



Governor John Kasich

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Betty Jo Gray
Complainant,

Complaint No. 15-EMP-DAY-24315
Complaint No. 15-EMP-DAY-24316

v.

OHIO
CIVIL RIGHTS
COMMISSION

**Tailored Training Services, LLC &
In Living Support, LLC**
Respondents.

G. Michael Payton
Executive Director

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

Commissioners

Leonard Hubert, Chairman
Lori Barreras
Juan Cespedes
William W. Patmon, III
Madhu Singh

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In Living Support, LLC
230 Northland Boulevard, Suite 135
Cincinnati, Ohio 45246
Respondent

Betty Jo Gray
240 Breckenridge Lane, Apartment 1
Louisville, Kentucky 40237
Complainant

ALJ'S REPORT

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Ohio Civil Rights Commission
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November 29, 2016

Betty Jo Gray
240 Breckenridge Lane, Apartment 1
Louisville, Kentucky 40237
Complainant

Re: Betty Jo Gray v. Tailored Training Services, LLC & In Living Support, LLC
Complaint Nos. 15-EMP-DAY-24315 and 15-EMP-DAY-24316

Attached 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 three (23) days from the mailing date of this report. A request to appear before the Commission must also be submitted by this date.

Pursuant to Ohio Administrative Code §4112-1-02, your Statement of Objections must be **received** by the Commission no later than December 22, 2016. *No extension 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, 30 East Broad Street, 5th Floor, Columbus, OH 43215-3414.** All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION:

Desmon Martin /eks

Desmon Martin
Director of Enforcement and Compliance

Attachments

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cc: Lori A. Anthony, Section Chief – Civil Rights Section / Kari Jackson, Administrative Secretary / G. Michael Payton, Executive Director / Keith McNeil, Director of Operations and Regional Counsel / Stephanie Bostos-Demers, Chief Legal Counsel

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INTRODUCTION AND PROCEDURAL HISTORY

Betty Jo Gray (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on March 17, 2014 and May 14, 2014.

The Commission investigated the charges and found probable cause that In Living Support, LLC, and Tailored Training Services, LLC (Respondents) engaged in unlawful employment practices in violation of Ohio Revised Code (R.C.) §4112.02(A) and §4112.02(I).

The Commission attempted, but failed, to resolve these matters by informal methods of conciliation. The Commission subsequently issued complaints on April 23, 2015.

The Commission alleged that Respondents engaged in discriminatory conduct by permitting a sexually hostile work environment and constructively discharged Complainant's employment in retaliation for engaging in a protected activity.

A public hearing was held on May 19, 2016 at the Ohio Civil Rights Commission Cincinnati satellite office located at 7162 Reading Road, Cincinnati, Ohio 45237.¹

The record contains previously described pleadings, a hearing transcript consisting of 92 pages, and a post-hearing brief filed by the Commission on June 30, 2016. Respondents did not file a post-hearing brief.

¹ On March 24, 2016, Respondents' counsel filed a Notice of Withdrawal of Counsel. The ALJ granted leave to Respondents' counsel to withdraw as counsel for Respondents pursuant to O.A.C. 4112-3-07(C)(2) by order dated March 25, 2016. The Respondents were not represented by counsel at the hearing.

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 charges with the Commission on March 17, 2014 and May 14, 2014.
2. The Commission determined on March 12, 2015, that it was probable that Respondents engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A).
3. The Commission attempted to resolve this matter by informal methods of conciliation.

4. The Commission issued the complaints after conciliation failed.²
5. In Living Support, LLC (Respondent In Living Support) is a residential agency that provides services for individuals with developmental disabilities 24 hours a day. (Tr. 68)
6. Tailored Training Services, LLC (Respondent Tailored Training) is an agency that provides training such as CPR, child care, and first aid. (Tr. 67)
7. Sedra Taylor (Taylor) is Respondents' owner and Chief Executive Officer (CEO). (Tr. 15, 71)
8. On June 3, 2013, Complainant started her employment with Respondents as an accounting assistant, working part-time hours. (Tr. 12-13)
9. On the day that Taylor hired Complainant, he hugged her in his office. (Tr. 16)

² On January 6, 2016, the Commission filed a motion to amend the complaints pursuant to R.C. 4112.05(C) to more clearly plead R.C. 4112.02(I). Although the complaints pled that Respondents' conduct violated R.C. 4112.02(A) and (I), there was no paragraph containing factual assertions that would specifically support a claim of retaliation. On January 15, 2016, Respondent filed a motion in opposition and the Commission filed a response thereto on the same day. On February 23, 2016, the ALJ issued an order granting the Commission's motion.

10. Complainant assisted Keyante Shauntee (Shauntee), one of Respondents' Vice Presidents, a program manager and Executive Director of Compliance. (Tr. 51)
11. Complainant's job responsibilities included assisting with accounting, filing and other necessary tasks. (Tr. 11-12)
12. A few weeks after Complainant was hired, she told Shauntee that Taylor had popped her bra strap. (Tr. 52)
13. In July 2013, Taylor had a meeting with Complainant about her working full time and performing some of the aspects of Shauntee's job. (Tr. 17)
14. After the meeting, Taylor hugged Complainant from behind while she was sitting at her desk and then he tickled her. (Tr. 17)
15. One day, Taylor made a comment about Complainant's rear end to Shauntee. (Tr. 53)
16. In August 2013, Taylor asked Complainant if she "gave it up" while visiting her friend in Florida. (Tr. 19-20)
17. In September 2013, Taylor told Complainant that guys liked larger women and "the larger the woman the sweeter the juices" and that "men would do a tree if it had boobs on it." (Tr. 21)

18. That same month, Complainant was using the printer in Shauntee's office when Taylor came in, hugged her from the side and started tickling her. (Tr. 23)
19. Complainant pulled away and Taylor told her that no one could see them. (Tr. 23)
20. After Labor Day, Complainant came in and adjusted her shirt and pulled her jacket up because the shirt was a little low. (Tr. 24)
21. Taylor told her there was "no need to do that on my account; that's how we get raises around here." (Tr. 24)
22. Complainant thought Taylor's behavior was inappropriate and it made her feel awkward. (Tr. 16, 18, 21-22, 25)
23. In October of 2013, Complainant told Shauntee about Taylor's behavior and how it made her feel uncomfortable. (Tr. 26, 57)
24. The day after speaking with Complainant, Shauntee had a discussion with Taylor about Complainant's disclosure to her about Taylor's sexual comments and touching Complainant in a sexual manner. (Tr. 59)
25. Shauntee also discussed other issues that had come to her attention regarding inappropriate conduct of a sexual nature

engaged in by employees at the group homes in addition to discussing Complainant's specific complaint. (Tr. 60-62)

26. Taylor was dismissive of the complaints, attributing the group home behavior to gossip, saying that they needed to hire more employees who acted professionally. (Tr. 61-62)
27. Taylor's specific response to Complainant's complaint was that "it's not a concern, she overreacted. . . ." (Tr. 62)
28. In October or November of 2013, Complainant also told Matthew Hatcher (Hatcher), Respondents' Vice President about Taylor's remarks. (Tr. 47)
29. After Complainant complained to Shauntee, Taylor's behavior towards Complainant changed. (Tr. 27)
30. When Complainant was originally hired on a part-time basis, she expressed to Taylor that she wanted to work part-time. (Tr. 12)
31. Complainant wanted part-time hours because she is a divorced single parent and her children have special needs; part-time hours would allow her to take care of them. (Tr. 9-10, 12)

32. Taylor wasn't as flexible with her children's schedule and he yelled at Complainant for an hour and a half for not putting a report in a folder before placing it on his desk. (Tr. 27)
33. Shauntee gave Taylor reports every week and almost never placed them in folders first. (Tr. 60)
34. Prior to Complainant reporting his behavior, Taylor encouraged her to take a refresher course on QuickBooks for work. (Tr. 28-30)
35. After Complainant complained about Taylor to Shauntee, Taylor kept putting off allowing Complainant to take the refresher course. (Tr. 28, 30-31)
36. Taylor began ignoring her when she asked questions but would answer questions for other people. (Tr. 28-29)
37. Complainant began to avoid Taylor. (Tr. 31)
38. In December 2013, Taylor took pictures of Complainant for a brochure and told her they wouldn't be used as she did not like having her picture taken. (Tr. 32)
39. Taylor then hung up one of the pictures from the ceiling at their Christmas party. (Tr. 32)

40. Right after that, Complainant held a baby in her office, but her shirt was pulled down slightly from how the baby was positioned and showed some of Complainant's cleavage. (Tr. 32)
41. Taylor took pictures of this on his phone. (Tr. 32)
42. In the beginning of March 2014, Complainant left work to take extra clothing to one of her children because he had ripped his pants. (Tr. 33-34)
43. Complainant texted Shauntee to see if she was still at work, since it was Shauntee's last day working for Respondents. (Tr. 34)
44. When Complainant returned to work, she was accused of lying about where she went and was told she could be fired for texting Shauntee. (Tr. 34)
45. In March of 2014, Respondents hired a part-time employee to help with accounting. (Tr. 35)
46. Complainant received an e-mail indicating the new employee was the accounting administrator. (Tr. 35)
47. Complainant was supposed to have a meeting with Taylor about the new hire but the meeting never took place. (Tr. 35-36)

48. Complainant believed that Respondents were going to make the new hire her boss. (Tr. 37)
49. The next day after Complainant received the e-mail she tried to complete her report in QuickBooks but found she had been denied access. (Tr. 36)
50. When Complainant approached Taylor about why she couldn't access QuickBooks, he told her there was nothing wrong with her computer and that she should talk to the company accountant. (Tr. 36)
51. When Complainant spoke to the company accountant, she was told that Taylor had asked that Complainant be removed from QuickBooks. (Tr. 36)
52. The next day, March 13, 2014, Complainant was requested to attend a meeting with Taylor and Hatcher. (Tr. 37)
53. Complainant told Taylor that she enjoyed doing QuickBooks and asked what the issue was. (Tr. 37)
54. Hatcher told Complainant that was an inappropriate question. (Tr. 37)
55. Taylor jumped up from the table, said some words and abruptly left the meeting. (Tr. 37)

56. Shortly thereafter, Hatcher told Complainant that she had violated company policy. (Tr. 38)
57. Hatcher sent Complainant home for the rest of the day and told her to make a decision about whether or not she wanted to stay with Respondents. (Tr. 38-39)
58. Complainant ended her employment with Respondents by a letter stating "I can no longer work for Sedra Taylor as of March 17, 2014." (Tr. 39, Comm. Exh. 2)
59. Complainant also told Hatcher that Taylor was dishonest and that it was a horrible environment to work in. (Tr. 39)

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.³

1. The Commission alleged in its amended complaints that Respondents engaged in discriminatory conduct by: (1) permitting a sexually hostile work environment to exist and (2) constructively discharging Complainant's employment in retaliation for engaging in a protected activity.

2. These allegations, if proven, would constitute a violation of R.C. § 4112.02, which provides in pertinent part, that it shall be unlawful discriminatory practice:

(A) For any employer, because of the ... sex ... of any person, to discharge without just cause ... or

³ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(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 by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G).
4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. V. Ohio Civil Rights Comm.*, 61 Ohio St. 3d 607, 609-10, 575 N.E.2d 1164, 1167 (1991).
5. Thus, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

6. The Commission has the initial burden of establishing a *prima facie* case of discrimination; the burden then shifts to Respondent to articulate a legitimate non-discriminatory reason for its adverse employment action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The *prima facie* case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.' *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

7. To establish a *prima facie* case of sexual harassment based on a hostile work environment, the Commission must establish evidence demonstrating that:

- 1) Complainant is a member of a protected class;
- 2) Complainant was subjected to harassment, either through words or actions, based on sex;
- 3) The harassment had the effect of unreasonably interfering with her work performance and creating an objectively intimidating, hostile, or offensive work environment; and

- 4) There exists some basis for liability on the part of the employer.

Gallagher v. C.H. Robinson Worldwide, Inc., 567 F.3d 263, 270 (6th Cir. 2009) (citing *Grace v. USCAR*, 251 F.3d 655, 678 (6th Cir. 2008)).

8. Complainant, a female, was subjected to sexually explicit comments and sexual innuendo by Taylor. (Tr. 17, 19-21, 23-24, 32, 52)
9. The sexually explicit comments and innuendo, directed at Complainant, were frequent, starting in July 2013 and continuing through September of 2013. (Tr. 16-17, 19-21, 23-24)
10. Taylor's inappropriate conduct of a sexual nature also included touching, tickling and back rubs. (Tr. 17, 23, 52)
11. Complainant told Taylor that she did not liked to be tickled. (Tr. 18)
12. Complainant did not want to tell Taylor that she did not like his lewd sexual comments, remarks and leering because she was shocked and embarrassed. (Tr. 21, 25)

13. Taylor's conduct made Complainant feel uncomfortable because she was not used to people at work speaking to and touching her in the manner that Taylor did. (Tr. 22)

To be actionable under Title VII, conduct must be severe or pervasive enough to create both an objectively hostile or abusive work environment—one that a reasonable person would find hostile or abusive—and a subjectively hostile work environment—one that the victim perceived to be hostile or abusive. Whether an environment is hostile or abusive must be determined by looking at all the circumstances. While no single factor is required, circumstances to consider may include the frequency and severity of the conduct, whether the conduct is physically threatening or humiliating as opposed to merely an offensive utterance, whether the conduct unreasonably interferes with an employee's work performance, and whether psychological harm results. *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 723, 729 N.E.2d 813, 819 (1999).

14. A reasonable person would find that Taylor's remarks, leering, and lewd comments of a sexual nature were unwelcome and unwanted by Complainant and were objectively severe and pervasive based on the frequency of Taylor's conduct and physical contact to create an actionable hostile environment based on sex. (Tr. 17, 19-21, 23-25, 52-53)
15. Once the Commission has demonstrated that the harassment was because of Complainant's sex and was sufficiently severe

or pervasive, the Commission must show that her employer bears responsibility for the harassment.

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275, 2292-2293, 141 L.Ed 2d 662 (1998).

16. Taylor is Respondents' owner and CEO and has the ultimate authority to hire, fire, discipline and affect the conditions of Complainant's work environment.
17. The Commission introduced credible evidence that Taylor subjected Complainant to a hostile work environment based on sex and Respondents are therefore vicariously liable.
18. The Commission also alleged in their complaints that Complainant was constructively discharged in retaliation for opposing an unlawful discriminatory practice.
19. To establish a *prima facie* case of unlawful retaliation under Title VII, the Commission must demonstrate by a preponderance of the evidence that:
 - 1) Complainant engaged in activity that Title VII protects;

- 2) Respondent knew that Complainant engaged in this protected activity;
- 3) Respondent subsequently took an employment action adverse to the Complainant; and
- 4) A causal connection between the protected activity and the adverse employment action exists.

Greer-Burger v. Temesi, 116 Ohio St.3d 324 at ¶13 (citing *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (C.A. 6, 1990)).

20. A Complainant's activity is protected if the Complainant has opposed any unlawful discriminatory practice or 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. *Gembus v. MetroHealth Sys.*, 290 Fed.Appx. 842, 846 (6th Cir. 2008).
21. The temporal relationship between a Complainant's participation in protected activities and a Respondent's alleged retaliatory conduct is an important factor in establishing a causal connection. *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).
22. The Commission must prove that the adverse action would not have occurred "but for" Respondent having engaged in

unlawful retaliation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2533, 186 L.Ed.2d 503 (2013).

23. Taylor started making comments of a sexual nature to Complainant about a month into her employment, in July of 2013. (Tr. 16-17)
24. Complainant finally complained to Shauntee and Hatcher about Taylor's behavior in October 2013 when she could no longer tolerate Taylor's comments and conduct of a sexual nature that he specifically directed towards her. (Tr. 26, 47, 52)
25. Shauntee was also aware that a former female employee had filed a charge of discrimination alleging sexual harassment by Taylor. (Tr. 55-56)
26. Shauntee characterized Taylor as a "very flirtatious person" while at the same time testifying that Taylor's behavior towards Complainant "just wasn't appropriate." (Tr. 53)
27. The Commission established the first three elements of a *prima facie* case of retaliation with evidence that Complainant engaged in a protected activity, complained to Shauntee and Hatcher, and Taylor was made aware of the complaints.

28. After Shauntee's discussion with Taylor, she observed that the whole environment changed, characterizing Taylor's behavior toward Complainant as becoming abrasive where he was not speaking to Complainant anymore or when he did it was to make complaints that were not legitimate. (Tr. 63)
29. Although Complainant resigned, it was not because of a history of negative work performance or a need to pursue other job or family interests that might otherwise have triggered the decision to voluntarily leave her position.
30. The meeting that occurred on Thursday, March 13, 2014, was the final scene in a well-orchestrated plan to force Complainant to resign from her job.
31. The Commission established that Complainant suffered an adverse employment action because she was constructively discharged.

Constructive discharge occurs when [a Respondent] deliberately renders the [Complainant's] working conditions intolerable and thus forces [her] to quit [her] job. *Klein v. McGowan*, 198 F.3d 705, 709 (8th Cir. 1999).

[T]o prove that a constructive discharge occurred, the [Commission] must demonstrate that a reasonable person would find the working conditions intolerable. The intolerability of working conditions is judged by an objective standard, not the [Complainant's] subjective feelings. *Allen v.*

Bridgestone/Firestone, Inc., 81 F.3d 793, 796 (8th Cir. 1996).

32. A reasonable person would find that the environment Taylor deliberately subjected Complainant to after she complained made the work environment intolerable.
33. The Commission also established that but for Complainant's complaint of sexual harassment, Taylor would not have deliberately set out to render Complainant's working conditions so intolerable that she had no other choice than to resign.
34. Respondents engaged in illegal sex discrimination and retaliation in a violation of R.C. 4112.02(A) and 4112.02(I).
35. Therefore Complainant is entitled relief as a matter of law.

RECOMMENDATIONS

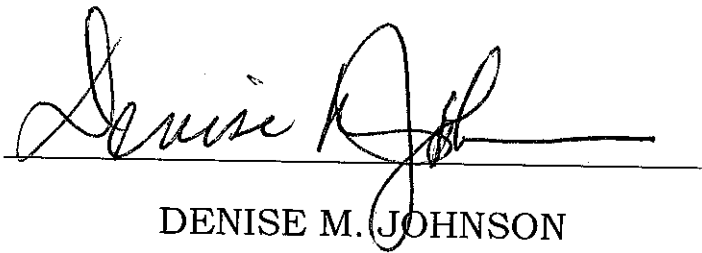
For all of the foregoing reasons, it is recommended in Complaint Nos. 15-EMP-DAY-24315 & 24316 that:

- a. The Commission orders Respondents to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
- b. The Commission orders Respondents within 10 days of the Commission's Final Order to pay Complainant back pay, including raises, benefits and overtime pay based on the wages Complainant would have been paid had she not been constructively discharged;⁴

⁴ Complainant was earning \$12.50 per hour and averaging 40 hours per week. (Tr. 42). Complainant's back pay earnings from the date of her termination until the date of the hearing accrued in the amount of \$56,500.00 (113 weeks x \$500.00 per week). Complainant found a job and began employment on September 7, 2015. (Tr. 41) Complainant's interim earnings for up to the date the hearing are \$15,732.00.

- c. The Commission orders Respondents to receive sexual harassment training specifically that includes all the workplace anti-discrimination laws in Ohio within six (6) months of the date of the Commission's Final Order. As proof of participation in anti-discrimination training, Respondents shall submit certification from the trainer or provider of services that Respondents have successfully completed the training. The letter of certification shall be submitted to the Commission's Compliance Department within seven (7) months of the date of the Commission's Final Order; and
- d. The Commission orders Respondents within nine (9) months of the date of the Commission's Final Order to submit to the Compliance Department a draft for an Employee Handbook outlining Respondents' policies and procedures regarding Ohio's anti-discrimination laws, *including but not limited to* sections regarding:
- Zero tolerance for any form of discrimination based upon race, color, religion, sex, military status, national origin, disability, age, or ancestry
 - Sexual harassment
 - Racial harassment

- Pregnancy
- Disabilities
- Progressive discipline and disciplinary grid
- Reporting and investigation of complaints

A handwritten signature in black ink, appearing to read "Denise Johnson", is written over a horizontal line. The signature is fluid and cursive.

DENISE M. JOHNSON

CHIEF ADMINISTRATIVE LAW JUDGE

Date mailed: November 29, 2016