deems appropriate.

Respectfully submitted,

RICHARD CORDRAY
ATTORNEY GENERAL



STEFAN J. SCHMIDT (0047358)

Assistant Attorney General

Civil Rights Section

30 East Broad Street, 15th Floor

Columbus, Ohio 43215-3428

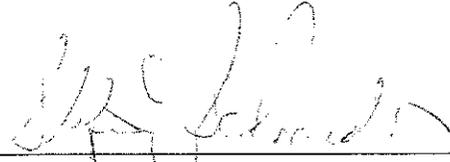
(614) 466-7181

stefan.schmidt@ohioattorneygeneral.gov

Counsel for the Ohio Civil Rights Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of the Ohio Civil Rights Commission* was sent by regular U.S. Mail to counsel for Respondent, Julie Badel, Epstein, Becker & Green, P.C., 150 North Michigan Avenue, 35th Floor, Chicago IL 60601-753; and to Complainant, Karen Halstenberg, 164 Greenbank Road, Gahanna OH 43230-1773, this 6th day of July, 2010.



STEFAN J. SCHMIDT (0047358)
Assistant Attorney General
Civil Rights Section

Respondent's
Response
To
Objections

STATE OF OHIO
CIVIL RIGHTS COMMISSION

OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

KAREN HALSTENBERG,

)

)

Complainant,

)

COMPLAINT NO. 9847

)

(COL) 7111192003 (30988) 03232004

)

22A-2004-01799C

vs.

)

CHIEF ADMINISTRATIVE LAW JUDGE

)

DENISE M. JOHNSON

LUCENT TECHNOLOGIES, INC.,

)

)

Respondent.

)

**RESPONDENT'S MOTION FOR AN EXTENSION OF TIME
TO RESPOND TO COMPLAINANT'S OBJECTIONS
TO THE CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS
OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

Respondent, Lucent Technologies Inc., by its attorneys EPSTEIN BECKER & GREEN, P.C., moves the Commission for an extension of time until October 18, 2012 to respond to the objections filed by the complainant on September 20, 2012. In support of the motion, Respondent states as follows.

1. Complainant, Karen Halstenberg (now Jorgensen), filed objections to the Chief Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation on September 20, 2012. These objections consist of 25 pages of single spaced material.
2. Pursuant to section 4112-3-09(B) of the Ohio Administrative Code, responses to objections must be filed within fourteen days of the date the objections were served. As a result, Respondent's response to Complainant's objections is due on October 4, 2012.
3. The undersigned counsel for the Respondent who is responsible for preparing the response to those objections currently has the following matters to attend to in the

next two weeks: depositions scheduled on September 26 and October 2 (both of which require preparation time), responses to written discovery due, meetings scheduled on September 21 and October 1 and an out of town Board of Trustees meeting to attend between September 25 and 28 in addition to routine daily matters.

4. As a result, Respondent's counsel cannot adequately prepare a response to 25 pages of objections by October 4, 2012.

WHEREFORE, Respondent prays that the Commission grant it an extension of time to respond to Complainant's objection until October 18, 2012.

LUCENT TECHNOLOGIES INC.

By: 
One of its attorneys

Julie Badel
EPSTEIN BECKER & GREEN, P.C.
150 N. Michigan Ave. – 35th Floor
Chicago, Illinois 60601
312-499-1418/312-845-1998 (facsimile)
jbadel@ebglaw.com

Dated: September 21, 2012

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she served the foregoing motion for an extension of time this 21st day of September 2012 via facsimile on:

Desmon Martin
Director of Enforcement and Compliant
Ohio Civil Rights Commission
State Office Tower – 5th Floor
30 E. Broad St.
Columbus, Ohio 43215-3414
614-644-8776

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower – 5th Floor
30 E. Broad St.
Columbus, Ohio 43215-3414
614-644-8776

And served the motion via email on:

Karen Halstenberg Jorgensen
164 Greenbank Rd.
Gahanna, Ohio 43230-1773
kmhjorgensen@att.net

Stegan J. Schmidt, Esq.
Assistant Attorney General
Civil Rights Section
State Office Tower – 15th Floor
30 E. Broad St.
Columbus, Ohio 43215-3428
sschmidt@ag.state.oh.us



Julie Badel

Response
To
Objections

INTRODUCTION

Complainant's list of objections ignores the fact that she was never anything other than an average performer, and all of the employees terminated in the same work force reduction or "force management program" ("FMP") that ended her employment were rated as average performers on their last performance appraisal, just as she was. She has no evidence that her ratings on the skills assessment that resulted in her inclusion in the FMP was pretextual and that the real reason for her rating was retaliation. The Commission should approve the written report and recommendations of the Chief Administrative Law Judge. For a complete recitation of the facts, please see the Respondent's Post Hearing Brief, dated June 25, 2010.

Complainant's objections to the Judge's Findings of Fact are meritless

Although Complainant cites lengthy portions of the transcript and exhibits, with the inconsequential exceptions noted below, she has not pointed to any error in the Chief Administrative Law Judge's findings of fact ("ALJ FOF"). The minor discrepancies between the Judge's findings and the evidence, noted below in connection with findings of fact 43 and 47, do not warrant disturbing the Chief Administrative Law Judge's conclusions, which are correct and fully supported by the credible evidence.

In the final analysis, the Complainant simply disagrees with the decision to terminate her and with the skills assessment that resulted in that decision. But there is no evidence whatsoever to indicate that the decision was in retaliation for her earlier complaints. She has pointed to no error to justify reversing the Chief Administrative Law Judge's decision. This matter has been fully and fairly litigated since Complainant's termination in 2003. Both parties should now be able to put this matter behind them.

Finding of Fact ¶8

Complainant quarrels with the Chief Administrative Law Judge's finding that she was a technical writer (Cp. Obj. at 3), but that finding is based on her own testimony. (Tr. 20)

Finding of Fact ¶15

Complainant disputes the finding that she was rated as "meeting expectations" in June 2003 but offers no facts to dispute this finding. The Chief Administrative Law Judge correctly noted that Complainant's mid-year review, signed in June 2003, indicated she met or exceeded all of her objectives. (Tr. 38, 253, Resp. Ex. 37) Complainant's objections merely cite a portion of Diana Mayes' (Complainant's last supervisor) testimony in which she agreed there were no negative comments in that review (Tr. 215-16), which was completed by Complainant's prior supervisor, Denise Gary. (Resp. Ex. 37) Nevertheless, Denise Gary rated Complainant's performance the lowest among all the employees she supervised. (Reyes Dep. at 17-18) As Respondent has consistently pointed out, Complainant *for years* was rated a "3" in terms of her performance, which means "average" or fully meets expectations. (Tr. 112-13, 252, Reyes Dep. at 146) The five employees in Complainant's department ranked lowest in the skills assessment in October 2003 all were rated a "3" or average on their last performance rating. (Resp. Ex. 18, 20, 22, 24, 27, 29, 31, 33, 36)

Finding of Fact ¶17

The selection of Joel Gary for a project manager's position in the fall of 2003 that Complainant coveted is not at issue in this case, and Complainant points to no error in the Chief Administrative Law Judge's finding of fact 17, that Denise Gary recommended Complainant for the project manager's position because Complainant expressed an interest in the position, and Denise Gary believed she possessed an aptitude for it. (Tr. 253)

Findings of Fact ¶20, 22

Complainant's objections seems to focus on the Judge's omission of the precise date she and others were transferred out of Denise Gary's group, presumably to stress the short time her new supervisor, Diana Mayes, supervised her prior to the skills assessment. However, the length of time that Diana Mayes supervised the Complainant after she and the other writers transferred into Mayes' group in August 2003 (ALJ FOF 20, 22, Cp. Obj. at 4) was exactly the same amount of time that Mayes supervised the other employees she assessed for purposes of the October 2003 FMP.

Finding of Fact ¶36

Complainant propounds no facts to reflect any error in the Chief Administrative Law Judge's finding that three other employees from messaging were equally affected by the FMP. (ALJ FOF 36) In fact, the four employees with the lowest rankings on the skills assessment were slated for termination. Each of these employees were rated "3" or average on his or her last performance appraisal. (Resp. Ex. 16, 18, 20, 22, 24, 27, 29, 31, 33, 36)

Findings of Fact ¶39, 44

Complainant's objection that the Chief Administrative Law Judge did not reflect that Yssis Reyes, a former Lucent employee who investigated Complainant's complaint about her termination, did not remain in Lucent's EO/AA group after the first half of 2004 (ALJ FOF 39, 44, Reyes Dep. at 180) focuses on a totally irrelevant issue. (Cp. Obj. at 5-9) Equally immaterial is Complainant's objection to finding of fact 44, that Reyes called Complainant on November 24, 2003 to tell her she was looking into her allegations. (ALJ FOF 44, Cp. Obj. at 12) This is not inconsistent with Reyes' email to Complainant on November 18, 2003 stating, "I've completed **most** of the investigation. . . ." (Comm. Ex. 12)(emphasis added) Given that

Yssis Reyes was investigating Complainant's complaint about her discharge, it hardly seem apropos for Complainant to quarrel with the fact that Reyes did not respond to her question about what David Prestly [sic] based his assessment on when he decided that Complainant was less qualified for the project manager's job than Joel Gary. (Cp. Obj. at 9)

Finding of Fact ¶42

Similarly, Complainant's quarrel with the finding (ALJ FOF 42) that Don Madeiros provided Reyes with information on why Joel Gary was more qualified for the project manager's job is irrelevant, as that was not the complaint Reyes was investigating, nor is it the basis for this claim. In fact, Madeiros told her that Joel Gary had done that type of work in another part of the organization and was familiar with the process and tool. (Reyes Dep. at 19)

Findings of Fact ¶43

Although there is a technical error in the Chief Administrative Law Judge's finding of fact 43, it is clear from her finding of fact 31 that she correctly assessed the situation. The Judge's finding of fact 43 states that "Madieros told Reyes that Denise and Joel Gary were not on the same project team, nor did Denise Gary have anything to do with Complainant's FMP appraisal. (Reyes Dep., p. 22)" In fact, Yssis Reyes testified in her deposition that Madeiros told her that "Denise (Gary) reported to him (Don Madeiros) and that they had no involvement on the same project team or she had no say in **his** (Joel's) performance appraisal either." (Reyes Dep. at 22)(emphasis added)

However, the Judge clearly reflected in her finding of fact 31 that Denise Gary had input into the Complainant's skills assessment for the FMP when she stated, "Mayes told her IP&T team, which included Complainant, there was going to be an upcoming FMP. Mayes decided to ask Denise Gary for input because Denise Gary had previously managed the team." (ALJ FOF

31, Tr. 206) Thus, all of the evidence that Denise Gary reviewed and agreed with the skills assessments done by Diana Mayes is correct. (Tr. 177-8, 275) Even though Denise Gary had input into the skills assessment, neither she nor her husband, Joel, had anything to gain by the termination of Karen Halstenberg. (Tr. 257)

Findings of Fact ¶45, 46, 48

Complainant's objections focus on the error made by Lucent's internal investigator, Yssis Reyes, in a letter on December 12, 2003, responding to Complainant's complaint. That letter also found that retaliation did not play any role in Complainant's inclusion in the FMP and that Joel Gary's selection for the project manager role was not based on familial ties. (See Resp. Ex. 3, Reyes Dep. at 26, ALJ FOF 45) Reyes' testimony fully and credibly explains her error.

In her December 12 letter, Reyes incorrectly stated that Complainant had a score of "1" in communication skills on the skills assessment that resulted in her termination. Complainant's correct score for communication was "3." The highest ratings on the skills assessment was "1," and the lowest rating, "3." (Tr. 276) The Judge reflected the fact that the letter erroneously showed Complainant's communications score as "1" in her finding of fact 46 and cited to Reyes' deposition at page 26. While Reyes explained at page 26 of her deposition that there was a typo in the December 12, 2003 letter, she later explained that the printout of the force management tool reflected a skill average for Complainant of 2.75 and scores of 3 (communications), 3, 3 and 2 in the criteria that were assessed. (Reyes Dep. at 30-31, Resp. Ex. 6) Reyes explained that when she printed the page from Lucent's computerized force management tool in portrait format, it cut off a portion of the information on the right side of the page, so it looked like this when it was printed:

Skill Name	1
Communications Skills, Written and Verbal	3
Doc & Training Development	3
relationship mgmt. [sic]	3
Technical/Function Skills	2

(Reyes Dep. at 30-31, Resp. Ex. 6) The “1” for communications was a smidgen of ink (*id.*) that did not correspond to any skill. (Reyes Dep. at 133) In addition to mistakenly reflecting the score on the first skill as a “1” instead of a “3,” Reyes also skipped the first 3 altogether in her letter to Halstenberg. (Reyes Dep. at 134) When Reyes printed the scores in landscape format, the portion containing the words “skill name” had highlighting which did not appear in the portrait version. (Reyes Dep. at 31-31, 129, Resp. Ex. 7)

Complainant’s suggestion that Reyes somehow made up the score for Complainant’s FMP assessment when she hand wrote the scores on a printout of the FMP tool (Cp. Obj. at 16) finds no support in the record. The numbers that Reyes wrote on Complainant’s FMP tool (Resp. Ex. 6) show exactly the same scores for Complainant as every other document that summarizes the FMP ratings. (Resp. Ex. 7, 15, 16, 17, Comm. Ex. 3) In addition, Reyes did not possess the ability to change the numbers in the computer system. (Reyes Dep. at 34)

Complainant’s ratings did not change during the course of her being rated for purposes of the FMP. (*See* Cp. Obj. at 19) When Diana Mayes’ supervisor sent her the initial spreadsheet on which she was to rate the employees, that spreadsheet was incorrectly formatted. She recognized that the document was incorrect because messaging writers already had ratings, employees had ratings of “4” when the only possible ratings were 1, 2 and 3, and one employee was misclassified. (Tr. 220-221, 223, 273-4, Resp. Ex. 13, Comm. Ex. 16, 17)

The scores for one employee, Jerry Smith, did change, however. After the five lowest ranked employees were selected for termination in the FMP, Mayes learned that another employee, Carol Layton, likely was going to resign from the company. As a result, only four employees had to be terminated. (Tr. 222, Comm. Ex. 19) The employees ranked fourth and fifth from the bottom, Jerry Smith and Marianne Lisska, had the same score on the skills assessment of 2.50. (Tr. 222, 282-3, Resp. Ex. 17, 18) Mayes revised Smith's score upward to 2.25 in order to retain him (Tr. 222, 283, Resp. Ex. 17, Comm. Ex. 19), and four employees were FMP'd in October 2003, including Complainant. (Tr. 283-4)

Finding of Fact ¶47

This finding contains a typographical error. Complainant responded to Reyes' letter on January 9, 2004, and pointed out that the scores listed in Reyes' letter did not add up to the correct total. The Judge's finding of fact number 47 contains a typo by stating that this letter indicated the scores provided by Reyes were "correct" (ALJ FOF 47), while Complainant's letter clearly indicates they were "incorrect." (Resp. Ex. 4)

The Judge correctly reflected that following her investigation, Yssis Reyes concluded that Complainant was not retaliated against or the victim of age or gender discrimination when Respondent filled the project manager position. (ALJ FOF 49) The Complainant cannot dispute that Reyes reached this conclusion. (See Cp. Obj. at 22)

Complainant has pointed to no errors of law

1. Conclusions of Law ¶23

Complainant's major objection seems to be that she was rated too low in the October 2003 skills assessment that resulted in her termination. She argues that because she was rated better in earlier skills assessments, the October 2003 assessment was incorrect. However,

Complainant was rated on different skills in October 2003, resulting in her overall average of 2.75, than she was in connection with previous FMPs. (Tr. 220) The skills on which she was rated in October 2003 were: (1) communication, (2) relationship management, (3) technical expertise and (4) documentation and/or training delivery. (Tr. 274, Resp. Ex. 14) When complainant's supervisor, Diana Mayes, assessed employees' skills for purposes of the October 2003 FMP, she looked at the definition of each of the skills, thought about how each of the employees possessed those skills and rated the employees accordingly. (Tr. 229)

The skills rated in an FMP were those that the organization needed going forward (Reyes Dep. 14); so the skills rated for purposes of the October 2003 FMP were different than the skills rated for purposes of the FMP in April 2003. (Reyes Dep. at 113-4, Comm. Ex. 15 at LUC 01100) In April 2003, the Complainant was rated on five skills: (1) information development skills, (2) initiative and teamwork, (3) leadership skills, (4) problem solving, (5) product knowledge and (6) productivity. (Comm. Ex. 15 at LUC 01100) With respect to her uncharacteristically high rating of "1" on the April 2003 skills assessment, her supervisor at the time, Denise Gary, provided the input for that assessment to her own supervisor, but she did not actually input the information into the computer. Gary never saw the skills assessment with the "1" rating until this litigation, and she does not understand how an employee with a performance rating of "3" or average could have a skills assessment of "1," the highest rating. (Tr. 191-2)

Nothing in the record supports Complainant's argument that the skill category of "information development skills" included in the April 2003 assessment was equivalent to "documentation training and development" on which she was rated in October 2003. (Compl. Objections at 1)¹ In addition to being rated on different skills, the Complainant was rated against

¹ Nothing in the record reflects the definitions of the skills on which Complainant was rated in April 2003 or any earlier skills assessment.

different individuals. (Reyes Dep. at (114-5) Furthermore, due to the series of workforce reductions at Lucent, employees' skill ratings changed during the time they were employed, as they may have been in different organizations with different sets of peers and managers when the assessments took place. (Reyes Dep. at 119) Finally, the poorest performers were terminated in every FMP, so as time wore on, better and better employees fell to the bottom of the stack. (Reyes Dep. at 112)

Complainant apparently misunderstands the burden of proof in discrimination and retaliation cases. The Judge in this case concluded that Complainant engaged in protected activity when she complained about Joel Gary getting the project manager's position on September 15, 2003. (ALJ FOF 13) The judge then concluded that because Complainant engaged in protected activity, of which the Respondent was aware, and she was subjected to an adverse employment action a month later, the Commission established a *prima facie* case of retaliation. (ALJ COL 17) The Judge further concluded that Respondent articulated a legitimate non-discriminatory reason for Complainant's termination, her low scores on the skills assessment. (ALJ COL 18) *See Coch v. GEM Industrial, Inc.*, No. L-04-1357, 2005 WL 1414454 at *5-6 (Ohio App. 6 Dist. June 17, 2005)(once the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for its actions). Because the Commission could not show that Respondent's articulated reason for its actions was pretextual, the Judge concluded that no unlawful retaliation occurred.

CONCLUSION

The findings of fact were based on the Chief Administrative law Judge's assessment of the credibility of the witnesses who testified before her in this matter. (ALJ FOF at 3) There is

no reason to disturb those findings or her conclusions, and the Commission should approve the written report and recommendation of the Chief Administrative Law Judge and dismiss this case.

LUCENT TECHNOLOGIES INC.

By: 
One of its attorneys

Julie Badel
EPSTEIN BECKER & GREEN, P.C.
150 N. Michigan Ave. – 35th Floor
Chicago, Illinois 60601
312-499-1418/312-845-1998 (facsimile)
jbadel@ebglaw.com

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she served the foregoing response to Complainant's objections this 3rd day of October 2012 via facsimile and Federal Express on:

Desmon Martin
Director of Enforcement and Compliance
Ohio Civil Rights Commission
State Office Tower – 5th Floor
30 E. Broad St.
Columbus, Ohio 43215-3414
614-644-8776 (facsimile)

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower – 5th Floor
30 E. Broad St.
Columbus, Ohio 43215-3414
614-644-8776 (facsimile)

And served the response via email on:

Karen Halstenberg Jorgensen
164 Greenbank Rd.
Gahanna, Ohio 43230-1773
kmhjorgensen@att.net

Stefan J. Schmidt, Esq.
Assistant Attorney General
Civil Rights Section
State Office Tower – 15th Floor
30 E. Broad St.
Columbus, Ohio 43215-3428
sschmidt@ag.state.oh.us



Julie Badel



Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners

Leonard J. Hubert, Chair
Stephanie M. Mercado, Esq.
William Patmon, III
Tom Roberts
Rashmi N. Yajnik
March 20, 2013

G. Michael Payton, Executive Director

Karen Halstenberg Jorgensen
164 Greenbank Rd.
Gahanna, Ohio 43230-1773

Re: Karen Halstenberg v. Lucent Technologies, Inc.
COL71111903(30988)032304
22A-2004-01799C
Complaint No. 9847

The enclosed Order dismissing Complaint No. 9847 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting of March 14, 2013.

This case is closed.

FOR THE COMMISSION

Desmon Martin

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]
Julie Badel, Esq.

CENTRAL OFFICE • State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414
• Central Office: 614-466-2785 • TOLL FREE: 1-888-278-7101 • TTY: 614-466-9353 • FAX: 614-644-8776

REGIONAL OFFICES
AKRON • CINCINNATI • CLEVELAND • COLUMBUS • DAYTON • TOLEDO
www.crc.ohio.gov

the recommendations contained in the Administrative Law Judge's report as if fully rewritten herein and dismisses the complaint against Respondent.

This ORDER issued by the Ohio Civil Rights Commission this 14th day of March, 2013.

Handwritten signature of Tom Roberts in cursive script.

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 Final 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: 3/14/2013