

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**CECILIA MIKLA**

Complainant

v.

**LUCENT TECHNOLOGIES, INC.**

Respondent

Complaint No. 9342  
(COL) A1021201 (28654) 08072001  
22A - 2001 - 3677 - C

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

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**ALJ'S REPORT BY:**

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## **INTRODUCTION AND PROCEDURAL HISTORY**

Cecilia Mikla (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on August 7, 2001.

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

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on July 11, 2002. The Complaint alleged that Respondent terminated Complainant for reasons not applied equally to all persons without regard to their age.

Respondent filed an Amended Answer to the Complaint on November 14, 2002.<sup>1</sup> Respondent admitted certain procedural

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<sup>1</sup> On September 22, 2003, Counsel for Respondent filed a Motion to Withdraw and Leave to File Substituted Appearance, substituting Peter A.

allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on April 27-29, 2005.<sup>2</sup>

The record consists of the previously described pleadings, a 626-page transcript of the hearing, exhibits admitted into evidence during the hearing, stipulated exhibits submitted after the hearing, and post-hearing briefs filed by the Commission on July 31, 2006; by Respondent on October 13, 2006, a reply brief filed by the Commission on December 4, 2006, and Complainant's brief filed December 12, 2006.

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Steinmeyer and Deepa Rajkarne. On October 6, 2003, Respondent filed a Motion to Add Additional Counsel for Respondent, Julie Badel. A Joint Motion for Continuance was filed on September 12, 2003 for additional time to engage in discovery due to substitution of counsel. On November 11, 2003, Counsel for Complainant filed a Motion for Continuance; Complainant was out-of-country during May 2004. The hearing was rescheduled to July 7-9, 2004. On April 30, 2004, Respondent filed a Motion for Leave to File An Amended Answer. On May 11, 2004, a Joint Motion for Continuance was filed for additional time to conduct discovery. The hearing was rescheduled to October 21-22, 2004.

<sup>2</sup> On April 27-28, 2005 the hearing was held at 1111 East Broad Street, Columbus, Ohio. On April 29, 2005 the hearing was held at Lucent Technologies, 6200 East Broad Street, Columbus, Ohio.

## **FINDINGS OF FACT**

The following findings of fact are based, in part, upon the ALJ's assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on August 7, 2001.

2. The Commission determined on June 13, 2002 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

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

4. Complainant was born on May 17, 1956.

5. Complainant started working for American Telephone and Telegraph (AT&T) in 1979.

6. Respondent Lucent Technology came into existence after it was divested from AT&T in 1996.<sup>3</sup>

7. In February of 2000 Complainant was the Product Manager on the OMPFX.

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<sup>3</sup> At the time of the divestiture Respondent had approximately 135,000 employees.

8. The OMPFX is a piece of equipment that is used in the telecommunications industry to monitor cell phone sites for telephone companies that offer cellular services.

9. In February of 2000 Complainant reported to Jacqueline Boggs (Boggs).

10. Complainant received a performance appraisal from Boggs in November of 2000 for the fiscal year ending in September.

11. The performance appraisal system in use consisted of two parts: GPP-1, "Objectives and Appraisal Form", and GPP-2, "Performance Appraisal Matrix". The GPP-2 was the performance rating component of the performance appraisal system.

12. Respondent rated its employees along a bell curve where top performers, a small percentage of the population, were rated "1" and "2".

13. Complainant received a rating of "3" on her 2000 performance appraisal given by Boggs.

14. In September or October of 2000 Fred Chavis (Chavis) became Complainant's immediate supervisor.

15. On January 24, 2001, Respondent's CEO, Henry Schacht (Schacht), informed the employees that disappointing revenues for the first quarter of Fiscal Year 2001 resulted in a plan to cut costs by two billion dollars, including reducing approximately 10,000 positions.

16. Respondent's Human Resources Department (HR) used an electronic computerized tool to assist management in assessing employees. Employees were grouped into universes.

17. The universe that Complainant was finally placed in consisted of four other employees, all of whom were under the age of 40 at the time of the skills assessment.

18. Complainant received an assessment of "1.9" which placed her "at risk" based on "lower performance".

19. Respondent implemented the Forced Management Plan (FMP) on February 15, 2001. The FMP targeted the termination of 2,000 employees.

20. The employees selected for the FMP were notified on February 15, 2001 that they were “at risk” of termination if they did not find another job with Respondent in the next sixty (60) days.

21. Complainant applied for eleven (11) jobs with Respondent over the two-month period she was at risk.

22. Complainant did not get any of the positions, either because she was not the successful candidate or the job remained unfilled and the openings were cancelled due to Respondent’s financial condition.

## **CONCLUSIONS OF LAW AND DISCUSSION**

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.

1. The Ohio Civil Rights Commission has jurisdiction over the parties and the subject matter of this case.

2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.

3. Complainant is an employee within the meaning of R.C. 4112.01(A)(3).

4. Respondent is an employer within the meaning of the R.C. 4112.01(A)(2).

5. The Commission alleged in the Complaint that Respondent terminated Complainant for reasons not applied equally to all persons without regard to their age.

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

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the ... age, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

R.C. 4112.01(A)(14) defines age as "at least forty years old."

7. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

8. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under the Age Discrimination in Employment Act of 1967 (ADEA).

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

10. The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1961).

11. 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 (1981).

12. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action.<sup>4</sup> *McDonnell Douglas, supra* at 802. To meet this burden of production, Respondent must:

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<sup>4</sup> Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254.

The defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for the termination; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.

*EEOC v. Flasher Co.*, 986 F.2d 1312, 1316 (10<sup>th</sup> Cir. 1992) (citations and footnote omitted).

... “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*, *supra* at 254-55.

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

13. In order for the Commission to establish a *prima facie* case of age discrimination under R.C. 4112.02(A), it must establish the following facts:

1. Complainant is a member of the statutorily protected class;
2. Complainant was discharged;
3. Complainant was qualified for the position; and
4. Complainant was replaced by, or the discharge permitted the retention of, a person of substantially younger age.

*Kohmescher v. Kroger Co.*, (1991), 61 Ohio St.3d 501, 575 N.E. 2d 439.

14. There is no dispute that Complainant is a member of the statutorily protected class or that Complainant was discharged. Therefore, the Commission has established the first two elements of a *prima facie* case of age discrimination.

15. The Commission also established that Complainant was qualified for the position.

16. When subjective evaluations play a role in employment decisions, employees are not required to show that they possessed certain subjective qualifications as part of proving a *prima facie* case. Such issues are properly resolved in the pretext stage of the *McDonnell Douglas* framework.

Thus, to deny the [Complainant] an opportunity to move beyond the initial stage of establishing a *prima facie* case because [she] failed to introduce evidence showing [she] possesses certain qualities would improperly prevent the court from examining the criteria to determine whether their use was mere pretext.

*Sempier v. Johnson & Higgins*, 45 F.3d 724 (3d Cir. 1995).

17. The Commission also established the fourth element of a *prima facie* case of age discrimination, “that the discharge permitted the retention of a substantially younger person”. Complainant’s job duties were distributed to Mark Thomas (Thomas), age 26.

18. Respondent met its burden of production with evidence that Respondent needed to reduce the workforce in response to Respondent’s fiscal crisis, and Complainant’s low assessment was the basis for her layoff.

19. Respondent having met its burden of production, the inquiry moves to the ultimate issue of the case, i.e., whether Respondent terminated Complainant because of her age. *Hicks, supra* at 511. The Commission must show by a preponderance of the evidence that Respondent’s articulated reasons for Complainant’s layoff were not the true reasons, but were “a pretext for discrimination.” *Id.*, at 515, quoting *Burdine, supra* at 253.

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

*Hicks, supra* at 515.

20. Thus, even if the Commission proves that Respondent's articulated reasons are false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the ... [Commission's] proffered reason of ... [age] is correct. That remains a question for the factfinder to answer ....

*Id.*, at 524.

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

21. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for Complainant's layoff. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that the reasons had no basis *in fact* or they were *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6<sup>th</sup> Cir. 1994). Such direct attacks, if successful, permit the fact-finder to

infer intentional discrimination from the rejection of the reasons without additional evidence of unlawful discrimination.

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination, and ... no additional proof of discrimination is *required*.<sup>5</sup>

*Hicks, supra* at 511, (bracket removed); *See also Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2108 (2000).

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

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<sup>5</sup> 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* 511, n.4.

23. Respondent was unable to produce the GPP-2 for the employees in Complainant's universe.

24. At the hearing, the ALJ granted the Commission's motion to hold an adverse inference against Respondent for the failure to produce those documents:

(...) where relevant information ... is in the possession of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it.

*Clay v. United Parcel Service, Inc.*, (6<sup>th</sup> Cir., August 31, 2007), 2007 WL 2457455, citing *McMahan & Co. v. PoFolks, Inc.*, (6<sup>th</sup> Cir. 2000), 206 F.3d 627, 632-33.

25. Respondent used an E-Comp system which was their corporate compensation system as explained by Regina Fico, Senior Manager in Human Resources:

Ms. Fico: The e-comp system was our corporate compensation system that we used. At the end of each performance year we did salary reviews. We did performance reviews and the managers at that time when they were doing the reviews put in the ratings and the salary information for all of their employees.

(Tr. 363)

26. The information from the GPP-2s was also inputted into the E-Comp system by the individual managers. Human Resources did not collect the paper GPP-2 evaluations from individual managers:

Mr. Schmidt: So, if I wanted to check and make sure whether that "GPP2" that they entered was accurate or inaccurate, isn't the only thing that I could do would be to look at the actual piece of paper, the "GPP2" and compare it to what that manager put into the system?

Ms. Fico: Umm ... I don't know where else you would have the information. They would put it into the system that was the data base of the record. That was how we collected the information. We didn't collect the pieces of paper.

(Tr. 364-65)

27. Ms. Fico testified very credibly about her observation of the record-keeping system in place at that time:

Ms. Fico: You know, again we are going through a huge turmoil at the time back in 2000, 2001. And supervisors although instructed to, if they left the company they needed to archive those files and send those to Iron Mountain, who is the vendor that we use to archive all of that information. We couldn't be guaranteed that it happened all of the time.

(Tr. 357)

28. The credible testimony of Respondent regarding the record-keeping system in place at the time and the turmoil that Respondent was going through was persuasive evidence that the missing GPP-2s were not intentionally lost.

29. Fred Chavis, Complainant's immediate supervisor in October 2000, reported to Jim Smith (Smith). Smith reported to Mike Iandola (Iandola). Iandola was the executive over Smith and Chavis.

30. Other than Complainant, none of the employees in her universe reported to Smith or to anyone who reported to him and Chavis was not involved in assessing the other employees in the universe in which Complainant was placed. (Tr. 576; Tr. 434)

31. Ms. Fico testified about what happened after the managers had done individual assessments:

Ms. Fico: Well, I collected them all back so I have got the information that came from Mr. Smith's organization as well as all the other organizations under Mike Iandola's organization, then I compiled those into exhibit, (...) 25.

(Tr. 345)

32. Ms. Fico also testified that she did not provide Smith with information as to what employees were placed in the same universe with employees under him. (Tr. 345)

33. The timeline and work plan for implementing the February 2001 FMP in Sales and Marketing, of which Inadola's organization was a part, also reflected that the new organization design was to include the levels and geographical location of employees. (Tr. 328, Resp. Ex. 22)

34. Proof of disparate treatment requires similarly situated comparatives. The Commission must show that the comparatives were "similarly situated in all respects":

Thus to be deemed "similarly situated", the individuals with whom ... [Complainant] seeks to compare ... her treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

*Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6<sup>th</sup> Cir. 1992) (citations omitted).

35. The other four employees in Complainant's universe, (Brady, Haworth, Ogg and Alexander), did not report to Chavis. Brady, Haworth, and Alexander reported to Ypsilantis and Ogg reported to Newman. (Resp. Ex. 25)

36. Since the comparatives in Complainant's universe were not ranked by Chavis, they are not "similarly situated" comparables.

37. The Commission also attempted to show pretext by asserting that the universes used for the 2001 FMP were somehow manipulated to make geography a component of the universes, contrary to Complainant's recollection of how universes were created during her tenure in HR.

38. However, the credible evidence introduced by Respondent shows that geography was a component of all the FMP universes in the Inadolo organization. (Resp. Ex. 24, 25)

39. The evidence shows that Complainant was not replaced. Instead, Mark Thomas absorbed Complainant's duties, in addition to the duties he performed prior to being given Complainant's duties.

[A] person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work.

*Barnes v. GenCorp., Inc.*, 896 F.2d 1457, 1465 (6<sup>th</sup> Cir. 1990).

40. Mark Thomas, who was supervised by Complainant, worked on the OMPFX while he was located in Naperville, Illinois.

Ms. Badel: Immediately after Ms. Mikla's termination who performed her tasks with respect to the "OMPFX"?

Mr. Chavis: Mark Thomas picked up her responsibilities.

Ms. Badel: Why was Mr. Thomas selected to do that?

Mr. Chavis: Well he came from a data team. He had the "TDMA" circuit "IWF" which was a data application product. He also had a lot of knowledge on the (inaudible) platforms and at the core of the "OMPFX" was a server. And we believed as though he had a skill set that we could actually utilize in terms of product management because he understood the platform for the Sun and he had also worked with Cecilia before from a purchasing stand point at his prior job.

Ms. Badel: Did Mr. Thomas perform Ms. Mikla's duties instead of the duties he performed [sic/before] her termination?

Mr. Chavis: No.

Ms. Badel: What did he do then?

Mr. Chavis: He basically did the hardware piece of it as well and he also supported his own "IWF" as well.

(Tr. 575)

41. The Commission offered testimony regarding Complainant's belief that her performance was superior to the employees who remained employed under Chavis, Smith, and Iandola. This testimony was offered for the purpose of showing that Respondent's reasons for selecting Complainant for layoff were not credible.

42. The testimony of Complainant and her coworker regarding their opinions of Complainant's work performance is self-serving and biased rather than objective, credible evidence:

With respect to the opinion testimony, we have repeatedly explained that it is the perception of the decision maker which is relevant, not the self assessment of ... [Complainant].” Accordingly, ... [Complainant’s] perception of herself ... is not relevant. Similarly, that ... [Complainant’s] co-workers may have the opinion that she did a good job, or that she did not deserve [to be laid off] is close to irrelevant.

*Dejarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1998) (footnote, citations, and quotations omitted).

It is well settled, however, that ... [Complainant’s] own opinions about her work performance or qualifications do not sufficiently cast doubt on the legitimacy of her employer’s proffered reasons for its employment actions.

*Ost v. West Suburban Travelers Limousine*, 88 F.3d 435, 441 (7<sup>th</sup> Cir. 1996) (citations omitted).

43. The opinions of Complainant and her coworkers that this treatment may be based on age are not legally sufficient to support an argument of pretext. *Reynolds v. Land O’Lakes, Inc.*, 112 F.3d 358, 364 (8<sup>th</sup> Cir. 1997).

44. Although Respondent’s FMP process was not smooth in all of its’ aspects, the irregularities pointed out by the Commission were more evidence of human error (mistake or misunderstanding)

in a difficult process than nefarious manipulations to target Complainant's position for elimination because of her age.

[C]ourts are not in the position of determining whether a business decision was good or bad ... Title VII is not violated by erroneous or even illogical business judgment ... An employer's business judgment is relevant only insofar as it relates to the motivation of the employer with respect to the allegedly illegal conduct.

*Sanchez v. Phillip Morris*, 992 F.2d 244, 247 (10<sup>th</sup> Cir. 1993) (citations and parentheticals omitted).

45. In general, neither the ALJ nor the Commission is in a position to second-guess an employer's business judgment, "except to the extent that those judgments involve intentional discrimination." *Krumwiede v. Mercer Co. Ambulance Service*, 116 F.3d 361, 364 (8<sup>th</sup> Cir. 1997) (citations omitted).

[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.

*Combs v. Meadowcraft, Inc.*, 73 FEP Cases 232, 249 (11<sup>th</sup> Cir. 1997).

46. This case lacks the “suspicion of mendacity” that is mentioned in the *Hicks* case. *Hicks, supra* at 511. In other words, the ALJ does not believe that Respondent’s articulated reasons are a cover-up for age discrimination.

47. Respondent’s articulated reasons for not transferring Complainant were either she was not qualified for the positions that she sought or the positions in question were not filled due to financial constraints.

48. The Commission failed to show that similarly situated younger employees who were subject to the RIF were treated better than Complainant was.

... plaintiff claiming discriminatory failure to transfer as part of a reduction in force must proffer ‘direct, circumstantial, or statistical evidence tending to indicate that the employer singled out [the plaintiffs] for discharge for impermissible reasons.’

*Barnes, supra* at 1465.

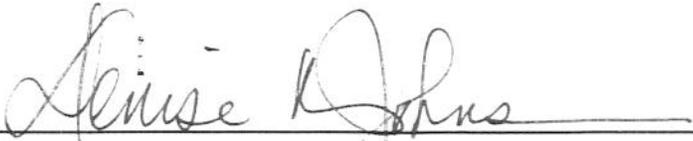
49. Anna O'Dea (O'Dea), age 45, an employee who also reported to Chavis and whose job was eliminated as a result of the 2001 FMP, applied for and received a transfer to a new position. (Tr. 86-87, 103)

50. In an attempt to introduce evidence that Respondent was seeking younger applicants for a position that was posted after the 2001 FMP was executed, the Commission asserted that Complainant did not apply for the product management associate job because Respondent "preferred recent graduates." (Tr. 186)

51. The preference for recent graduates does not necessarily translate into a preference for younger employees as many people go back to college after completing military service or working other places. (Harding Dep., p. 82-83)

## RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9342.



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DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

December 15, 2008