



OHIO CIVIL RIGHTS COMMISSION

Governor John R. Kasich

Commissioners: Lori Barreras, Chair | Juan Cespedes | William Patmon, III | Madhu Singh
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April 17, 2018

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Camille Barnes
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Complainant

Re: *Camille Barnes v. City of Toledo, Department of Public Utilities*
Complaint Nos. 15-EMP-TOL-36834 & 16-EMP-TOL-37200

A copy of the Administrative Law Judge's Amended Findings of Fact, Conclusions of Law, and Recommendation(s) (ALJ's Report) is enclosed. In accordance with Ohio Administrative Code § 4112-3-09, any person or aggrieved party may file and serve a written statement of objections to the ALJ's Report within twenty-three (23) calendar days from this mailing. No extension of time will be granted and untimely objections will not be considered.

Mail 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**. Please serve all parties and the Administrative Law Judge copies of your Statement of Objections.

Responses to the objections must be filed with the Compliance Department within fourteen (14) calendar days [seventeen (17) if served by mail] from the date the objections were served.

All requests for oral arguments must be noted on the submission.

FOR THE COMMISSION:

Desmon Martin /eks

Desmon Martin
Director of Enforcement and Compliance

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



IN THE MATTER OF:

Camille Barnes
Complainant,

Complaint No. 15-EMP-TOL-36834
Complaint No. 16-EMP-TOL-37200

v.

City of Toledo, Department of Public Utilities
Respondent.

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

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ALJ'S AMENDED REPORT

Denise M. Johnson
Ohio Civil Rights Commission
Division of Hearings
30 East Broad Street, 5th Floor
Columbus, OH 43215
(614) 466-6684
Chief Administrative Law Judge



INTRODUCTION AND PROCEDURAL HISTORY

Camille Barnes (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on October 16, 2014 and June 8, 2015.

The Commission investigated and found probable cause to believe that City of Toledo, Department of Public Utilities (Respondent) engaged in unlawful employment practices in violation of Revised Code Sections (R.C.) 4112.02(A) and (I).

The Commission attempted, but failed, to resolve this matter by informal methods of conciliation. The Commission subsequently issued Complaints on September 24, 2015 and February 4, 2016.

The Commission alleged that: (1) Respondent's failure to investigate or engage in the interactive process after receiving Complainant's request for accommodation was a violation of R.C. 4112.02(A), (2) treating Complainant's internal complaint as a complaint for workplace violence was in retaliation for Complainant engaging in a protected activity, violating R.C. 4112.02(I) and, (3) Respondent's failure to provide accommodation for Complainant's disability led to Complainant's constructive discharge.

Respondent filed Answers to the Commission's Complaints on October 27, 2015 and March 8, 2016.

A public hearing was held on November 15 and 16, 2016, at the One Government Center located at 640 Jackson Street, Toledo, Ohio.

The record contains previously described pleadings, a hearing transcript consisting of 612 pages, a post-hearing brief filed by the Commission on January 31, 2017, Respondent's post-hearing brief filed on February 28, 2017, and the Commission's reply brief filed on March 7, 2017.

On October 17, 2017, Complainant filed objections to the Report and Recommendation. The Commission and Respondent did not file a response to Complainant's objections.

At the Commission's meeting on December 14, 2017, the Commissioners remanded the matter to the Administrative Law Judge (ALJ) to issue an amended report and recommendation.¹

¹ The basis for the Commissioners' remand is documented in the minutes under "Appearance Cases" from the December 14, 2014 Commission meeting.

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 October 16, 2014 and June 8, 2015.
2. The Commission determined on September 24, 2015 and February 4, 2016, that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A) and (I).
3. The Commission attempted to resolve this matter by informal methods of conciliation.

4. The Commission issued the Complaints after conciliation efforts failed.
5. Respondent is an employer that manages the water and sewage services for the city of Toledo.²
6. In 2012, Maria Gorny (Gorny) was the administrator for financial analysis in Respondent's Department of Public Utilities (DPU). (Tr. 429)
7. Gorny began her employment with Respondent in 1986. (*Id.*)
8. Gorny supervised the Systems Application Products (SAP) support section of DPU, which was in charge of support for DPU's billing system. (*Id.*)
9. In July 2012, Gorny hired Complainant to work under her supervision as an Administrative Analyst 3 (AA3) in the SAP support section of the DPU. (Tr. 19, 449, 452, Comm. Exh. A)
10. The position that Complainant was hired into was a newly created position. (Tr. 451)
11. Gorny thought that hiring someone from the outside would benefit the unit and bring in a different perspective. (Tr. 452)

² Info taken from the City of Toledo's Department of Public Utilities website at <http://toledo.oh.gov/services/public-utilities>.

12. In addition to Complainant, there were two other AA3s in the DPU SAP unit: Bret Telecsan (Telecsan) and LaVonda Johnson (Johnson). (Tr. 430)
13. Telecsan and Johnson were promoted internally into their positions. (Tr. 452)
14. Complainant has a B.A. in Journalism, as well as Masters degrees in Business Administration and in Accounting and Finance. She also has several IT certifications. (Tr. 18-19)³
15. The DPU SAP team members were assigned different units within the DPU Utilities Administration to cover issues and problems that workers would discover in the system. (Tr. 30, 453)
16. The DPU SAP members were assigned a unit or multiple units based on seniority. (Tr. 430)
17. Although each member of the DPU SAP covered different units, they also cross-trained in order to be able to help out when other people were on vacation or had scheduled time off. (Tr. 406)

³ Complainant received her BA from the Ohio State University and MS from the Keller Budget School of Management. (Tr. 18-19)

18. Complainant was assigned to the billing unit, Telecsan was assigned the finance and float staff units, and Johnson was assigned the customer service unit. (Tr. 407, 430)
19. A new cubicle was prepared for Complainant and was equipped with a non-ergonomic computer desk and chair. (Tr. 413, 415, 517)
20. Many of the employees who worked on their floor had ergonomic desk and chairs. (Tr. 413)
21. Complainant asked Gorny for an ergonomic desk and chair. (Tr. 560)
22. Gorny directed Telecsan to locate an ergonomic desk and chair for Complainant. (Tr. 412, 488, 517)
23. Complainant used the desk that Telecsan located. (Tr. 57, 412-413)
24. Around the beginning of her employment, Complainant began completing a retiring worker's sewer and water usage report and found major discrepancies where millions of dollars were unaccounted for. (Tr. 22, 454-455)
25. These discrepancies occurred as a result of back-billing, a data entry process performed by billing clerks for whom Complainant was SAP support. (Tr. 434, 483-484)

26. The information alarmed Gorny because it exposed a budget deficit of \$23 million. (Tr. 31, 156)
27. Gorny assigned Complainant the project to fix the back-billing process by developing a hard stop fix to prevent back-billing beyond the current period. (Tr. 432-433, 445, 484-485, 540-541)
28. Gorny assigned Complainant the responsibility of doing the billing clerks' bill adjustments to prevent the clerks from back-billing until the project was completed. (Tr. 432-433, 540-541)
29. A consultant was hired to assist Complainant in working on the project. (*Id.*)
30. In addition to developing a hard stop fix, Complainant was to create a training manual from which to train the billing clerks on using the newly developed billing process. (Tr. 484-485)
31. Upon completion of the project, the back-billing task would revert back to the billing clerks. (Tr. 540-541)
32. The other DPU SAP members were assigned additional tasks and job duties to perform as other projects or issues came up. (Tr. 436)

33. Gorny directed Telecsan and Johnson to provide additional support to Complainant after Complainant complained about the volume of work that she had. (Tr. 446, 489-490)
34. Complainant did not feel that she should be doing the work of the billing clerks because she was not a bargaining unit employee and she had two degrees and other certifications. (Tr. 38, 49)
35. Complainant also believed that the project, including the manual, was something that Gorny as supervisor should have been able to do herself. (Tr. 41-42)
36. In February of 2013, Complainant notified Gorny that she had upcoming doctors' appointments because of migraines, sinus problems, and carpal tunnel. (Tr. 43-44, 46, 130)
37. In July of 2013, Complainant went on FMLA leave to have surgery on her sinuses. (Tr. 46-47)
38. On April 18, 2014, Complainant went on FMLA leave for surgery to correct her carpal tunnel and trigger finger. (Tr. 47, 75, Comm. Exh. G)
39. Complainant had difficulty working with subordinates and co-workers and attempted to do the work without help. (Tr. 526-528, 531)

40. Johnson spent half a day attempting to help Complainant with a billing issue. (Tr. 527)
41. At the end of the day Complainant responded to Johnson's help by stating "What do I have, three supervisors now?" (*Id.*)
42. It was difficult for Complainant to complete all of the work that she wanted to get done in a given day because of the weekly and sometimes more frequent meetings the team had. (Tr. 47, 131)
43. Respondent's overtime policy requires exempt employees to get approval from their supervisor before they can work overtime. (Tr. 568)
44. Complainant worked overtime without first requesting approval from Gorny. (Tr. 342-343, 568-570)
45. Around June 5 or 6, 2014, Complainant went to the EEO office to talk to Cynthia Wilkes (Wilkes), the EEO representative for the DPU. (Tr. 300-302)
46. In her position as a representative, Wilkes acted as a liaison between the department, the employees, and the Office of Affirmative Action/Contract Compliance (AA/CC). (Tr. 300-301)

47. During the meeting Complainant complained that Gorny wanted her to do reversals that Complainant felt were not her job and that she was not being paid for the overtime work that she had already performed. (Tr. 303)
48. On June 27, 2014, Complainant told Gorny that she was immediately leaving work to take FMLA leave. (Tr. 79-81, Comm. Exh. N)
49. Complainant tried to give Gorny paperwork. (Tr. 305, 316, 503, Comm. Exh. N)
50. Gorny did not take the paperwork because of her concerns about HIPPA privacy requirements. (Tr. 503)
51. Gorny told Complainant that she could not leave. (Tr. 80, 304)
52. Complainant left Gorny without telling her where she was going and did not go back to her own workstation. (Tr. 349, 353)
53. After Complainant left Gorny, Gorny created a discipline document containing the charge of job abandonment. (Tr. 356)
54. Complainant went to the EEO office to speak with Wilkes about Gorny's refusal to let her go on FMLA leave. (Tr. 304)

55. Gorny called Jenny Gogol (Gogol) and asked her to be a witness and assist with an employee issue. (Tr. 349)
56. In June 2014, Gogol was Respondent's Manager of Utilities Administration for the DPU. (Tr. 346)
57. Gogol was the acting commissioner over the DPU division on June 27, 2014. (Tr. 347-348)
58. When a commissioner or manager of a section was out of the office for any reason, another manager could be asked to serve in an alternative capacity. (Tr. 346-347)
59. During the time that Complainant was at the EEO office, Wilkes looked through the paperwork Complainant tried to give to Gorny and advised her that the FMLA leave request needed to be completed and signed by her doctor. (Tr. 306-307, 314, 316)
60. While Complainant was in Wilkes' office, Wilkes received a phone call from Gorny and Gogol asking about Complainant's whereabouts. (Tr. 305, 330, 335)
61. Wilkes told Gorny and Gogol that Complainant hadn't left, that Complainant was in Wilkes' office. (Tr. 305, 330)
62. Gorny and Gogol went to Wilkes' office and asked Complainant to join them in a conference room to talk. (Tr. 350)

63. Gogol also asked Dawn Clear (Clear), a Human Resources (HR) representative, to join the meeting to act as a witness. (Tr. 350-351, 567)
64. Clear's office was located next to Wilkes' office. (Tr. 350-351)
65. Gogol acted as a mediator with Complainant and Gorny to work towards a resolution. (Tr. 351-354)
66. During the meeting Gorny discussed Complainant leaving her work area and coming in late to work, and that Complainant needed to be disciplined for those infractions. (Tr. 311, 339-340)
67. Complainant discussed the surgery that she had had on her hand and that she was taking medication for it which made her sleepy. (Tr. 311)
68. Complainant discussed the duties of performing the full reversals and that she wanted to be relieved of additional duties that caused her to work overtime. (Tr. 312)
69. Gorny discussed taking over some of Complainant's job duties as a result of the issues raised by Complainant during the meeting. (Tr. 312, 340)
70. At the end of the meeting, Gorny brought out the document that she created before the meeting that included

abandonment from the workstation and wanted Complainant to sign the discipline charge. (Tr. 356-357)

71. Gogol had Gorny drop the job abandonment charge because of the information Gorny received after she wrote up Complainant. (Tr. 312, 356)

72. Instead of discipline for job abandonment, Gorny gave Complainant a written counseling for occurrences of tardiness from January, February, March, April, and June of 2014. (Tr. 357, Comm. Exh. W)

73. Complainant signed the written counseling form. (Comm. Exh. W)

74. At the end of the meeting Wilkes had a one-on-one meeting with Complainant. (Tr. 314)

75. Wilkes gave Complainant more information about what she needed to do to complete her FMLA paperwork. (*Id.*)

76. Wilkes also gave Complainant information about the EEOC and provided Complainant with an Intake Complaint Form. (Tr. 314, 316-317)

77. After the meeting, Complainant left the premises to begin her leave. (Tr. 88)

78. When Complainant left on June 27, 2014, she used sick leave and after the completed FMLA leave forms were received and processed by HR, Complainant was on FMLA leave from July 8 until August 10, 2014. (Tr. 383, R. Exh. 3)
79. Complainant's FMLA was recertified to extend from August 10 to August 13, 2014, and Complainant would return to work on August 14, 2014. (Tr. 384, R. Exh. 5)
80. Complainant's EEO Intake Complaint Form was put in Wilkes' intake box when she wasn't in the office. (Tr. 318)
81. In July of 2014, Wilkes sent Complainant's Intake Complaint Form to AA/CC Director Calvin Brown (Brown) via interoffice mail after she came back from her scheduled vacation. (Tr. 238, 318-319, 321, Comm. Ex. I)
82. Wilkes sent an email to AA/CC to notify them that she was sending over the complaint. (Tr. 318)
83. At the top of the first page of the EEO Intake Complaint Form Complainant put a check next to "ADA Accommodation" for the type of complaint. (Comm. Ex. I)
84. In the complaint, Complainant stated that the basis for her complaint was Gorny's statement made during a meeting about the importance of completing the project that

Complainant was assigned to and that Gorny's behavior was affecting morale. (*Id.*)

85. Complainant also stated that the basis for her complaint was hostile work environment and retaliation. (*Id.*)

86. Complainant further complained that she had been harmed because Gorny failed "to follow through accommodation after complying with her requests, failure to reasonably accommodate FMLA. Specifically told 'You can't leave,' after I informed supervisor I was filing FMLA with HR." (*Id.*)

87. Robin Wilson (Wilson), lead investigator and acting ADA coordinator for the AA/CC, received and reviewed Complainant's complaint on July 14, 2014. (Tr. 270-272, Comm. Exh. J)

88. The previous ADA co-coordinator had transferred out of the department and at one time prior to receipt of Complainant's Intake Complaint Form, a secretary and office manager also worked in the AA/CC. (Tr. 288-289)

89. Wilson and Brown were the only individuals working in the AA/CC at the time that Complainant's EEO Intake Complaint Form was transferred. (*Id.*)

90. Wilson called Complainant's work phone on the day that she received the complaint and left a voicemail message asking

Complainant to return her call when she returned to work.
(Comm. Exh. J)

91. On July 15, 2014, Wilson met with Brown and after a brief discussion about the contents of the Intake Complaint Form and the specific complaints, decided to transfer the complaint to HR to be investigated as workplace violence and harassment. (*Id.*)
92. After making the determination to transfer the file to HR, Wilson did not attempt to contact Complainant until Complainant called Brown on August 8, 2014 to inquire about the status of her EEO complaint. (Tr. 288-289, Comm. Exh. L))
93. On August 8, 2014, the same day that Complainant called Brown, Wilson sent a letter to Complainant informing her that after review of the complaint it had been determined that Complainant's issue of concern was covered under Respondent's Workplace Violence Policy (AP #51). (Comm. Exh. K)
94. On the same day Wilson transferred the case file to Miranda Vollmer (Vollmer) in HR. (*Id.*)
95. On August 14, 2014, Complainant returned to work without having restrictions or work limitations being placed on her ability to work by her physician. (Comm. Exh. G, page 2)

96. Complainant returned to work without needing to wear a brace on her wrists. (Tr. 123)
97. Complainant continued to work on the billing project because the project had not been completed. (Tr. 71-72, 449)
98. On August 15, 2014, Complainant called Wilson and was told that her file had been transferred to HR and that Complainant should call Vicki Coleman in the Employment Relations section of HR. (Tr. 381, Comm. Exh. K)
99. Vollmer made contact with Complainant sometime between August 14 and August 19, 2014 to schedule a meeting with Complainant to investigate the complaint transferred from AA/CC. (Comm. Exh. M)
100. On August 19, 2014 at 11:02 A.M., Complainant sent an e-mail to Vollmer canceling her meeting that week with Vollmer to discuss Complainant's "ADA/Retaliation" complaint because she had just returned from FMLA leave and needed to catch up on her work. (*Id.*)
101. Vollmer responded to Complainant's e-mail at 11:25 A.M. asking Complainant to let her know when she would be available to meet because Vollmer would be out of the office from August 29th through September 8th. (*Id.*)

102. Complainant responded via e-mail at 12:10 P.M. stating "I'll be in touch." (*Id.*)
103. At 12:38 P.M. Vollmer sent Complainant an e-mail stating that "it is imperative that we meet this week so the report can be completed within the timelines of AP #51" adding that she would coordinate the interview with Commissioner Abby Arnold (Arnold). (*Id.*)
104. At 5:16 P.M. Complainant sent Vollmer an e-mail stating that she would not be interviewed by Vollmer because Vollmer is an attorney and that Complainant wanted to have an attorney representing her in a meeting with Vollmer. (Comm. Exh. M)
105. Vollmer interviewed Complainant and Gorny based on a complaint of workplace violence. (Tr. 214, Comm. Exh. N)
106. When Vollmer interviewed Complainant, Arnold was the only other person in attendance. (*Id.*)
107. On September 17, 2014, Vollmer sent Complainant the result of her investigation that concluded there was no workplace violence. (Comm. Exh. N)
108. In the report, Vollmer stated that she learned of instances of unprofessional conduct and behavior that had been occurring in the DPU-Utilities Administration section and reminded all

employees, including Gorny and Complainant, of "the need to maintain a professional demeanor in the workplace." (*Id.*)

109. Gorny did not have an expertise in SAP programming and relied on Mary Mennick (Mennick), a billing supervisor, and Johnson to review drafts of the training manual that Complainant was still working on when she returned to work. (Tr. 447-448)
110. Gorny asked Mennick and Johnson to suggest edits and revisions where appropriate when reviewing Complainant's draft manual. (*Id.*)
111. When Complainant sent the draft document back to Gorny, Complainant would revise some of the things that she was asked to revise and sent back revisions that she was not asked to make. (Tr. 448)
112. This meant the new unrequested revisions that Complainant made created another draft for Johnson and Mennick to review and edit for revisions. (*Id.*)
113. This process frustrated Complainant so Gorny asked Arnold to look at the training policy draft and, thinking if Arnold made changes, Complainant would accept the changes without adding additional revisions. (*Id.*)

114. Complainant however did the same thing with Arnold's changes that she did to Johnson's and Mennick's changes. (*Id.*)
115. After receiving a complaint from Mennick about Complainant's behavior in a meeting with Mennick, Arnold had Complainant come to her office. (Tr. 559)
116. Complainant got argumentative with Arnold. (*Id.*)
117. Arnold's supervisor advised her to write up Complainant. (Tr. 559-560)
118. On September 23, 2014, Arnold attempted to speak with Complainant again before resorting to writing her up but Complainant became argumentative again. (Tr. 560)
119. On October 1, 2014, Arnold served Complainant with a written reprimand for her insubordination towards Arnold on September 23rd. (Comm. Exh. P)
120. Complainant refused to sign the written reprimand. (*Id.*)
121. Complainant filed a charge with the Commission on October 16, 2014. (Tr. 111-112, Comm. Exh. O)

122. The charge alleged, among other things, that Complainant was denied a reasonable accommodation and retaliated against after she filed an internal EEO complaint. (Comm. Exh. O)
123. As a new Commissioner, Arnold reviewed and made changes to several work policies. (Tr. 565)
124. Arnold implemented about five new policies, including a new tardy policy, on September 5, 2014. (Tr. 564-565, R. Exh. 12, 13)
125. Tardiness was an issue that Arnold heard supervisors complain about. (Tr. 565)
126. The complaints were in the nature of employees coming in late, fifteen or twenty minutes, and being allowed to take vacation leave to cover for the tardiness. (*Id.*)
127. The collective bargaining agreement had a tardy policy based on a rolling six months. (Tr. 358, 391, 564)
128. Complainant was an exempt employee and would not have been covered by the collective bargaining agreement's tardy policy. (Tr. 580-581)
129. The policy implemented in September 2014 states that after three tardy occurrences in a six month period, the employee will receive discipline. (R. Exh. 12, 13)

130. On November 18, 2014, Complainant received a notification of her second tardy in a six month period from Gorny prepared by Clear. (Tr. 471-472, 491, R. Exh. 12)
131. In the beginning of 2015, the automatic full reversal fix was implemented. (Tr. 447)
132. Complainant began training the billing section before she completed the manual. (*Id.*)
133. On February 18, 2015, Complainant received a notification for her second tardy in a six month period from Gorny prepared by Clear. (Tr. 471-472, 491, R. Exh. 13)
134. By letter dated March 30, 2015, Complainant resigned from her employment with Respondent effective April 10, 2015. (Tr. 99, 117-118, Comm. Exh. R)
135. Gorny assigned Johnson to finish the policy. (Tr. 449)
136. Complainant filed her second charge with the Commission on June 8, 2015, alleging that she was forced to resign because of the hostile work environment created by Respondent's failure to investigate her EEO complaint and to provide her with a reasonable accommodation.

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.⁴

1. The Commission's complaints allege that:

- (1) Respondent failed to investigate or engage in the interactive process after receiving Complainant's request for accommodation,
- (2) Respondent treated Complainant's internal complaint as a complaint for workplace violence in retaliation for Complainant engaging in a protected activity, and

⁴ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

- (3) Respondent's failure to provide accommodation for Complainant's disability led to Complainant's constructive discharge.
- 2. The Commission's allegations, if proven, would constitute a violation of R.C. § 4112.02(A) and (I), which provides in pertinent part, that it shall be an unlawful discriminatory practice:
 - (A) For any employer, because of the . . . disability . . . of any person . . . to discharge without just cause . . . or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.
 - (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(A) and (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*, 82 Ohio St.3d 569, 573 (1998), *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 326 (2007).
5. To prove a case of unlawful disability discrimination the Commission may introduce evidence sufficient to support a finding of unlawful discrimination under the Americans with Disabilities Act (ADA) as amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).
6. The Assistant Attorney General limited the scope of the prosecution of the Commission's complaints and introduced evidence to only support the allegation that Complainant was disabled based on her medical condition of carpal tunnel.
7. The order of proof in a failure to accommodate/disability discrimination case requires the Commission to first establish a prima facie case. The Commission has the burden of proving:
 - (1) Complainant is disabled (within the meaning of R.C. 4112.01(A)(13));
 - (2) Respondent knew about the disability;
 - (3) Complainant requested an accommodation for her disability;

(4) Respondent did not make a good faith effort to assist Complainant in seeking accommodations; and

(5) Complainant could have been accommodated but for Respondent's lack of good faith.

Shaver v. Wolske & Blue, 138 Ohio App. 3d 653, 664 (2000),
Taylor v. Phoenixville School District, 184 F.3d 296,
319-320 (3rd Cir.1999).

8. There are two distinct time periods in the Complainant's employment that the Commission alleges that Respondent had notice that Complainant had a disability and needed an accommodation for the disability: (1) February 2013 up until June 26, 2014, (2) June 27, 2014 up until Complainant terminated her employment on April 10, 2015.

**I. The Commission Failed to Introduce Credible Evidence That
Prior to June 27, 2014, Respondent Had Notice that
Complainant Had a Disability for Which She Was Requesting an
Accommodation**

9. The Commission alleges that prior to the June 27, 2014 meeting with Gorny, Gogol, Clear, and Wilkes that Gorny had both direct and constructive knowledge that Complainant had a disability and needed an accommodation by being relieved of performing full reversals.
10. The Commission's allegation of constructive notice is based on the assertion that Complainant's disability and need for an accommodation should have been obvious to Gorny.
11. Employers have been held to have constructive notice under circumstances where the court determined that the employer knew or should have known that an accommodation was needed. See *Cannon v. Jacobs Field Services North America, Inc.*, 813 F.3d. 586 (5th Cir.2016) (employer knew of disability (shoulder injury) and received a report from employee's own doctor recommending accommodations), *Kenan v. Cox*, 2010 U.S. App. LEXIS 19101 (9th Cir.2010)(unpublished) (employee had a diminished intellectual and emotional capacity, not functioning at an adult level), *Smith v. Henderson*, 376 F.3d 529 (6th Cir.2004) (employer was aware of employee's disability and her medical need to avoid working overtime so

as not to exacerbate her rheumatoid arthritis), *Stephenson v. United Airlines*, 2001 U.S. App. LEXIS 1140 (9th Cir.2001)(unpublished) (employee arguably requested an accommodation by bringing in a doctor's note with restrictions on standing, walking, driving, lifting, and carrying, among other things).

12. The Commission also alleges that Gorny had notice that Complainant had a disability because Gorny was "aware" of Complainant's doctors' appointments and the contents of doctors' notes and forms that were the basis for Complainant's doctors' visits or taking FMLA leave.
13. The Commission's allegations lack credibility for the following reasons.
14. Complainant testified that Gorny saw her wearing a wrist brace at certain times during her employment prior to June 27, 2014. (Tr. 97, 131, 149)
15. Gorny met with the DPU SAP team normally on a weekly basis, and more often when needed. (Tr. 431-432)
16. Other than the weekly meetings with the DPU SAP unit, the Complainant was unable to identify a time, place, or location where she was alone with Gorny.

17. Gorny's observation of Complainant wearing a wrist brace or even bandages on her wrist especially in the context of group meetings where Gorny was concerned about the progress of the project is not by itself evidence that Gorny should have known that Complainant had a disability for which she needed an accommodation.
18. When an employer sees an employee in the workplace with a physical impairment or physical injury, the employer must not assume or speculate that the physical impairment places a limitation on the employee's ability to work.

The ADA distinguishes between knowledge of a disability versus knowledge of any limitations which the employee experiences as a result of that disability. . . [T]he ADA only requires employers to accommodate the known physical or mental limitations of the employee. Americans with Disabilities Act of 1990, § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A).

The employer is not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation. *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046 (6th Cir.1998).

19. The Commission did not introduce any credible evidence that Gorny had personal knowledge about the reasons for Complainant's doctors' appointments, that Gorny actually saw

or read the contents of Complainant's doctors' notes or FMLA leave forms.

20. The Commission did not introduce any doctors' notes or FMLA leave forms into evidence to corroborate Complainant's testimony other than the statement of attending physician that Complainant submitted with HR after June 27, 2014 for her July 2014 FMLA leave.
21. Prior to June 27, 2014, a reasonable inference can be drawn that Complainant complained to Gorny about doing the full reversals because Complainant did not want to perform tasks that she felt were beneath her.
22. The Complainant would not be relieved of performing the full reversals until the training manual was completed.
23. Complainant testified that she had on numerous occasions provided Gorny with a draft of a training manual that conformed to what Gorny wanted in a training manual. (Tr. 51, 53, 58, 96, 111, 114, 147)
24. In the Intake Complaint Form Complainant complained that she had been harmed because Gorny failed "to follow through accommodation after complying with her requests, failure to reasonably accommodate FMLA. Specifically told 'You can't leave,' after I informed supervisor I was filing FMLA with HR." (Comm. Exh. I)

25. When Complainant gave Gorny a draft of the training manual, Gorny had the draft reviewed by others within the DPU SAP who had more technical knowledge than Gorny. (Tr. 447-448)
26. Complainant's draft training manuals were not the finished product that Gorny wanted. (*Id.*)
27. Complainant however disregarded Gorny's determination of what constituted a completed training manual and substituted her own judgement for that of her supervisor, Gorny.
28. It's reasonable to infer that "complying with her requests" is Complainant's belief that she had completed the training manual as Gorny had asked and therefore she should have been relieved of performing the full reversals.
29. Finally, the Commission asserts Gorny had direct knowledge because Complainant sent e-mails to Gorny and had in-person, one-on-one meetings where Complainant told Gorny that she needed to be relieved of performing the full reversals because of her carpal tunnel. (Tr. 44, 46, 50, 53-54, 58-59)
30. Complainant was not able to testify to a time or place where she allegedly had an in-person meeting with Gorny or to produce any emails to corroborate Complainant's testimony. (Tr. 53, 58-59)

31. When Complainant started to work with Respondent in July 2012, Gorny had thirty years of service with Respondent and was eligible for retirement. (Tr. 429)
32. Gorny was under pressure to complete the project within a short period of time so that a permanent fix was in place to prevent the problem that had led to a twenty-three million dollar budget deficit from happening again. (Comm. Exh. I)
33. Gorny did not personally possess the skills to create a hard stop fix for the back billing process. (Tr. 447)
34. Complainant was aware that Gorny did not possess the skill and expertise to do the hard stop fix for the back-billing process. (Tr. 41, 51)
35. Complainant had no respect for Gorny's skills and abilities to be a supervisor in the DPU SAP unit. (Tr. 50-51)
36. Complainant derided Gorny's lack of skills to do the hard stop fix and manual and for working for the Respondent for thirty years and having an accounting error of twenty-three million dollars to happen under her supervision. (Tr. 41-42, 50-51, 155-156)
37. Complainant also derided Gorny for not having the skills to do the training manual that was a part of the project that had

been assigned to Complainant which she described as being "dumped in her lap." (Tr. 41-42, 51)

Tassie: Okay. I'm going to skip B for a second and have you turn to C. Do you know what this document is?

Barnes: Yes. This is one of many, many, many, many, many policies and procedures that I came up with that I feel than an administrator that has 30 years of experience should be coming up with; but nonetheless, I did.

Tassie: Okay. All right. I think I can guess who you're talking about. But who is an administrator with 30 years of experience?

Barnes: Maria Gorny.

Tassie: Okay. So you—are you saying that she did not come up with this?

Barnes: No. Considering that I came to the City of Toledo July 23, 2012, [in] December 2012, I had just come off of probation. I just found this major, major financial discrepancy to the tune of millions, and I go to my high school [sic] like, "I just found this. What do I do? I just came off probation." And then I'll - you know, I'm afraid to say this, this person that's been doing these numbers, and he's like, "Ah, you know, I just kind of make them look like last year's." You know, do I go up against somebody that's been here 30 years? Who are they going to believe?

And so this work gets dumped in my lap. And I've only been employed four months. (Tr. 41-42)

38. Complainant testified that Gorny stated that the back-billing project should only take six months. (Tr. 38, 40)
39. It begs credibility that Complainant would expect Gorny to give an exact date or even speculate on the completion of the project without possessing the skill, expertise and knowledge that Complainant possessed.
40. Additionally, it is reasonable to infer that Complainant's absences from work due to FMLA leave in addition to her not accepting help from coworkers added to the length of time that it was taking to complete the project.
41. Although Gorny offered help to Complainant from Telecsan and Johnson, the credible evidence shows that Complainant's own conduct prevented her from utilizing the help.
42. Complainant was combative, argumentative, did not like taking direction from others, and did not reach out to her co-workers for help or assistance. (Tr. 312, 355-356, 368, 438, 480, 527, 529-530, 532, 548, 559, 572-573)
43. It's reasonable to infer that instead of relying on help from her co-workers, Complainant worked overtime that had not been approved by Gorny.

44. The Commission attempted to portray Gorny as a supervisor who showed indifference toward interacting with employees who requested accommodations for disabilities.
45. Complainant testified that she asked for an ergonomic desk and chair after she started employment in July 2012 and what Gorny provided was old and somehow not suitable for use. (Tr. 57)
46. Complainant used the ergonomic desk and chair that was provided to her and did not file an internal complaint with Respondent or an external complaint with either a state or federal EEO agency about the ergonomic desk and chair that she was provided by Gorny.
47. Gorny testified that during her employment she had engaged with numerous employees who asked her for an accommodation for a disability. (Tr. 438-440)
48. I found Gorny's testimony to be credible.
49. The credible evidence in the record shows that Complainant did not shy away from speaking her mind to managers, supervisors, and co-workers.
50. It begs credibility that Complainant was constantly asking Gorny to be relieved from performing the full reversal task as an accommodation for her carpal tunnel, when the first time

she visited the EEO office in early June of 2014 she complained about performing tasks that she felt weren't in her job description and wanted to be paid for overtime she worked without prior approval from Gorny.

51. A reasonable inference can be drawn that prior to June 27, 2014, Complainant did not want to perform the full reversals because they were beneath her based on her education, experience, certifications, and status as a exempt employee; and her feelings of superiority negatively impacted her ability to work with managers, supervisors, and co-workers.

52. There is no credible evidence in the record that Gorny knew or should have known that Complainant needed an accommodation for carpal tunnel.

II. On August 14, 2014, When Complainant Returned to Work from FMLA Leave She Was Not Disabled and Did Not Need an Accommodation for Carpal Tunnel to Perform Her Job

53. June 27, 2014 is the first time that Gorny had notice that Complainant was complaining about having a physical impairment and that she needed to be relieved from doing full reversals because they aggravated her carpal tunnel.
54. As a result of the meeting on June 27, 2014, Gorny said that she would look at relieving her of some of her duties. (Tr. 312, 340)
55. The Commission contends that Complainant was disabled when she returned to work because her carpal tunnel affected the major life activities of performing manual tasks and working.
56. In order to prove that the Complainant is disabled, the Commission must introduce credible evidence that the Complainant's medical condition is a physical or mental impairment within the meaning of R.C. 4112.01(A)(13):

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

regarded as having a physical or mental impairment.

57. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [the] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1).
58. The focus of the inquiry is not on the name of the impairment but how the impairment affects a major life activity of the individual. *Interpretive Guidance of Title I of the Americans with Disabilities Act (EEOC Interpretive Guidance)*, 29 C.F.R. pt. 1630 App., § 1630.2(j).
59. The regulations further provide that an individual is substantially limited in such activities if she is unable to perform such an activity or is "[s]ignificantly restricted as to the condition, manner or duration under which" she can perform it, as compared to an average person in the general population. 29 C.F.R. § 1630.2(j)(2).
60. Major life activities are "those basic activities that the average person in the general population can perform with little or no difficulty." *EEOC Interpretive Guidance*, at § 1630.2(i). Such activities include, but are not limited to:

. . . caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, . . . working[,] . . . sitting, standing, lifting, and reaching. *Id.* (legislative citations omitted).

61. Three factors should be considered when determining whether an impairment substantially limits an individual's ability to perform a major life activity:

- (1) The nature and severity of the impairment;
- (2) The duration or expected duration of the impairment;
and
- (3) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. *Id.*

62. This determination, which must be made on a case-by-case basis, requires comparison with the abilities of the average person:

An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the . . . [three factors], does not amount to a significant restriction when compared with the abilities of the average person. *Id.*

63. The Commission failed to introduce any credible evidence that shows that after Complainant returned to work on August 14, 2014, that Complainant needed an accommodation to perform

manual tasks and to work or that the effect of Complainant's carpal tunnel on her ability to perform manual tasks or to work was long term or permanent.

64. In the instant case, Complainant returned to work on August 14, 2014, without any restrictions or limitations placed upon her by her doctor and without needing an accommodation for the physical impairment that was the basis for the prosecution of the Commission's complaints.⁵ (Comm. Exh. G, page 2)

[A]n employer cannot be said to know or have reason to know of an employee's disability where that employee returns to work without restriction or request for accommodation. The natural assumption in such a case is that the employee is fully fit for work. *Hubbs v. Textron, Inc.*, 2000 WL 1032996, at *2, 2000 U.S.App. LEXIS 30465, at *7 (6th Cir. July 20, 2000).

A plaintiff must show that . . . an accommodation was needed, in that a causal relationship existed between the disability and the request for accommodation. *Leeds v. Potter*, 249 Fed.Appx. 442, 449 (6th Cir.2007) *quoting Gerton v. Verizon South Inc.*, 145 Fed.Appx. 159, 164 (6th Cir.2005).

⁵ In the Complainant's objections to the ALJ's Report and Recommendation, she asserts that after she terminated her employment, she had carpal tunnel surgery in May 2015 that caused her to lose the use of her right hand. (Attachment A) Evidence to support her assertion was not introduced at the hearing. The 2015 medical documentation Complainant submitted to the Commission was authored by her neurologist. (Comm. Exh. B) Additionally, her assertions in her objections are not supported by any references to the record.

65. Proving that Complainant has a disability as defined by R.C. 4112.02(A)(13) is the predicate for determining whether the Respondent is liable for not engaging in the interactive process with Complainant to determine whether or not a reasonable accommodation could be provided for a known disability.

While the EEOC regulations accompanying the ADA do suggest that “it *may* be necessary for the [employer] to initiate an informal, interactive process with the [employee]” to determine an appropriate accommodation, 29 C.F.R. § 1630.2(o)(3) (emphasis added), there is no separate cause of action for a failure of that interactive process. In this area of the law, we are primarily concerned with the ends, not the means: “Because the interactive process is not an end in itself, it is not sufficient for [an employee] to show that [an employer] failed to engage in an interactive process or that it caused the interactive process to break down.” *Bunn v. Khoury Enterprises, Inc.*, 753 F.3d 676, 683 (7th Cir.2014) quoting *Rehling v. City of Chicago*, 207 F.3d 1009, 1015–1016 (7th Cir.2000).

66. There is no independent liability for failure to investigate and engage in the interactive process when there is credible evidence that Complainant had no restrictions and did not need an accommodation for carpal tunnel when she returned to work on August 14, 2014.
67. The Commission failed to establish a prima facie case of disability discrimination because it failed to prove that Complainant was disabled pursuant to R.C. 4112.01(A)(13).

**III. The Commission Failed to Prove that Retaliation Was the
Determinative Factor that Motivated the Respondent to
Investigate the Complainant's EEO Complaint as a Workplace
Violence Complaint**

68. Under Title VII case law, the evidentiary framework normally requires the Commission to prove a prima facie case of unlawful retaliation by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973).

69. To establish a prima facie case of unlawful retaliation, the Commission must demonstrate by a preponderance of the evidence that:

- (1) Complainant engaged in a protected activity,
- (2) Respondent was aware that Complainant had engaged in that activity,
- (3) Respondent took an adverse employment action against the Complainant, and
- (4) There is a causal connection between the protected activity and adverse action.

Greer-Burger v. Temesi, 116 Ohio St.3d 324, 327 (2007).

69. The establishment of a prima facie case creates a rebuttable presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).
70. 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.” *Gonzales v. Ohio, Dept. of Taxation*, 183 F.R.D. 514, 518, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).
71. However, the temporal relationship is not the only relevant evidence that courts consider depending on other circumstances that occur between the protected activity and the adverse action. *Devera v. Adams*, 874 F.Supp. 17, 21, 67 FEP Cases 102 (D.C.Cir.1995).
72. The Commission must show that retaliation was the “but for” factor which is a higher standard of proof than required in other Title VII discrimination claims.

[T]o prevail on a retaliation claim, a plaintiff must show that retaliation is a determinative factor—not just a motivating factor—in the employer's decision to take adverse employment action. Thus, the causation standard imposed in retaliation cases (but-for causation) is a higher standard than that applied in USERRA or Title VII discrimination claims (‘motivating factor’). *Smith v. Dept. of Pub. Safety*, 2013-Ohio-4210, 997 N.E.2d 597, 614 citing

Univ. of Texas Southwestern Med. Ctr. v. Nassar,
570 U.S. 338, 360, 133 S.Ct. 2517, 2533 (2013).

73. Complainant filed an EEO complaint on the basis of an ADA accommodation. (Comm. Exh. I)
74. Specifically the complaint alleged the failure to follow through on "accommodation offer." (*Id.*)
75. The complaint was delivered to Respondent's AA/CC and received by Wilson who had the responsibility to investigate EEO complaints when they were received in the office. (Tr. 270-272)
76. After Wilson and Brown reviewed the complaint, they did not investigate the complaint as an ADA complaint, and they determined from the contents of the form that the complaint alleged a violation of Respondent's Workplace Violence Policy. (Comm. Exh. J)
77. The decision by Wilson and Brown to not investigate the Complainant's complaint as an ADA accommodation complaint was made only one day after they received the complaint. (*Id.*)
78. The Commission established a prima facie case of retaliation.
79. To meet the 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 (1993), *quoting Burdine*, 450 U.S. at 254-55.

80. The presumption created by the establishment of a prima facie case “drops out of the picture” when the employer articulates a legitimate, nondiscriminatory reason for the employment action. *Id.* at 511.

81. Respondent argues that based on the contents of Complainant’s EEO complaint, the complaint was more in line with a complaint about workplace violence, not ADA accommodation.

82. 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, *quoting Burdine*, 450 U.S. at 253.

[A] reason cannot be proved to be a “pretext for [unlawful discrimination and retaliation]” unless it is shown *both* that the reason was false, *and* that discrimination [and unlawful retaliation] was the real reason. *Id.* at 515.

83. Therefore the Commission must demonstrate by a preponderance of the evidence that Respondent's "proffered legitimate reason: (1) has no basis in fact; (2) did not actually motivate the defendant's challenged conduct; or (3) was insufficient to warrant the challenged conduct." *Dews v. A.B. Dick Co.* 231 F.3d 1016, 1021 (6th Cir.2000).
84. Although Complainant's EEO complaint form indicated that the complaint was an ADA accommodation, Wilson and Brown decided, without talking to Complainant, to treat the complaint as a workplace violence complaint.
85. The Commission must prove that AA/CC and HR's failure to investigate the Complainant's complaint as an ADA accommodation complaint would not have occurred "but for" Respondent having engaged in unlawful retaliation.
86. The Respondent introduced evidence that after reviewing the contents of Complainant's complaint that Wilson and Brown determined that the complaint was about workplace violence and harassment.
87. Although the Intake Complaint Form was marked as ADA Accommodation, Complainant did not checkmark the basis of the complainant as disability, she check marked that it was retaliation and hostile work environment. (Tr. 284-285, Comm. Exh. I)

88. In the Intake Complaint Form Complainant stated that the basis for her complaint was Gorny's statement made during a meeting about the importance of completing the project to which Complainant was assigned and that Gorny's behavior was affecting morale. (Comm. Exh. I)

89. Complainant further stated that Gorny's conduct had created a hostile work environment and retaliation specifically:

Bullying tactics, disparagement of subordinates to other subordinates she supervises, threats of intimidation if [Gorny's] terminated without 90% of retirement pay, policies she implements affect morale within the division even after I've completed every task she's asked, with promises that its "temporary." Temporary has now turned into 7 months and counting---constantly moving the goal post after expressing how its affecting my health and team morale. (*Id.*)

90. Gorny assigned Complainant the project in December 2012 which included doing the full reversals until Complainant completed the project. (Tr. 445, 484-485)

91. At the time that Complainant filled the complaint out, she had still not completed the project. (Tr. 71, 448-449)

92. Complainant wrote that the relief she was looking for was "counseling memo rescinded and all [carbon copied recipients] notified of rescinded memo, transfer to another division that

will utilize my SAP analytical skills at same grade level.”
(Comm. Exh. I)

93. When Wilson was asked why it took her until August 8, 2014 to send Complainant the letter telling her that the complaint was being transferred to HR to be investigated as a workplace violence complaint, she testified:

Tassie: Can you look at the—second page? First of all, in this letter you notify her—almost three weeks after the decision to transfer it to another department, you notify her that it’s been transferred.

Wilson: Okay.

Tassie: Is there a reason for that, the delay in notifying her?

Wilson: Being that we only had two individuals working in the division, myself and Mr. Brown, and two other individuals were gone, the actual ADA coordinator had been transferred out and the other office manager had left and the secretary was gone, so being that, you know, here I am investigating complaints and, you know, not in the role of an ADA coordinator per se, that wasn’t my actual job. You know, I’m trying—I was trying at the time to do as much as I could in the division as possible. (Tr. 288-289)

94. A reasonable inference can be drawn that with only one person to investigate AA/CC complaints, Wilson and Brown were taking the path of least resistance by not investigating a

complaint that based on its contents looked like a workplace violence complaint.

95. When Vollmer interviewed Complainant, Complainant did not bring up the topic of the original EEO complaint that she filed with the AA/CC or talk about its contents to Vollmer.

96. Vollmer testified that she took notes of the notes of the interviews. (Tr. 216)

97. I believed Vollmer's testimony based on the credible evidence in the record.⁶

98. It is reasonable to infer that Complainant participated in the workplace violence investigation because she believed that a finding in her favor could still result in her being transferred from under Gorny's supervision and relieved from performing tasks that she felt were beneath her.

⁶ Pursuant to R.C. 4112.05(G)(1), the Commission's determination of whether or not a Respondent has engaged in discriminatory practices are to be based upon all reliable, probative, and substantial evidence presented at a hearing. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) and (I) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E). In the Complainant's objections she copied an email that was allegedly sent by her to Vollmer as proof that Vollmer was aware that Complainant still wanted to have her EEO complaint investigated as an ADA Accommodation complaint and not as a workplace violence complaint. (Attachment B) The AAG did not introduce the e-mail document into evidence at the hearing. The email submitted by the Complainant was not considered by the ALJ in making its recommendation to the Commission because it was not in the hearing record.

99. There is no credible evidence in the record that would support a determination that retaliation was the but-for/determinative factor for Respondent investigating Complainant's EEO complaint as a workplace violence complaint.

IV. The Complainant Voluntarily Terminated Her Employment on April 10, 2015

100. When Complainant returned to work she did not need an accommodation for carpal tunnel. (Comm. Exh. G, page 2)
101. However, Complainant's project had not been completed and Complainant was still expected to perform the full reversals until the project was completed. (Tr. 432, 449)
102. It's reasonable to infer that Complainant's request for accommodation in October of 2014 was motivated by her realization that Gorny wasn't going to take away the full reversals. (Tr. 123)
103. Complainant did however continue to have a combative attitude towards management and show indifference toward workplace attendance policies.
104. On October 1, 2014, Complainant received a written reprimand from Arnold for insubordination toward Arnold on September 23, 2014. (Comm. Exh. P)
105. On November 18, 2014 and February 18, 2015, the Complainant received notifications of tardy which were both second notices of occurrences of tardy within a six month period. (R. Exh. 12, 13)

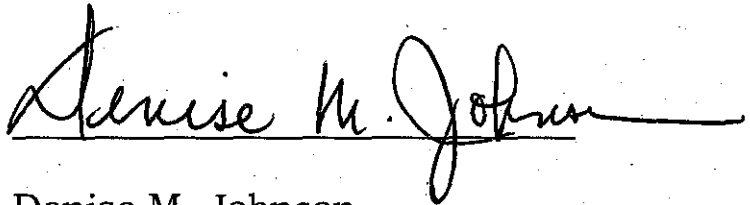
106. A constructive discharge claim is not a basis for liability unless the Commission proves that Respondent discriminated against Complainant because of her disability or retaliated against Complainant.

Constructive discharge claims "must be predicated on a showing of either intentional discrimination, or retaliation." *Mayers v. Laborers' Health & Safety Fund of N. Am.*, 478 F.3d 364, 370 (D.C.Cir.2007) quoting *Carter v. George Washington Univ.*, 387 F.3d 872, 883 (D.C.Cir.2004).

107. The Commission failed to meet its burden of proof to show that the Respondent discriminated against the Complainant based on disability or retaliated against Complainant because she opposed what she believed to be a discriminatory practice.
108. Therefore, the Complainant voluntarily terminated her employment with Respondent on April 10, 2015.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue Dismissal Orders in Complaint Nos. 15-EMP-TOL-36834 and 16-EMP-TOL-37200.

A handwritten signature in black ink, reading "Denise M. Johnson", with a horizontal line drawn underneath the name.

Denise M. Johnson
Administrative Law Judge

Date mailed: April 17, 2018

Dear Commissioners:

Mr. Leonard Hubert, Mr. William Patmon III, Ms. Lori Barreras, Ms. Madhu K. Singh, Mr. Juan P. Cespedes,

In the matter of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendations Report, regarding Camille Barnes v. City of Toledo, Department of Public Utilities, I respectfully object to the Administrative Judge's recommendation. Please re-consider and grant a request to re-appear before you in this matter, if deemed necessary.

SPECIFIC OBJECTIONS TO CONCLUSIONS OF LAW & DISCUSSION

Indeed, the Commission has established a prima facie case of disability discrimination/failure to accommodate, failure to engage in the interactive process and engaged in retaliatory conduct which led to my constructive discharge on April 10, 2015, by introducing evidence that:

I. Complainant is disabled;

a. Dr. Robert Hartwig's medical record statement regarding carpal tunnel & trigger finger:

- i. Condition:** Carpal tunnel, swelling and trigger finger in both hands and wrists, Surgeries: 4/2014, 5/2015
- ii. Duration:** Lifetime
- iii. Abilities affected:** lifting, grasping, reading, talking on phone, pain during the night—No use of right hand due to surgery.
- iv. New problem 11/14/2014:** Right Trigger thumb. Limitations: Wear splint Surgery 5/1/2015

b. Dr. Howard Schect's medical record statement regarding migraines:

- i. Condition:** Chronic daily headaches, Episodic migraines, tension type headaches
- ii. Duration:** Lifetime
- iii. Abilities affected:** Thinking, Concentration and vision problems
- iv. Nasal surgery—4/2013, Dr. Oliver Jenkins**

c. Dr. Robert Axonovitz medical record statement regarding anxiety:

ADA/FMLA Discrimination-Interference, FMLA Retaliation and Harassment claim, as indicated on my internal complaint form.

Ms. Volmer testified that she was ordered to classify it as Workplace violence by Affirmative Action Department headed by Calvin Brown. (see email exchange below)

Volmer, Miranda

From: Barnes, Camille
Sent: Monday, August 25, 2014 12:26 PM
To: Volmer, Miranda
Subject: RE: Wednesday Meeting

I would like to meet on Thursday regarding my June 27, 2014th ADA/FMLA Discrimination-Interference, FMLA Retaliation and Harassment claim, as indicated on my internal complaint form.

**Camille R. Barnes
SAP Administrative Analyst
SAP Support Team
City of Toledo
Division of Utilities Administration
419-936-7661**

From: Volmer, Miranda
Sent: Monday, August 25, 2014 10:50 AM
To: Barnes, Camille
Subject: RE: Wednesday Meeting
Exemptness High

Hi Camille-

Just checking in to see when you would like to meet regarding your complaint of work place violence(IA form).

Thank you,

**Miranda Volmer
Administrative Analyst I
City of Toledo Department of Human Resources
One Government Center, 19th Floor
Toledo, OH 43604
419-345-1500 (phone)
419-345-1911 (fax)**

- c. Cynthia Wilkes (COT DPU EEOC Rep) testimony confirmed my testimony that I had a disability and requested accommodation. Maria agreed to an accommodation but decided to write me up instead, for absences/tardiness that were already excused with her signature. This was blatant retaliation for complaining of ADA/FMLA Discrimination-Interference, FMLA Retaliation and Harassment. (see Cynthia's testimony below)**