

Memo

To: Desmon Martin, Director of Enforcement and Compliance
From: Denise M. Johnson, Chief Administrative Law Judge 
Date: August 29, 2012
Re: *Karen Halstenberg v. Lucent Technologies, Inc.*
(COL) 7111192003 (30988) 03232004 22A-2004-01799C
Complaint No. 9847

**CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT
ALJ RECOMMENDS DISMISSAL ORDER**

Report issued: August 28, 2012

Report mailed: August 29, 2012

**** Objections due: September 21, 2012**

DMJ:tg



Ohio Civil Rights Commission

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Board of Commissioners

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Re: *Karen Halstenberg v. Lucent Technologies, Inc.*
(COL) 7111192003 (30988) 03232004 22A-2004-01799C Complaint No. 9847

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 (20) days from the mailing date of this report.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **Friday, September 21, 2012**. *No extensions of time will be granted.*

Any objections received after this date will be **untimely filed** and cannot be considered by the Ohio Civil Rights Commission.

*Please send the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414.** All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION

Desmon Martin / tg

Desmon Martin
Director of Enforcement and Compliance

DM:tg

Enclosure

cc: Lori A. Anthony, Chief – Civil Rights Section/Stefan J. Schmidt, Esq.
Denise M. Johnson, Chief Administrative Law Judge

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

KAREN HALSTENBERG

Complainant

v.

LUCENT TECHNOLOGIES, INC.

Respondent

Complaint No. 9847

(COL) 7111192003 (30988) 03232004

22A-2004-01799C

CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATION

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INTRODUCTION AND PROCEDURAL HISTORY

Karen Halstenberg (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on March 23, 2004.

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

The Commission attempted, but failed to resolve these matters by informal methods of conciliation. The Commission subsequently issued a Complaint and Notice of Hearing on March 17, 2005.

The complaint alleged that the Respondent terminated the Complainant's employment in retaliation for having engaged in activity protected by Revised Code Section (R.C.) 4112.02(I).

Respondent filed an Answer to the Complaint on April 18, 2005. Respondent admitted certain procedural allegations, but denied it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on May 12-13, 2009 at the Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, Ohio.

At the hearing, the Commission proceeded on the allegations that Complainant was retaliated against due to complaining about sex and age discrimination.

The record consists of the transcript of the hearing, consisting of 355 pages; exhibits admitted into evidence during the hearing; the trial deposition of Yssis Reyes (Reyes); and the post-hearing briefs filed by the Commission on May 13, 2010, by Respondent on June 25, 2010, and the Commission's reply brief filed July 6, 2010.

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 March 23, 2004.

2. The Commission determined on February 24, 2005 it was probable Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(I).

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

4. Respondent is an employer that is in the business of manufacturing telecommunications equipment.

5. Complainant began her employment with Respondent's predecessor, AT&T, in 1990 as a Contractor. (Tr. 18)

6. Complainant began working in the Messaging Group (MG) on March 8, 1993. (Tr. 18)

7. Complainant was hired by Respondent as a full-time employee on October 24, 1994. (Tr. 18)

8. By August 2003, Complainant was a Technical Writer in the MG and a Project Manager. (Tr. 20, 102)

9. During Complainant's last merit raise cycle she received a \$1,500.00 raise. (Tr. 25)

10. In August 2003, Complainant was making approximately \$58,800.00. (Tr. 108, 298; Comm. Ex. 24)

11. For approximately the last two (2) years of Complainant's employment with Respondent, Denise Gary was her immediate supervisor. (Tr. 21, 171)

12. Denise Gary was employed by Respondent since February 1982 until she was impacted by Respondent's Forced Management Program (FMP) in October 2005. (Tr. 250)

13. Denise Gary's husband, Joel Gary, also worked for Respondent. (Tr. 157)

14. Joel Gary worked for Respondent from November 1981 until he was affected by Respondent's FMP in November 2006. (Tr. 250)

15. In June of 2003, Denise Gary did Complainant's evaluation and noted she met or exceeded all expectations. (Tr. 38)

16. In August 2003, Denise Gary recommended Complainant for the Project Manager position in the Network Operating Software (NOS) group. (Tr. 173)

17. She recommended Complainant because Complainant had expressed interest and Denise Gary believed Complainant had the aptitude to do the job. (Tr. 253)

18. When Denise Gary recommended Complainant for the position, Denise Gary did not know that her husband had also been recommended for the same position. (Tr. 253-54)

19. Joel Gary had been recommended for the position by Diane Mayes (Mayes), Information, Products & Training (IP&T) Supervisor. Mayes recommended him because he consistently received ones (1's) on evaluations and was a "real go getter."¹ (Tr. 265-66)

20. In August 2003, Complainant and nine (9) other Messaging Writers (MW) were moved from the MG to IP&T. (Tr. 270)

21. On August 26, 2003, three (3) employees were laid off through Respondent's FMP. (Tr. 270)

22. Denise Gary stopped supervising Complainant and the others when they were moved to IP&T. (Tr. 209)

23. Mayes was Respondent's IP&T Supervisor since 1987. (Tr. 198)

¹ In evaluations, the highest score possible is a one (1) and the lowest is a five (5).

24. Joel Gary, Denise Gary's husband, received the Project Manager position. (Tr. 24)

25. Denise Gary was not involved in the final selection of a candidate for the Project Manager position. (Tr. 254)

26. There were no interviews conducted for the Project Manager position, nor was the position posted. (Tr. 160, 204)

27. On September 15, 2003, Complainant complained to Therese Kierl-Allen (Kierl-Allen), a Lucent Investigator and Equal Opportunity Action Group Investigator (EOAG Investigator), about feeling she was more qualified for the position than Joel Gary. (Tr. 59)

28. Kierl-Allen said she would investigate the matter and asked Complainant for permission to speak with Complainant's previous direct supervisor, Denise Gary. (Tr. 59)

29. On September 17, 2003, Denise Gary was contacted by Kierl-Allen about Complainant's complaint. (Tr. 159)

30. Due to funding cuts another FMP occurred in October 2003. (Tr. 272)

31. Mayes told her IP&T team, which included Complainant, there was going to be an upcoming FMP. Mayes decided to ask Denise Gary for input because Denise Gary had previously managed the team. (Tr. 206)

32. The ten (10) MWs who joined IP&T did not have applicable FMP ranking scores.

33. The NOS Writers, originally in the IP&T, had ranking scores from the prior FMP. Mayes, therefore, had to evaluate the ten (10) MW employees based upon the same skills appraisal as the NOS Writers from the previous FMP. (Tr. 273-274)

34. Mayes sent in the FMP scores on October 7, 2003.
(Tr. 275)

35. Complainant was laid off via FMP on October 21, 2003.
(Tr. 15)

36. Additionally, three (3) other people from the MG were
equally affected by Respondent's FMP. (Tr. 208)

37. After she was laid off, Complainant called Respondent's
hotline with concerns and allegations of inappropriate treatment.
(Reyes Depo., p.7)

38. Reyes was assigned Complainant's case. (Reyes Depo.,
p. 7)

39. Reyes worked full-time for Respondent since 1999 in
EOAG Investigations. (Reyes Depo., p. 5)

40. Reyes called Complainant on October 22, 2003. Complainant told Reyes about her employment concerns regarding her years of service, her title, changes to the IP&T organization, and that the Project Manager position had been given to Joel Gary. Complainant mentioned she had previously spoken to Investigator Kierl-Allen. (Reyes Depo., p. 8)

41. Reyes spoke with Mayes, Don Madieros (Madieros), and Denise Gary. (Reyes Depo., p. 22)

42. Madieros provided Reyes with information on why Joel Gary was more qualified for the Project Manager position. (Reyes Depo., p. 22)

43. Madieros told Reyes that Denise and Joel Gary were not on the same project team, nor did Denise Gary have anything to do with Complainant's FMP appraisal. (Reyes Depo., p. 22)

44. After speaking with Mayes, Denise Gary and Madieros, Reyes called Complainant on November 24, 2003 to inform Complainant she was looking into her allegations. (Reyes Depo., p. 22)

45. Reyes sent Complainant a letter in response to her allegations of unfair treatment. (Reyes Depo., p. 26)

46. In the letter Reyes made an error regarding Complainant's scores. The score listed for Complainant's communication skills was one (1). However, in the Forced Management Tool Program (FMTP) the score was three (3). (Reyes Depo., p. 26.)

47. Complainant wrote back to Reyes to point out the differences in scores. She believed the scores provided by Reyes were correct. (Reyes Depo., p. 28)

48. However, the correct scores are those in the FMTP. Reyes erroneously indicated a "1" in her correspondence, because her print-out of the FMTP screen printed in a way that cut off the communication skills score, making it look like a "1" instead of a "3". (Reyes Depo., p. 30).

49. After the investigation, Reyes concluded Complainant was not retaliated against. Age and gender were not factors used to select the Project Manager. (Reyes Depo., p. 27)

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 state 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 credit.²

1. The Commission alleged in the complaint Respondent terminated Complainant's employment in retaliation for having engaged in activity protected by Revised Code Section (R.C.) 4112.02(I).

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding a Fact.

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

It shall be an unlawful discriminatory practice:

For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(I) 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 findings of unlawful retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973) 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. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, 116 (1981). 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.

6. 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. In this 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 v. Atlantic Co., Inc., 80 FEP Cases 835 (6th Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

7. The retaliation provision under R.C. 4112.02(I) contains an opposition clause and a participation clause. Since courts have analyzed these clauses differently, it is important to focus on the nature of the alleged protected activity.

The distinction between employee activities protected by the participation clause and those protected by the opposition clause is important because federal courts have generally granted less protection for opposition than participation.

Aldridge v. Tougaloo College, 64 FEP Cases 708, 711 (S.D. Miss. 1994), *citing Brown v. Williamson Tobacco Co.*, 50 FEP Cases 365 (6th Cir. 1989).

8. Courts usually grant absolute protection for participation activities, such as filing a discrimination charge, testifying in civil rights proceedings, or otherwise participation in such proceedings. *Proulx v. Citibank*, 44 FEP Cases 371 (S.D. N.Y. 1987).

9. As a threshold matter, the Commission must prove Complainant engaged in activity protected by R.C. 4112.02(I).

10. A wide array of conduct, including verbal complaints to management, may constitute opposition to unlawful discrimination: *Reed v. A.W. Lawrence & Co., Inc.*, 72 FEP Cases 1345 (2d Cir. 1996) (employee engaged in protected activity by complaining about a coworker's allegedly unlawful conduct to an officer of company and maintaining same complaint throughout internal investigation); *EEOC v. Hacienda Hotel*, 50 FEP Cases 877 (9th Cir. 1989) (employee engaged in protected activity when she complained to management about her supervisor's refusal to accommodate her religious beliefs). Employees engaged in protected activity under the opposition clause when they oppose, in good faith, what they

reasonably believed at the time was unlawful discrimination on the part of their employer.

11. It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component.

A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful discriminatory practices, but also that his belief was *objectively* reasonable in light of the facts and record presented.

Little v. United Technologies, Carrier Transicold Div., 72 FEP Cases 1560, 1563 (11th Cir. 1997) (Emphasis added.)

An employee is engaged in protected activity if he or she opposes an employer's conduct that he or she has a good faith and reasonable belief is illegal.

EEOC v. Wilson Metal Casket Co., 58 FEP Cases 1523, 1528 (M.D. Tenn. 1992) (citations omitted).

12. In the instant case, Respondent was aware Complainant engaged in protected activity. Respondent knew of calls made to its EEO hotline, as well as calls made to the H.R. Department.

13. Complainant filed a complaint with the EOAG on September 15, 2003 and the FMP occurred on October 21, 2003.

14. Complainant was subjected to Respondent's FMP one (1) month after she complained of sex and age discrimination.

15. In determining whether a causal connection exists, the proximity between the protected activity and the adverse employment action is often "telling." *Holland v. Jefferson Natl. Life Ins. Co.*, 50 FEP Cases 1215, 1221 (7th Cir. 1989), quoting *Reeder-Baker v. Lincoln Nat'l Corp.*, 42 FEP Cases 1567 (N.D. Ind. 1986).

16. The closer the proximity between the protected activity and the adverse employment action, the stronger the inference of a causal connection becomes:

... a court may look to the temporal proximity of the adverse action to the protected activity to determine where there is a causal connection.

EEOC v. Avery Dennison Corp., 72 FEP Cases 1602, 1609 (6th Cir. 1997) (citation and quote within a quote omitted).

Temporal relationship between a plaintiff's participation in protected activities and a defendant's alleged retaliatory conduct is an important factor in establishing a causal connection.

Gonzales v. State of Ohio, Dept. of Taxation, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).

17. The Commission having established a *prima facie* case, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for its employment action. *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.

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), quoting *Burdine, supra* at 254-555, 25 FEP Cases at 116, n.8.

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

18. Respondent met its burden of production with the introduction of evidence that Complainant's scores for the FMP skills assessment for the October 2003 FMP were low compared to the other ten (10) messaging employees whose skills were being assessed. Complainant and three (3) others were affected by the FMP on October 21, 2003.

19. Respondent having met its burden of production, the Commission must prove that Respondent retaliation 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 reasons for Complainant's discharge were not its true reasons, but were a "pretext for ... [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine*, 450 U.S. 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 was false, and that ... [unlawful retaliation] was the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

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 ... [unlawful retaliation] is correct. That remains for the factfinder to answer ...[.]

Id., at 524, 62 FEP Case at 106.

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

22. In order to show pretext, the commission may directly or indirectly challenge the credibility of Respondent’s articulated

reasons for Complainant's termination. 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 (6th 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 ... [n]o additional proof is required.³

Hicks, supra at 511, 62 FEP Cases at 100 (emphasis added).

23. The credible evidence introduced by Respondent is Complainant's scores from one FMP skills assessment to the other were due to Complainant being moved to messaging. Therefore,

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.

the October 2003 FMP skills assessment looked at different skills than the previous assessment.

24. These actions by Respondent do not constitute unlawful retaliation and Complainant is not entitled to relief as a matter of law.

RECOMMENDATION

For all of the foregoing reasons, it is recommended the Commission issue a Dismissal Order in Complaint No. 9847.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

August 28, 2012