



OHIO CIVIL RIGHTS COMMISSION

Governor Mike DeWine

Commissioners: Lori Barreras, Chair | Juan Cespedes | William Patmon, III | Dr. Carolyn Peters | Madhu Singh
Executive Director Angela Phelps-White

May 13, 2020

Heather Fugate

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Complainant

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**Re: Heather Fugate v. Abbott Laboratories dba Abbott Nutrition
Complaint No. 18-EMP-DAY-26521**

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-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 Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **June 5, 2020**. *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.



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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, Ohio 43215-3414.** *All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION:

Desmon Martin /kk

Desmon Martin
Director of Enforcement and Compliance

Enclosure

cc: Angela Phelps-White, Executive Director/Darlene Sweeney-Newbern, Director of Regional Operations/Stephanie Bostos-Demers, Chief Legal Counsel



IN THE MATTER OF:

Heather Fugate
Complainant,

Complaint No. 18-EMP-DAY-26521

v.

Abbott Laboratories dba Abbott Nutrition
Respondent.

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

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ALJ'S REPORT

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Ohio Civil Rights Commission
Division of Hearings
30 East Broad Street, 5th Floor
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(614) 466-6684
Chief Administrative Law Judge

INTRODUCTION AND PROCEDURAL HISTORY

Heather Fugate, (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on June 26, 2017.

The Commission investigated the charge and found probable cause that Abbott Laboratories dba Abbott Nutrition (Respondent) engaged in unlawful discrimination in violation of Ohio Revised Code R.C. 4112.02(A) and 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 June 7, 2018.

The complaint alleged that Respondents subjected Complainant to a hostile work environment based on her sex and terminated her in retaliation for opposing an unlawful discriminatory employment practice.

Respondent filed an answer on June 29, 2018. Respondent admitted some procedural allegations but denied that they engaged in any unlawful discriminatory practices.

A public hearing was held on March 13 and April 3, 2019 at the Dayton Regional Office of the Ohio Civil Rights Commission located at 3055 Kettering Boulevard, Suite 111, Dayton Ohio.

The record contains previously described pleadings, a transcript consisting of 563 pages of testimony, exhibits admitted into evidence at the hearing, post-hearing briefs filed by the Commission on July 1, 2019, Respondent on August 22, 2019, Complainant on July 8, 2019 and the Commission's reply brief filed on August 29, 2019.

FINDINGS OF FACT

The following findings 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 was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on June 26, 2017.
2. The Commission determined on June 7, 2018 that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A) and 4112.02(I).
3. The Commission attempted but failed to resolve this matter by informal methods of conciliation.

4. Complainant is a state licensed electrician with thirty years of experience. (Tr. 28)
5. Respondent is a company that makes food products and nutritional supplements for infants (Pediasure), the elderly (Ensure), and diabetics (Glucerna) and is subject to regulation by the U.S. Food and Drug Administration (FDA). (Tr. 24, 376)
6. Respondent's Tipp City, Ohio facility is a twenty-four hour, seven days a week processing, filling, and packaging production facility that started up in 2013. (Tr. 31-32, 374-375)
7. The Tipp City facility has three main areas: Processing, Packaging, and Filling. (Tr. 24)
8. Each department in the facility has a Front Line Leader (FLL), two Operators, and one Mechanical Operator (MeOp). (Tr. 31)
9. On December 8, 2014, Mark Hoban (Hoban) and two other supervisors interviewed Complainant for a MeOp position on the filler on shift 1A. (Tr. 386-387)
10. Hoban was the Operations FLL in the filling section on shift 1A (6:30 a.m.-7:00 p.m.). (Tr. 36, 395)

11. A MeOp is a hybrid or floater position on the filler line, performing the Operator tasks when the line is running, in addition to performing maintenance on the line. (Tr. 31, 126)
12. The Operators make the batches of product and clean the line. (Tr. 36, 329, 379)
13. Respondent was looking for MeOp candidates with a background in maintenance, preferably in the food industry. (Tr. 385-387)
14. Hoban has a background in operations and not in maintenance so other team members with maintenance background questioned Complainant about her maintenance skills. (Tr. 386, 387, 393)
15. Complainant was asked during the interview about her welding experience, especially sanitized welding. She was also asked to draw a diagram about a pump and if it had no flow, how would she troubleshoot that. (Tr. 387)
16. Hoban and the interview team liked Complainant's electrical background because they didn't have many maintenance employees with electrical background. (Tr. 394)

17. On the same day as the interview, Respondent offered the Complainant the job of MeOp. (Tr. 30)
18. When Respondent first hired employees for the Tipp City facility, there was no dedicated staff for maintenance. MeOps were pulled off of their tasks to perform maintenance on other equipment and in other areas of the facility. (Tr. 388)
19. As the facility got bigger and more lines were added and ran faster, there were more maintenance tasks to perform. (Tr. 391)
20. MeOps were constantly taken from their task of operating their lines to help out with maintenance. (Tr. 392)
21. Respondent created a designated maintenance staff to address the increased maintenance demands. (Tr. 392)
22. Total Preventative Maintenance employees (TPM) became a full time maintenance position that was originally filled by MeOp employees. (Tr. 392)
23. TPMs were responsible for performing maintenance for the entire facility, which included maintenance on all areas of the building in addition to performing maintenance on the

processing and production machines in each department. (Tr. 37, 392-393, 397-398).

24. TPM's were expected to assist MeOps with machinery breakdowns that were too advanced for MeOps to handle independently. (Tr. 37, 392-93)
25. Mitch Gostomsky (Gostomsky) and Don Anderson (Anderson) were the TPMs who were responsible for plant maintenance on shift 1A. (Tr. 36)
26. Hoban did not supervise Gostomsky and Anderson. (Tr. 459)
27. The maintenance side of Complainant's MeOp responsibilities were to do preventative maintenance (PM) and demand maintenance (DM). (Tr. 49-50)
28. PM is routine maintenance that is performed weekly to prevent something from failing that would prevent the Filler from running. (Id.)
29. DM is when something has failed or there is a determination that something needs to be fixed. (Id.)
30. MeOps were expected to handle certain PM tasks during the Filler's weekly maintenance windows without assistance from

TPMs, which included valve and pump rebuilds.
(Tr. 377- 388, 395)

31. At the beginning of her employment and annually prior to the two-week shutdown of the facility, Complainant received onsite training from Filler manufacturer representatives.
(Tr. 389-90, 396)

32. While TPMs were expected to provide MeOps with some on the job training, it was not a TPM's job function to train MeOps.
(Tr. 396)

33. All new hires received training at the beginning of their employment on the Respondent's work policies contained in the Code of Conduct Manual and thereafter were required to take online training annually to review the policies.
(Tr. 480, 495)

34. The manual includes the requirements for the processing and documentation procedures for employees involved in the production of Respondent's products and EEO policies.
(Resp. Exhibit 1)

35. Complainant started working under Abbi Wilson's (Wilson) supervision for two months while Wilson covered for Hoban who was on a special project. (Tr. 35, 355)

36. In June or July of 2015, Complainant and other employees were placed in their positions that they were hired to work in. (Id.)
37. After Complainant started working under Hoban's supervision, Gostomsky and Anderson provided Complainant with training. (Tr. 41)
38. Travis Wise (Wise) and Tim Lane (Lane) were the Operators on the shift 1A Filler work crew. (Tr. 36, 329, 379)
39. Complainant had no difficulties performing the operations part of her job that included running production, dumping caps, doing checks, everything that an Operator did. (Tr. 31, 395, 400)
40. Complainant was struggling learning the maintenance side, particularly valve and pump rebuilds. (Tr 41, 395)
41. Complainant believed that the way she would learn was through repetition, comparing the training that she needed to the type of training that she went through to learn the trade of electrician. (Tr. 46)

42. Complainant was aware that Gostomsky and Anderson were frustrated with her difficulty learning how to do valve and pump rebuilds. (Tr. 41, 42)
43. Complainant told Gostomsky that she was having trouble with valves and was doing everything that she can and would do a valve rebuild “one hundred times, whatever it takes”. (Id.)
44. Gostomsky told Complainant “We don’t have a hundred rebuild kits to show you. You just don’t get it, and we’ve showed you and showed you, and you just don’t get it.” (Id.)
45. At some point in time during the Complainant’s employment, the following verbal exchanges/interactions occurred between Complainant, Gostomsky and Anderson:
- Complainant sought help with valve replacements from Anderson and Gostomsky and they used the phrase “righty tighty, lefty loosey”. (Tr. 41)
 - One time when Complainant offered to help Gostomsky work on a piece of equipment, she was holding a ball bearing and Gostomsky said “Get your damn hands off that part.” (Tr. 65)

- Once when Complainant asked Gostomsky what he was working on, he told her to “shut the fuck up and mind your own business.” (Tr. 66)
 - When Complainant was cleaning out her toolbox on one occasion, Gostomsky quickly entered the room, grabbed a screwdriver, told Complainant to “get the fuck out of my way,” and stormed out of the room. (Tr. 67)
 - Gostomsky told Complainant that she should “know how to do this by now” when she was asking another TPM questions about a maintenance task. (Tr. 68-69)
 - Gostomsky once accused Complainant of narcing on him and Anderson for not helping her enough with maintenance tasks. (Tr. 73-74)
 - Complainant once asked Gostomsky why he hated her so much and he responded, “I hate all women.” (Tr. 45)
46. Complainant did not report any of the comments to Hoban. (Tr. 153-172)

47. Complainant reached out to other employees for assistance instead of calling on Gostomsky and Anderson.
(Tr. 42, 44, 46-47, 68, 70, 395)
48. Hoban was aware that Complainant was frustrated because she wasn't receiving the training and assistance that she felt she needed from Gostomsky and Anderson. (Tr. 396)
49. Hoban told Complainant that he was going to give her more training on the filler for a week by having Wise perform the job of the MeOp and Complainant perform as an Operator.
(Tr. 132, 358)
50. Wise had assisted other employees in building valves.
(Tr. 358)
51. At the time that Hoban told Complainant about the temporary change she did not have a response except to say "Oh".
(Tr. 78)
52. Hoban announced the temporary change at the huddle.
(Tr. 79)
53. Sometime on November 3rd Complainant talked to Hoban and asked him was she responsible for maintenance on the filler and he responded "Yes". (Tr. 85)

54. Then Complainant said “Then this stops. This stops today. I’m a MeOp. I have never been an operator my entire life. I’m in maintenance. So this stops.” (Id.)
55. Complainant told Hoban that Gostomsky and Anderson were disrespecting her and did not want to work with her because she is a female. (Tr. 85, 133)
56. On January 26, 2017, during the Complainant’s performance review meeting, Complainant communicated to Hoban that the training and job assistance issues that she had with Gostomsky and Anderson were unresolved and “they don’t want to work with me because I’m a woman”. (Tr. 87)
57. On February 28, 2017, Complainant was scheduled to perform scheduled maintenance on the filler. (Tr. 90)
58. Hoban sent Terry Chessman (Chessman), a TPM, and Gostomsky to assist Complainant. (Tr. 90)
59. Complainant was discussing the scheduled preventative maintenance with Chessman. (Tr. 90)
60. Gostomsky said to Complainant, “You know what you need to do Heather? You know what you need to do? You need to go to packaging. That’s what you need to do. You need to go to

packaging so you can do your job in packaging since you can't do it in the filler." (Tr. 90)

61. Complainant then told Gostomsky, "I'll tell you what you can do. You can go fuck yourself." (Tr. 91)

62. Complainant was upset as a result of the verbal exchange with Gostomsky. (Id.)

63. On the same day at 1:05 PM, Complainant sent an "off the record" text message to Hoban relating the verbal exchange she had with Gostomsky, stating that she should not have to put up with the nonsense she is experiencing with Gostomsky and Anderson "just because somebody doesn't like women". (Tr. 95, Comm. Exh. 3)

64. By sending Hoban an "off the record" text message, Complainant did not want to go to HR but wanted Hoban to do something about the issues that she was having with Gostomsky and Anderson. (Tr. 138)

65. Hoban was in a meeting at the time that he received the email and responded to the email during the meeting. (Tr. 413)

66. At some point during the day, Hoban went to Complainant and discussed the text and Complainant told Hoban that she was

frustrated because she was not getting enough help to get her work done in the maintenance window. (Tr. 414)

67. Later on, at or around 7:12 PM, Complainant was trying to fill out work orders and she had only one half of one completed, something she had never done before. (Tr. 96)

68. Todd Frazier (Frazier) informed Complainant that temperature checks had not been done or signed off on for the sterile water generator at the end of the shift Complainant had just completed. (Tr. 97)

69. After Complainant obtained the document from Frazier, she did not check the actual temperatures based on half hour intervals as required but filled in temperatures next to the time spaces that had been blank. (Tr. 144-145, Resp. Exh. A)

70. Complainant then dated and initialed the last column corresponding to the times and temperatures that she had entered. (Id.)

71. Complainant was aware that the temperature data was false when she wrote it on the data sheet and signed her name verifying the accuracy of the data. (Tr. 97-99, 125, 145-147)

72. Respondent's Documentation Guidelines Procedures (DGP) prohibit falsification of data. (Resp. Exh. E)
73. The DGP list "Data as an artifact" as an unacceptable reason for a change or correction to a document". (Id.)
74. Complainant called Wise but did not call Hoban that night or speak to him about the entries until she returned to work on March 3, 2017. (Tr. 147, 150)
75. The document was reviewed by Daniel Ogeto, the FLL on the shift that immediately followed shift IA. (Tr. 401-402, Resp. Exh. A)
76. The first time that Hoban saw the document he did not review it carefully, thought the duplicate temperature entries were due to error and posted it on a board as a "batch right the first time." (Tr. 401-402)
77. The purpose of the "batch right the first time" error board was to track the documentation errors and serve as a metric for operator improvement. (Id)
78. When Complainant went back to work on March 3, 2017, she saw the document hanging on the error board on her way to the 6:30 AM morning huddle. (Tr. 99-100, 401)

79. Complainant took Hoban to the message board to talk him about the document:

Q: And then what did you do—what did you do on Friday morning?

A. So, we have the huddle in the morning at 6:36. I walk by. There's a board that hangs on—outside our huddles. There's a discrepancy board where if you do make an error, they'll put a flag on it that it needs to be corrected. They'll document Heather had an error or somebody had an error if you make a mistake.

So, I saw that on the board. So, I waited until the huddle, and I took Mark Hoban over to the board. And I said, "Hey, I need to get this fixed." And he said, "Did they catch it up front?"

And we have a different system where people check those things. I don't know who caught it. I said, "I'm not sure."

He said, "Well, if we caught it, don't worry about it.

I'll send Jenny back and fix it." (Tr. 99-100)

80. Jenny Severance (Severance) was the Corrective Action Preventative Actions Coordinator (CAPA) in the Quality Services (QS) department where all work orders were reviewed to make sure that everything was done in compliance with the FDA correctly and then released the batches. (Tr. 404)

81. Complainant went back to Hoban later on that day and talked to Hoban about the text message. She wanted Hoban to do something about how Anderson and Gostomsky were treating her or she would have to go to HR. (Tr. 103)
82. On March 8, 2017 Severance talked to Complainant and Frazier about the document. (Tr. 102)
83. Complainant told Severance that she did sign the sterile water generator monitoring sheet and did not do the checks. (Tr. 148)
84. Andy Cudney (Cudney), Respondent's Operations Manager who Hoban reported to, talked to Complainant and she told him the same thing that she told Severance. (Id.)
85. Cudney told Hoban that he had heard from QS about the document falsification and asked Hoban why he had not informed him about it. (Tr. 405)
86. Hoban and Severance took a copy of the document to talk to Complainant. (Tr. 407-408)
87. When Hoban and Severance asked Complainant about the errors, Complainant asked "Do you want the truth?" (Tr. 407)

88. Complainant told them that she had not checked the actual temperatures based on half hour intervals as required but filled in temperatures next to the time spaces that had been blank. (Id., Resp. Exh. B)
89. Respondent operates an Employee Relations/Human Resources Service Center (Service Center) in Chicago, Illinois. (Tr. 473)
90. If issues arise for Respondent's employees, they are required to contact the Service Center and "open a ticket". (Id.)
91. On March 16, 2017 Hoban called Employee Relations and reported that Complainant had falsified documentation and a case was opened. (Tr. 103, 408)
92. Once the "ticket" is opened, a representative will then contact the employee for further details and investigation. (Tr. 473.)
93. When Hoban opened the ticket, he recommended a written warning as discipline for Complainant's handling of the documentation. (Tr. 409-410, 492)
94. On March 17, 2017, Complainant was interviewed by Deborah Boskovic (Boskovic) of Respondent's Employee Relations Department. (Tr. 104)

95. At the time of the interview, Complainant told Boskovic about her complaint and that she believed that Gostomsky and Anderson had harassed her based on her sex. (Id.)
96. Boskovic told Complainant that because falsification and harassment were separate cases, she would be interviewed on another date regarding the harassment issue. (Tr. 105)
97. At the end of Complainant's discussion with Boskovic on March 17th, Complainant was suspended from working at Respondent's facility. (Tr. 152)
98. Complainant was interviewed about the sexual harassment complaint on March 21, 2017. (Id.)
99. On March 31, 2017, Hoban called Complainant and told her that her employment with Respondent was terminated. (Tr. 108, 411-412)
100. On April 5, 2017, Gostomsky and Anderson received verbal counseling from their supervisor, Ron Mobley. (Comm. Exhs. 9 & 10, Tr. 497)
101. The counseling was to set clear expectations regarding positive work environment, treating others with dignity and respect and inclusivity. (Comm. Exhs. 9 & 10)

102. The counseling also stated that it was important that if Gostomsky or Anderson had any concerns with any one's performance that they remain professional and speak with their manager and avoid actions that can be perceived as dismissive. (Id.)

103. On April 7, 2017, Complainant received an email from Boskovic stating the investigation into the harassment claims against Gostomsky and Anderson was complete and appropriate action had been taken. (Tr. 176)

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.¹

1. The Commission alleged in its Complaint that Respondent engaged in discriminatory conduct by: (1) permitting a sexually hostile work environment to exist, and (2) Complainant's employment was terminated 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:
 - (A) For any employer, because of the ..., sex ..., of any person, to discharge without just cause...,

 - (I) For any person to discriminate in any manner against any other person because that person has opposed any

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

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.
4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. V. Ohio Civil Rights Com.*, 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, 802-03 (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), citing *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), and *Teamsters v. United States*, 432 U.S. 324, 358, and n. 44 (1977).

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

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination ... [n]o additional proof is required.² *Hicks, supra* at 511, 62 FEP Cases at 100 (emphasis added).

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.

10. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" the reason is a pretext for unlawful discrimination. *Manzer, supra* at 1084.

11. This type of showing, which tends to prove that the reason did not *actually* motivate the employment decision, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

SEXUAL HARRASSMENT/HOSTILE WORK ENVIRONMENT

13. Sexual harassment is a prohibited form of sex discrimination.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

14. There are two types of sexual harassment:

(1) “quid pro quo”- harassment that is directly linked to the grant or denial of a tangible economic benefit, or

(2) “hostile environment”- harassment that, while not affecting economic benefits, has the purpose or effect of creating a hostile or abusive working environment. *Hampel v. Food Ingredients Specialties*, (2000), 89 Ohio St. 3d 169, 176.

15. While quid pro quo harassment is motivated by sexual desire and hostile environment harassment manifest itself as abusive behavior, both are directed at an employee because of the employee’s sex. *Id.*

“The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” *Oncale Offshore Sundowner Serv. Inc.* (1998) 523 U.S. 75 at 81-82 (1998)

“[t]he law recognizes that non-sexual conduct may be illegally sex-based where it evinces anti-female animus, and therefore could be found to have

contributed significantly to the hostile environment.”).

Williams v. General Motors Corp., (6th Cir. 1999), 187 F.3d 553 at 565

16. In the instant case, the Commission alleges that two of Complainant’s coworkers subjected her to an abusive and hostile work environment because of her sex.

17. In order to establish a prima facie case of a hostile environment based on sex, the Commission must introduce the following credible evidence:

- (1) that the harassment was unwelcome;
- (2) that the harassment was based on sex;
- (3) that the harassing conduct was sufficiently severe or pervasive to affect the “terms, conditions, or privileges of employment”; and
- (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action. *Hampel at 176.*

18. Respondent asserts that Gostomsky and Anderson’s comments were made as an evaluation on Complainant’s job performance because, even after she had been provided with training, Complainant still struggled to perform routine

maintenance without their assistance.

19. In a hostile environment sexual harassment claim, the alleged harassment does not have to be sexual in nature if it is gender based.

[A]ctions that are simply abusive, with no sexual element, can support a claim for sexual harassment if they are directed at an employee because of his or her sex. Simply put, “[h]arassment alleged to be because of sex need not be explicitly sexual in nature.” *Hampel* at 179 quoting *Carter v. Chrysler Corp.*, (8th Cir. 1999), 173 F.3d 693, 701

While the requirement that harassment be “because of sex” does not “mandate that the harassment be sexual in nature,” where the complained of behavior is “not overtly or explicitly sexual,” there must be sufficient evidence to create an inference that but for Complainant’s sex, the behavior would not have been undertaken. *Mast v. Imco Recycling of Ohio*, 58 F. Appx. 116, 118 (6th Cir 2003)

20. The credible evidence in the record supports the Respondent’s assertion that Gostomsky’s non sexually explicit comments and conduct were based on their frustration with Complainant’s job performance.

21. Complainant admitted that Gostomsky and Anderson trained her but that she was struggling learning how to do valve and pump rebuilds without their assistance. (Tr. 41)
22. Complainant testified that valve and pump rebuilds were critical to the operation of the filler machine. (Tr. 61)
23. Complainant's expectation of the type of training she was supposed to receive from Gostomsky and Anderson was based on her training to become an electrician: if Complainant was uncomfortable with what she was doing she had access to and availability of an electrician to ask questions. (Tr. 40-41)
24. I found Complainant's testimony incredible that Gostomsky and Anderson were to provide her with on the job training comparable to training that she received to become an electrician. (Tr. 193-196)
25. Gostomsky's frustration with Complainant's struggle to learn how to do valve and pump rebuilds after she received training is supported by his statement to Complainant that "We don't have a hundred rebuild kits to show you. You just don't get it, and we've showed you and showed you, and you just don't get it." (Tr. 67)

26. Once an employee raises concerns about sexual harassment it is HR/Employee Relations Department in Chicago who conducts the investigation. (Tr. 488)
27. Complainant wanted Hoban to handle her issue regarding Gostomsky and Anderson and did not want him to contact HR. (Tr. 138)
28. It begs credibility that Complainant would want Hoban to address the training and assistance issues that she was having with Gostomsky and Anderson without contacting HR if she believed that their behavior toward her was because of her sex.
29. Although Complainant did not like or welcome the rude, boorish, and unprofessional non sexually explicit comments and behavior directed toward her by Gostomsky and Anderson, the credible evidence in the record supports the determination that it was not because of her sex.
30. On one occasion, Complainant asked Gostomsky why he did not like her, and he responded that he hated all women which was an expression of an anti-female animus. (Tr. 45)
31. When Complainant complained to a male co-worker, Terry Chessman (Chessman) about Gostomsky and Anderson not giving her assistance, Chessman on more than one occasion said, "Those guys are assholes". (Tr. 135)

32. Gostomsky's comment was a single, isolated, offensive sex-based statement, a statement that she did not communicate to Hoban.

“ ‘simple teasing,’ offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’ ” (Internal citation omitted.) *Faragher v. Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L.Ed.2d 662 (1998))

In order to create a hostile work environment, the conduct must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) quoting *Meritor*, supra at 67.

33. A reasonable person would not find that the isolated sex-based statement unreasonably interfered with the terms, conditions or benefits of Complainant’s work environment based on her sex.

34. The Commission failed to prove by reliable, probative, and substantial evidence in the record that the Complainant was subjected to a hostile work environment because of sex.

RETALIATION

35. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 441 U.S. 792, 5 FEP Cases 965 (1973) for disparate treatment cases applies to retaliation cases.
36. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).
37. To establish a *prima facie* case of retaliation, the Commission must introduce credible evidence that:
- (1) Complainant engaged in a protected activity;
 - (2) Respondent was aware that the 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 327 at para. 13 citing *Canitia v. Yellow Freight Sys., Inc.* (C.A. 6, 1990), 903 F.2d 1064, 1066.

38. On March 17, 2017 during the Employee Relations investigation of Complainant for falsification of documents, Complainant made a complaint of sexual harassment against Gostomsky and Anderson. (Tr. 149)
39. On March 31, 2017 Complainant was terminated from her employment with Respondent for falsification of documents, fourteen days after she complained to HR that she had been subjected by a co-worker to sexual harassment. (Id.)
40. The Commission has therefore established a *prima facie* case of retaliation.

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).

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 (D.C. Cir. 1995).

41. Once the Commission establishes a *prima facie* case, the burden shifts to Respondent to articulate some legitimate, nondiscriminatory reason for its adverse employment action against Complainant. *McDonnell Douglas*, 411 U.S. at 802.

42. The presumption of unlawful retaliation created by the establishment of a *prima facie* case “drops out of the picture” when the Respondent articulates a legitimate, nondiscriminatory reason for its employment action. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 at 511 (1993).
43. Respondent met its burden of production with the introduction of evidence that Complainant was terminated for falsification of documents in violation Respondent’s policy.
44. 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. *Hicks*, 509 U.S. at 515.

45. The Commission must also 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).

“[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’).” *Id.*

46. The Commission asserts that instead of Hoban fixing Complainant’s documentation “error” he changed his mind after Complainant pressed him to do something about the complaint in her February 3, 2017 text and reported to HR that Complainant had falsified a document in violation of Respondent’s policy.
47. I found the Commission’s assertion incredible for the following reasons.
48. When Complainant did talk to Hoban at the beginning of shift 1A on March 3, 2017, she did not go into detail about how or why she made the “error,” she just wanted him to see if he could fix it. This conversation took place before the second conversation where Complainant pressed Hoban to do something about her February 28th text message. (Tr. 100)
49. It’s reasonable to infer that Hoban’s question “[did] they catch it up front?” and his telling Complainant that he would have

Severance check it put Complainant on notice that Hoban was not going to fix the “error” himself but send it to QS for review.

50. Additionally, the Commission asserts that other employees were disciplined but not terminated for falsifying documents who had not opposed a discriminatory practice.

51. I find that the Commission’s assertion is not credible for the following reasons.

52. Craine testified about the distinction in the policy between “falsification of data” and “document errors”:

Q: You described falsification as an intentional misrepresentation or intentionally engaging in an act that undermines –

A: Correct.

Q: --the quality of the record and the ability to produce a quality product.

A: Yes.

Q: And there are also situations where an error is committed in the documentation, correct?

A: Correct.

Q: Is the intent of the employee in writing the numerals or documentation necessarily reflected on the documentation?

A: Not necessarily, until you do—until you kind of dive into it and take a look at it.

Q: And—and by take a look into it, you mean investigate?

A: Correct. Yes. (Tr. 486-487)

53. Respondent did not have to speculate regarding Complainant's intent. Complainant admitted to Severance, Cudney, and Hoban that she falsified the temperature checks.

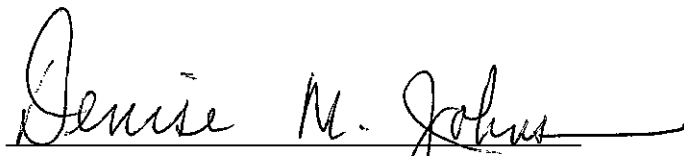
54. Craine testified that Respondent has terminated two male employees for falsification of documents after an investigation was conducted. (Tr. 492-495, 503-510)

55. I found Craine's testimony to be credible.

56. The Commission failed to introduce any credible evidence that Respondent's decision to terminate Complainant for falsification of documents was a pretext for opposing sexual harassment.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint Number 26521.


DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed: May 13, 2020

DMJ/kk