OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

DEBRA M. DARR

Complainant

v.

UNION VISION CENTER OF MANCHESTER ROAD DBA CO-OP OPTICAL

Respondent

Complaint No. 9875
(AKR) B3060304 (28942) 07202004
22A-2004-03066C

CHIEF 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

Debra M. Darr (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on July 20, 2004.

The Commission investigated the charge and found probable cause that Union Vision Center of Manchester Road, Inc. dba Co-Op Optical (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 December 14, 2005.

The Complaint alleged Respondent terminated Complainant's employment for reasons not applied equally to all persons without regard to their disability status.

Respondent filed an Answer to the Complaint on June 6, 2005. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on February 6-7, 2007 at the Akron Government Building, Room 203, 161 South High Street, Akron, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing, consisting of 383 pages; exhibits admitted into evidence during the hearing; the evidentiary deposition of Dr. Elizabeth Connelly, D.O., taken on October 11, 2006; and the post-hearing briefs filed by the Commission on May 9, 2008; by Respondent on June 24, 2008; and a reply brief filed by the Commission on July 13, 2008.

FINDINGS OF FACT

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

1. Complainant filed a sworn charge affidavit with the Commission on July 20, 2004.

2. The Commission determined on December 16, 2004 it was probable 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 a Complaint after conciliation failed.

4. Complainant was hired by Respondent in 1979.

5. Respondent provides optical services to the public which involve eye examinations, sales, and fittings of glasses and contact lenses.

6. Respondent's employees are represented by the Machinist Union and Aerospace Workers District 54 (the Union). (Tr. 23)

7. Initially, Complainant was hired to do insurance billing duties and was classified as an insurance technician under the Collective Bargaining Agreement (CBA).

8. Donald Rockhold (Rockhold) and Pam Forsea (Forsea) purchased Respondent in October 1985. (Tr. 351)

9. Rockhold and Forsea had been employees of the previous owner and coworkers of Complainant.

10. Rockhold and Forsea are also both licensed opticians and perform optician duties for Respondent.

11. After Rockhold and Forsea purchased the business Complainant withdrew from the Union to become Respondent's secretary. (Tr. 22-23)

12. Complainant held the position of secretary for Respondent until 1992 when she resigned as secretary/treasurer and was put back into the Bargaining Unit under the bookkeeper classification. (Tr. 23)

13. Complainant then performed the duties of receptionist and pre-testing. (Tr. 20)

14. In 1998 Complainant left her receptionist duties to become an Apprentice Optician (AO). (Tr. 36)

15. In the position of AO, the employee operates as an optician but is required to have a licensed optician as a supervisor on the premises with the AO at all times. (Tr. 36, 40, 136, 194)

16. Since Rockhold and Forsea purchased the business in 1985 it had cash flow problems. In 2000 Respondent's revenue began to decrease. (Tr. 29, 279)

17. To deal with the cash flow problems Judy Topa was laid off in 1991 and Kim Watling was laid off in 1999.

18. Complainant was aware checks had bounced on Respondent's corporate account due to insufficient funds. (Tr. 30)

19. Complainant also refrained from paying some bills during her tenure as bookkeeper because there was not enough money in the account. (Tr. 30)

20. Complainant, Anna Marie McFarland, Donna D'Andrea, and Robin Ricks agreed to take hourly pay cuts to save Ned Cabonor's optician position. (Tr. 31)

21. On other occasions departing employees were not replaced, as when Judy Collins quit in 2003 and Rose Movsesian retired the first of January 2004.

22. Rockhold and Forsea also discontinued their company vehicles. They no longer hired out the cleaning, the grass cutting or the maintenance on the building, discontinued their postal machine and cut their own salaries. (Tr. 363)

23. Rockhold and Forsea loaned Respondent money to keep it in business. (Tr. 31, Comm. Ex. 8)

24. Respondent's tax returns from 1998 to 2003 showed gross sales dropped $200,000 per year. (Tr. 276-279, Resp. Ex. II, JJ, KK)

25. In January of 2004 Complainant was diagnosed with breast cancer which resulted in a mastectomy, performed February 3, 2004.

26. Complainant learned the cancer was "stage three" and she would need chemotherapy.

27. Within two weeks of her surgery, Complainant returned to work. Complainant did not work her full work week of 32 hours, but averaged 17.85 hours per week. (Tr. 55-57, 65)

28. On June 3, 2004, Respondent laid off Complainant from her position as AO.

29. Complainant filed a grievance under the CBA on June 9, 2004. The meeting regarding the grievance ended with Forsea

asking Complainant if she would take concessions to a different position. Complainant did not respond to Forsea's query.

30. In March of 2005 Respondent sought to hire new employees. The new employee positions arose as a result of two employees leaving to work for a competitor with the doctors who had previously worked for Respondent performing examinations for customers.

31. Pursuant to recall rights under the CBA Complainant sent a handwritten letter asking to be considered for any open position. (Tr. 72, Comm. Ex. 24)

32. Respondent responded to Complainant's letter by stating they were seeking to hire a licensed optician, as well as an experienced Insurance Claims Technician (ICT). (Resp. Ex. BB)

33. Complainant responded by letter dated April 24, 2005 with a list of duties she had performed over the years at Respondent. (Resp. Ex. CC)

34. Respondent did not hire Complainant for the position of ICT on the basis she lacked the necessary computer experience to perform the job.

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]

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

1. The Commission alleged in the Complaint Respondent terminated Complainant's employment for reasons not applied equally to all persons without regard to their disability status.

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

It shall be an unlawful discriminatory practice:

> (A) For any employer, because of the ... disability, ... 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.

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) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G), 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial

evidence means evidence sufficient to support a finding of unlawful discrimination under the Americans with Disabilities Act of 1990 (ADA) or the Rehabilitation Act of 1973.

5. The order of proof in a disability discrimination case under Ohio law requires the Commission to first establish a *prima facie* case. The Commission has the burden of proving:

> (1) that he or she is (disabled);
>
> (2) that an adverse employment action was taken by an employer, at least in part, because the individual is (disabled); and
>
> (3) that the person, though (disabled) , can safely and substantially perform the essential functions of the job in question.
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> *Hood v. Diamond Products., Inc.*, 74 Ohio St. 3d 298, 1996 Ohio 259, 658 N.E.2d 738, 739 (Ohio 1996).

6. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). *Id.*, at 802, 5 FEP Cases at 969, n. 13.

7. 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, 25 FEP Cases 113 (1981).

8. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for its employment action.[2] *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

> ... "clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.

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[2] 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, 25 FEP Cases at 116.

> 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.
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> *EEOC v. Flasher Co.*, 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

> *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine*, *supra* at 254-55, 25 FEP Cases at 116, n.8.

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

9. "Disability" is defined as:

> 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.

R.C. 4112.01(A)(13).

10. The Commission may satisfy the first requirement of a *prima facie* case by showing Complainant was not disabled, but she was "regarded as having a physical or mental impairment." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999).

> [A]n individual may fall into the definition of one regarded as having a disability if an employer ascribes to that individual an inability to perform the functions of a job because of a medical condition when, in fact, the individual is perfectly able to meet the job's duties.
>
> *Sutton*, 527 U.S. at 489.

11. Regulations issued to provide interpretive guidance for terms found in the ADA define "substantially limits" to mean a person is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
>
> 29 C.F.R. § 1630.2(j)(1).

12. Major life activities" are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing,

hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).[3]

13. "If not contained within these exemplars, the activity must be 'significant' to everyday life." *Rossbach v. City of Miami,* 371 F.3d 1354 at 1357 (11th Cir. 2004), *citing Bragdon v. Abbott,* 524 U.S. 621 at 638 (1998).

14. It is undisputed that Rockhold and Forsea were aware Complainant was diagnosed with breast cancer in January of 2004 and had a mastectomy on February 3, 2004.

15. Complainant returned to work within two weeks of her surgery and received chemotherapy treatments. These treatments caused Complainant to feel fatigued, experience a lot of nausea and hair loss. (Tr. 57-58)

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[3] However, an EEOC Interpretive Guideline states this list is not meant to be exclusive, and added lifting as one example of another "major life activity." 29 C.F.R. § 1630.2

16. The determination as to whether cancer is a disability should be made on a case-by-case basis as there are different forms of cancer, and there may be instances where cancer is "not so pernicious in its effects to warrant a finding that a person afflicted with the disease is handicapped." *Hood* at 303.

17. The statute was designed to protect those who live with a disability that significantly affects the way they live their lives on a daily basis. *McGlone, supra,* at 571.

18. The Commission's evidence does not support the determination Complainant's cancer "substantially limits" major life activities. The Commission failed to establish the cancer's affect on Complainant's major life activities of lifting, walking, reproduction and sexual activity were long-term or permanent in nature. *Toyota, supra.*

19. Complainant's physician, Dr. Connelly, testified that as of October 2006, Complainant had no current evidence of recurrence. (Connelly Tr. 57)

20. Dr. Connelly testified she would place no medical restrictions on Complainant in performing the duties of an optician or similar job. (Connelly Tr. 60-61)

21. Complainant had no medically imposed restrictions on walking, seeing, hearing, speaking, breathing, learning and/or working. (Connelly Tr. 62-63)

22. Additionally, Dr. Connelly had placed no limitations on Complainant's ability to engage in sexual intercourse. (Connelly Tr. 66)

23. Complainant's surgery and chemotherapy occurred during the first half of 2004. By 2005, Complainant performed the following activities:

- February 2005:
  - completed a major house and closet cleaning (Tr. 166), and
  - assisted her husband in tearing out carpeting (Tr. 167-168)
- April 2005: accomplished a major landscaping project (Tr. 171); and

- June 2005: assisted in installing a screen door at her home. (Tr. 172)

24. Additionally, the Commission has not introduced credible evidence Rockhold or Forsea regarded Complainant as being disabled. In order for an individual to be "regarded as" disabled,

> it is necessary that a covered entity entertain misconceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.
>
> *Sutton*, at 479.

25. The testimony of Rockhold and Forsea regarding Complainant's condition after she returned to work was more of expressions of compassion rather than regarding her condition as limiting her ability to perform the essential functions of her job:

> Mr. Rockhold: That was a day that particularly that Debra was very sick. She had her head down on the desk. Pam came to her asked her if she wasn't feeling good could she, did she want to go home. You know, if you can't do any better, please go home. Debra took it as an offense that we were sending her home. Um, she came at Pam and said you are trying to get rid of me and Pam said no I am not. And I said Pam if Debra feels better here, please she will stay. And that was the

> conversation. There was no meanness in it, there was no, I remember my mom going through surgery and cancer and it made her proud that she went to work everyday and worked hard. And if that is what kept Deb fighting then let her sit at the desk with her head down.
>
> (Tr. 293)

> Ms. Forsea: We were having an extremely emotional time. Debbie wasn't feeling well that day at all. Um, I don't know why, um what precipitated the conversation but we ended up in the kitchen and she was crying. And, I am sorry Debbie, she showed me her mastectomy scar, and my heart was breaking for her. And I said I-I hate to see you go through this Debbie, I just, to go through, I had experienced it with my father, and not breast cancer, of course not. But it was just compassion.
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> (Tr. 353)

26. Assuming *arguendo* that the Commission did establish a *prima facie* case of disability discrimination, Respondent's articulation of a legitimate, nondiscriminatory reason for Complainant's layoff removes any need to determine whether the Commission proved a *prima facie* case, and the "factual inquiry proceeds to a new level of specificity." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 31 FEP Cases 609, 611 (1983), *quoting Burdine, supra* at 255, 25 FEP Cases at 116.

> Where the defendant has done everything that would be required of him if the plaintiff has properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.
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> *Aikens, supra* at 713, 31 FEP Cases at 611.

27. The *prima facie* phase merely serves to raise a rebuttable presumption of discrimination by eliminating the most common nondiscriminatory reasons for the (layoff). *Citing, Hollins v. Atlantic Co.*, 188 F.3d 652, 659 (6th Cir. 1999) (*quoting Burdine*, 450 U.S. at 253-54). It is only the first stage of proof in a Title VII case, and its purpose is simply to force [a] defendant to proceed with its case. *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861-62 (6th Cir. 1997).

28. Respondent met its burden of production with the introduction of evidence Complainant's position was eliminated due to financial exigencies.

29. Respondent having met its burden of production, the Commission must prove Respondent unlawfully discriminated

against Complainant because she was disabled or regarded her as disabled. *Hicks*, *supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence Respondent's articulated reason for Complainant's layoff was not the true reason, but was "a pretext for discrimination." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine*, *supra* at 253, 25 FEP Cases at 115.

> [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, 62 FEP Cases at 102.

30. Thus, even if the Commission proves Respondent's articulated reason is 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 ... [disability] is correct. That remains a question for the factfinder to answer ....
>
> *Id.*, at 524, 62 FEP Cases at 106.

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

31. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason. The Commission may directly challenge the credibility of Respondent's articulated reason by showing 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). 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.[4]

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[4] 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.

Hicks, supra at 2749, 62 FEP Cases at 100 (emphasis added).

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

33. Since Respondent purchased Union Vision in 1985, Respondent has had continual cash flow problems. (Tr. 29-30)

34. From 1998 to 2003 Respondent's gross sales dropped $200,000 per year. (Tr. 276-279, Resp. Ex. II, JJ, KK)

35. Some of the actions taken by Rockhold and Forsea to address the cash flow problems were:

- Employees took a cut in hours in 2003 to help the financial situation (Tr. 91);

- Employees who left were not replaced (Tr. 31);

- Rockhold and Forsea loaned Union Vision their own money to keep the business solvent (Tr. 31);

- Rockhold and Forsea watched purchases, costs of goods, and signed notes to labs to get bigger discounts (Tr. 280);

- Rockhold and Forsea discontinued the use of their company vehicles, and no longer hired out the cleaning, grass cutting, or maintenance on the building (Tr. 363); and

- Rockhold and Forsea discontinued the use of the postal machine and cut their own salaries before laying off employees (Tr. 363).

36. Rockhold and Forsea's reasons for Complainant's layoff in 2004 were credible. At the time of Complainant's layoff, Respondent had four licensed opticians. (Tr. 295) Of the four, Rockhold and Forsea held two of those positions.

37. As an AO, Complainant could not work independently. She had to work under the supervision of a licensed optician. (Tr. 295)

38. During the time Complainant was an AO she did not apply to take the exam to become a licensed optician. Although the Commission argued the actions of Respondent contributed to Complainant's failure to take the exam, a reasonable inference can be drawn from the evidence the failure was due to Complainant's own lack of initiative.

39. In needing to further cut costs Respondent determined the AO position was expendable. (Tr. 295)

40. After Complainant was laid off, the employees of Respondent voted to cut their hours in order to save Ned Caboner's optician position. (Tr. 234)

41. Evenutally Caboner was laid off in late 2004. (Tr. 199)

42. I find that there was ample testimonial and documentary evidence in the record to support the determination the layoff of Complainant happened at an unfortunate time in her personal life, but was necessitated for valid, sound financial reasons.

RETALIATION

43. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas*, supra, for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The burden of establishing a *prima facie* case is not onerous. *Burdine*, supra. It is simply part of an evidentiary framework "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*, at n.8.

44. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases 969, n.13.[5] In this

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[5] The Commission moved during the hearing to amend the Complaint to include an allegation of retaliation, pursuant to R.C. 4112.05(C) which sets forth in pertinent part:

> Any complaint (...) may be amended by (...) the hearing examiner conducting a hearing under division (B) of this section, at any time prior to or during the hearing. (...) The respondent has the right to file an answer or an amended answer to the original and amended complaints and to appear at the hearing in person, by attorney, or otherwise to examine and cross-examine witnesses.

The Commission's Motion was **granted**.

case, the Commission may establish a *prima facie* case of unlawful retaliation by proving:

(1) Complainant engaged in an activity protected by R.C. Chapter 4112;

(2) The alleged retaliator knew about the protected activity;

(3) Thereafter, Respondent subjected Complainant to an adverse employment action; and

(4) There was a causal connection between the protected activity and the adverse employment action.

Hollins, supra.

45. Generally, mere temporal proximity between a protected activity and a materially adverse action without other indicia of retaliatory conduct is not sufficient to establish the causal connection element of a retaliation claim. *See Michael v. Caterpillar Financial Services*, 496 F.3d 584, 596; *Tuttle v. Metro. Gov't. of Nashville*, (C.A. 6, 2007), 474 F.3d 307, 321; *Little v. BP Exploration & Oil Co.*, (C.A. 6, 2001), 265 F.3d 357, 363-64; *Nguyen v. City of Cleveland*, 229 F.3d 559, 593; *Johnson v. University of Cincinnati*, (C.A. 6. 2000), 215 F.3d 561, 582-83.

46. Where some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality. *Mickey v. Zeidler Tool & Die Co.*, (6th Cir. 2008, 516 F.3d 516, 525.

47. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas* for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases 969, n.13. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Burdine*, supra.

48. 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.[6] *McDonnell Douglas, supra.* To meet this burden of production, Respondent must:

> ... "clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.
>
> *Hicks*, supra.

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, 62 FEP Cases at 100.

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[6] 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, 25 FEP Cases at 116.

> The defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the failure to recall; 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.*, 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

49. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent's articulation of a legitimate, nondiscriminatory reason for not recalling Complainant to the newly-created position of ICT removes any need to determine whether the Commission proved a *prima facie* case, and the "factual inquiry proceeds to a new level of specificity." *U.S. Aikens*, supra.

> Where the defendant has done everything that would be required of him if the plaintiff has properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.
>
> *Aikens, supra.*

50. Respondent met its burden of production with the introduction of evidence that Complainant did not meet the qualifications for the position of ICT.

51. Respondent having met its burden of production, the Commission must prove Respondent retaliated against Complainant because she engaged in protected activity. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance

of the evidence Respondent's articulated reason for not recalling Complainant was not the true reason, but was "a pretext for ... [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine, supra* at 253, 25 FEP Cases at 115.

> [A] reason cannot be proved to be a "pretext for [unlawful retaliation]" unless it is shown *both* that the reason is false, *and* that ... [unlawful retaliation] is the real reason.
>
> *Hicks, supra* at 515, 62 FEP Cases at 102.

52. Thus, even if the Commission proves Respondent's articulated reason was false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the ... [Commission's] proffered reason of ... [unlawful retaliation] is correct. That remains a question for the factfinder to answer ....
>
> *Id.*, at 524, 62 FEP Cases at 106.

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

53. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason. The Commission may directly challenge the credibility of Respondent's articulated reason by showing the reason had no basis *in fact* or it was *insufficient* to motivate the employment decision. *Manzer, supra.* 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. [7]
>
> *Hicks, supra* at 511, 62 FEP Cases at 100 (emphasis added).

54. Complainant filed a grievance in June of 2004. Respondents and Complainant and Complainant's Union representative met. No resolution to the grievance was reached.

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[7] 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* at 511, 62 FEP Cases at 100, n.4.

55. Complainant filed a charge of discrimination with the Commission in July of 2004.

56. Complainant's re-call rights are governed by a CBA:

Section 6.1 (...)

> Company shall observe the principle of company-wide seniority, provided that the senior employee is within the classification and is capable of immediately performing the available work without any training. (...)

57. When Complainant was laid off in June of 2004 her position classification was Apprentice Optician.

58. Complainant was not eligible to bump another employee at the time of her layoff. Pursuant to Article VI, Section 6.1 of the CBA, she was not in the same classification as any other employee working for the Respondent. (Comm. Ex. 4, 5)

59. In March of 2005 two doctors who had worked for Respondent left and the employee who did the insurance billing, Donna D'Andrea, and a receptionist, Robin Ricks, went with them. (Tr. 138)

60. The new position was created because two employees had left to work for doctors who had worked for Respondent. The two employees who left held the positions of receptionist and insurance billing clerk. The new position combined the two positions into one. (Tr. 303)

61. Complainant contacted Respondent to provide an updated address in case of recall and to let them know she was interested in returning to work. (Tr. 72; Comm. Ex. 24)

62. Complainant received a letter from Respondent, dated April 18, 2005, stating that Respondent was considering recall or taking applications for experienced insurance claim technicians and a part-time licensed dispensing option.

> (...) Currently, we are considering recall under the Collective Bargaining Agreement and/or are taking applications for experienced insurance claim technicians. This person should be proficient in Word, Excel, PowerPoint and be able to generate and send the various insurance claims via the internet. This person should be able to code the diagnosis and procedures for proper reimbursement from both Medicare and Medicaid. (...)
>
> (Comm. Ex. 25)

63. The letter stated Respondent was not considering recall of an Apprentice Optician. They did not consider Complainant as having any experience or qualifications for the positions to be filled. (Tr. 72, Comm. Ex. 25)

64. Complainant's response listed her qualifications and experience in insurance billing and computer skills:

> Insurance Clerk: Have filled out and processed insurance claims with diagnosis and procedure codes, checked with insurance companies for eligibility and coverage. I have billed Medicare, Medicaid, General Relief and many other third party plans.
>
> Computer Skills: I have worked in Microsoft Word, and know how to search the Web. I am also able to send and receive E-mail. I feel I could easily adapt to online billing.
>
> (Resp. Ex. CC)

65. On cross-examination Complainant admitted on the date she was laid off, June 3, 2004, she had no computer experience. (Tr. 130)

66. Complainant also admitted on cross-examination she had never worked on a job where she had to use a computer or be proficient in using programs. (Tr. 144)

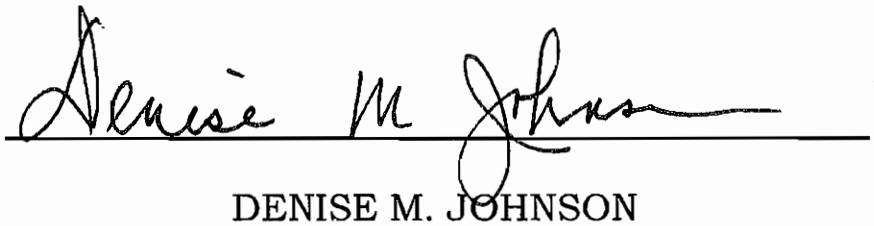
67. According to the CBA Complainant did not have recall rights to the position of insurance claims technician because she was not in that classification when she was laid off, and she had no computer skills to perform the job of insurance claims technician.

> (...) If and when it becomes necessary to lay off any employees, the Company shall observe the principle of company-wide seniority, provided that the senior employee is within the classification and is capable of immediately performing the available work without any training. (...)
>
> (Comm. Ex. 4)

68. The Commission did not meet its evidentiary burden and failed to persuade the ALJ that Respondent's failure to hire Complainant as an insurance claims technician in March of 2005 was due to her having filed a charge of discrimination in July of 2004.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9875.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

September 28, 2010