This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 04/28/06

**STATE OF ILLINOIS**
**HUMAN RIGHTS COMMISSION**

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| **IN THE MATTER OF:** | ) | |
| | ) | |
| **MELANIE LINDBERG,** | ) | |
| | ) | |
| **Complainant,** | ) | |
| | ) | **Charge No.: 2002CF1694** |
| **and** | ) | **EEOC No.: 21BA21104** |
| | ) | **ALS No.: 12217** |
| **LASER MODELING, INC. and,** | ) | |
| **FRANK MCRAE,** | ) | |
| **Respondents.** | ) | |

## RECOMMENDED ORDER AND DECISION

On October 9, 2003, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Melanie Lindberg. That complaint alleged that Respondents, Laser Modeling, Inc. and Frank McRae, sexually harassed Complainant. The complaint further alleged that the corporate Respondent, Laser Modeling, Inc., retaliated against Complainant by discharging her because she filed a charge of discrimination with the Illinois Department of Human Rights.

A public hearing was held on the allegations of the complaint on August 23, 2004. Subsequently, the parties filed posthearing briefs. Respondents also filed a reply brief. Complainant had the opportunity to file a reply, but no such reply was filed and the time for filing has expired. The matter is ready for decision.

## FINDINGS OF FACT

The following facts were proven by a preponderance of the evidence at the public hearing in this matter. Assertions made at the public hearing that are not addressed herein were determined to be unproven or were determined to be immaterial to this decision.

1. The corporate Respondent, Laser Modeling, Inc. (LMI), hired Complainant, Melanie Lindberg, in September of 2001. Complainant's position was part-time and her duties were to assist LMI's Vice President of Sales, Ralph Black.

2. The individual Respondent, Frank McRae, is LMI's Production Manager. He also is the corporate secretary and a shareholder in the corporation.

3. McRae routinely sent what he believed were humorous e-mails to other employees in the office. Complainant was one of the people who received some of those e-mails.

4. Complainant found some of McRae's e-mails offensive instead of amusing.

5. None of the e-mails that Complainant found offensive was explicitly sexual in nature. Some of the e-mails could have had off-color interpretations.

6. Complainant complained about to Black about McRae's e-mails. Black agreed to talk to Mike Boruta, LMI's president.

7. Early in his employment with LMI, Black received unwanted e-mails from McRae. Black asked McRae to stop sending such e-mails, and McRae complied with that request.

8. One of the computers in LMI's office, the same computer that Complainant used, was equipped with software which allowed the computer to be accessed from outside the office. McRae could, and frequently did, access that computer from his home.

9. When Complainant's computer was remotely accessed, she lost the ability to operate the computer until the remote access was terminated. During those times, the computer's monitor reflected the actions being controlled from the remote location.

10. On or about January 23, 2002, Complainant was sitting at her computer when McRae remotely accessed it. After McRae did some work on the computer, he went into his personal e-mail box. Complainant saw a message in the box that was from a source named 'Rawnudeteenporn.com." She believed that McRae was trying to open that particular message, so she moved the mouse on the computer to temporarily regain control of the computer. When McRae's remote access program regained control of the computer, Complainant yelled for someone in the office to come help her. Complainant also claimed that McRae opened an e-mail message from someone using the name "Karen." Complainant testified that the message

from Karen said, “Thanks for last night. I like to play grownup and I needed that.” Despite Complainant’s calls for help, nobody else the office saw the e-mail messages Complainant claimed to see.

11. McRae did not know Complainant was using the computer at the time he remotely accessed it.

12. On or about January 24, 2002, based upon the information she got during McRae’s remote access of the computer she was using, Complainant reported McRae to the Schaumburg Police Department.

13. Based upon the information she got during McRae’s remote access of the computer she was using, Complainant reported McRae to the Federal Bureau of Investigation.

14. On or about February 1, 2002, Boruta received a notice of attorney’s lien from Complainant’s attorney. Boruta also received a letter from Complainant’s attorney that indicated that Complainant was going to bring a charge of sexual harassment against LMI.

15. Complainant took sick leave from January 24, 2002 until February 1, 2002.

16. On January 29, 2002, during that period of sick leave, Complainant filed her original charge of discrimination against Respondents with the Illinois Department of Human Rights.

17. After her return from sick leave, Complainant’s work performance declined.

18. On March 12, 2002, Black, Complainant’s immediate supervisor, wrote a memorandum to Respondent’s managers, Boruta, McRae, and Lee Milovanovic. In that memorandum, Black documented his problems with Complainant’s performance. In the memorandum, Black stated that he believed that Complainant should have been fired two weeks earlier.

19. In early March of 2002, Complainant accessed McRae’s computer. Without permission, she downloaded several photographs that were marked as Complainant’s exhibits 6A, 6D, 6E, 6F and 6G. McRae never showed those photographs to Complainant.

Complainant only saw them because of her search of McRae's computer.

## CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter "the Act").

2. The corporate Respondent, Laser Modeling, Inc., is an "employer" as defined by section 2-101(B)(1)(b) of the Act and is subject to the provisions of the Act.

3. The individual Respondent, Frank McRae, is an "employee" as defined by section 2-101(A)(1)(a) of the Act and is subject to the provisions of the Act.

4. Complainant failed to establish a *prima facie* case of sexual harassment against her by Respondents.

5. Complainant established a *prima facie* case of retaliation against her by the corporate Respondent.

6. The corporate Respondent articulated a legitimate, non-discriminatory reason for its actions.

7. Complainant failed to prove by a preponderance of the evidence that the corporate Respondent's articulated reason was a pretext for unlawful retaliation.

## DISCUSSION

The corporate Respondent, Laser Modeling, Inc. (LMI), hired Complainant, Melanie Lindberg, in September of 2001. Complainant's position was part-time and her duties were to assist LMI's Vice President of Sales, Ralph Black. The individual Respondent, Frank McRae, is LMI's Production Manager. He also is the corporate secretary and a shareholder in the corporation.

McRae routinely sent what he believed were humorous e-mails to other employees in the office. Complainant was one of the people who received some of those e-mails. Unfortunately, Complainant found some of McRae's e-mails offensive instead of amusing. Complainant complained about to Black about McRae's e-mails, and Black agreed to talk to

Mike Boruta, LMI's president.

One of the computers in LMI's office, the same computer that Complainant used, was equipped with software which allowed the computer to be accessed from outside the office. McRae could, and frequently did, access that computer from his home. When Complainant's computer was remotely accessed, she lost the ability to operate the computer until the remote access was terminated. During those times, the computer's monitor reflected the actions being controlled from the remote location.

On or about January 23, 2002, Complainant was sitting at her computer when McRae remotely accessed it. After McRae did some work on the computer, he went into his personal e-mail box. Complainant saw a message in the box that was from a source named 'Rawnudeteenporn.com." She believed that McRae was trying to open that particular message, so she moved the mouse on the computer to temporarily regain control of the computer. When McRae's remote access program regained control of the computer, Complainant yelled for someone in the office to come help her. Complainant also claimed that McRae opened an e-mail message from someone using the name "Karen." Complainant testified that the message from Karen said, "Thanks for last night. I like to play grownup and I needed that." Nobody else in the office saw the messages Complainant claimed she saw.

Complainant took sick leave from January 24, 2002 until February 1, 2002. On January 29, 2002, during that period of sick leave, Complainant filed a charge of discrimination against Respondents with the Illinois Department of Human Rights. That charge alleged that Respondents sexually harassed Complainant. The charge further alleged that LMI retaliated against Complainant by discharging her when she complained of sexual harassment.

The method of proving a charge of discrimination is well established. First, Complainant must establish a *prima facie* case of discrimination. If she does so, Respondents must articulate a legitimate, non-discriminatory reason for their actions. Once such a reason is articulated, for Complainant to prevail, she must prove that Respondents' articulated reason is

pretextual. ***Zaderaka v. Human Rights Commission***, 131 Ill. 2d 172, 545 N.E.2d 684 (1989). *See also* ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 251 (1981).

Complainant's two claims require separate analyses. Her sexual harassment claim will be considered first.

Section 2-101(E) of the Act defines sexual harassment as:

> …any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of any individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

To establish that conduct created an "intimidating, hostile or offensive working environment," (1) the conduct must be shown to be severe or pervasive enough to create an objectively hostile or abusive working environment and (2) the environment must have been subjectively hostile or abusive, in that the complainant must have perceived it as hostile or abusive. ***Trayling and Board of Fire & Police Commissioners***, 273 Ill. App. 3d 1, 652 N.E.2d 386 (2d Dist. 1995).

The behavior alleged by Complainant simply does not meet the standards explained in ***Trayling***. The e-mails sent to Complainant cannot fairly be characterized as sexual in nature. There was no nudity and no sexual conduct in the photos. One of the e-mails contained a few juvenile double-*entendres*, but it did not rise to the level of actionable harassment. In short, the e-mails sent to Complainant did not even approach the "objectively hostile" standard.

Complainant, though, did not rely exclusively on the e-mails to establish her case. She also included the incident involving the remote-accessed computer. As described briefly above, on January 23, 2002, Complainant was sitting at her computer when McRae remotely accessed it. After McRae did some work on the computer, he went into his personal e-mail box. Complainant testified that she saw McRae attempt to open an e-mail from what appeared to be a pornographic web site. She also testified that she saw a fairly explicit message to McRae from someone who appeared to be underage.

The alleged computer incident does little to bolster Complainant's claim. For one thing, there was no indication that McRae was even aware that Complainant was at the computer when he tried to access it. He can hardly have been harassing her if he was unaware of her presence. Furthermore, despite the fact that Complainant called out to co-workers to look at the computer screen, nobody else in the office saw the claimed material. Clearly, then, even if the material was as Complainant alleged, she could not have been exposed to it for more than a few seconds. In sum, that single incident, even if it happened exactly as Complainant testified, was not of sufficient severity to establish a case of sexual harassment.

Complainant certainly behaved as if McRae's behavior was subjectively hostile. There is no question that she complained vigorously about it. Clearly, his messages were not messages she wanted to receive. The subjective leg of the sexual harassment test, though, standing alone, cannot justify a finding of sexual harassment. Therefore, Complainant cannot prevail on her sexual harassment claim and that claim should be dismissed.

Complainant fared no better on her claim of retaliation. She was able to establish a *prima facie* case, but could not establish that LMI's articulated reason for her discharge was a pretext.

To establish a *prima facie* case of retaliation, Complainant had to establish three elements. She had to prove 1) that she engaged in a protected activity, 2) that LMI took an adverse action against her, and 3) that there was a causal nexus between the protected activity and the adverse action. ***Carter Coal Co. v. Human Rights Commission***, 261 Ill. App. 3d 1, 633 N.E.2d 202 (5th Dist. 1994).

Complainant had no problem establishing the first two elements. She filed a charge of discrimination with the Illinois Department of Human Rights, a protected act which proved the first element, and she was discharged, unquestionably an adverse action. LMI was made aware of Complainant's charge when it received the letter and notice of attorney's lien from her attorney. The third element, the causal nexus, was established for purposes of the *prima* facie

case by the relatively short time span between the protected act and the adverse action. *See* ***Ellis and Brunswick Corp.***, 31 Ill. HRC Rep. 325 (1987).

In response to the *prima facie* case, Respondent LMI articulated a legitimate, non-discriminatory reason for discharging Complainant. According to Respondent's witnesses, Complainant was discharged because of performance problems.

Certainly, there was ample evidence of performance issues. After the incident with the remotely accessed computer, it appears that Complainant's behavior changed around the office. On or about January 24, 2002, based upon the information she got during McRae's remote access of the computer she was using, Complainant reported McRae to the Schaumburg Police Department and to the Federal Bureau of Investigation. Those reports were not evidence of performance issues, but they do suggest a change in how Complainant viewed her workplace.

From January 24, 2002 until February 1, 2002, Complainant took sick leave. On January 29, 2002, during that period of sick leave, Complainant filed her original charge of discrimination against Respondents with the Illinois Department of Human Rights.

After Complainant's return from sick leave, her work performance declined. On March 12, 2002, Black, Complainant's immediate supervisor, wrote a memorandum to Respondent's managers, Boruta, McRae, and Lee Milovanovic. In that memorandum, Black documented his problems with Complainant's performance. In the memorandum, Black stated that he believed that Complainant should have been fired two weeks earlier.

Among other things, Black stated in his memorandum that Complainant felt that she could do pretty much whatever she wanted to do since she began her lawsuit (this action) against Respondents. He stated that she had stopped lining up leads for him, even though that was the key part of her job. He also expressed concerns about not being able to trust Complainant.

LMI acted on Black's recommendation in discharging Complainant. That recommendation provides a legitimate, non-discriminatory reason for the discharge. To prevail

on her retaliation claim, Complainant needed to prove that the articulated reason was a pretext. She failed to meet that burden.

Black testified at the public hearing in this matter, and that testimony was consistent with the content of his memorandum. At the time of the hearing, Black was no longer employed by LMI. He had been laid off. He testified credibly and had no obvious reason to lie. His testimony is entitled to considerable weight.

On the other hand, there are reasons to question Complainant's credibility. Once she filed her initial charge of discrimination, her behavior suggested that she was more interested in winning this case than in doing her job. The decline in her performance certainly suggests that the job was no longer of great importance to her. More telling, though, were some of her other actions.

For example, when confronted about her performance issues, she told Black "go ahead and fire me." That statement, or some variant of it, was made at least once and was heard by both Black and by Jill Moretti, an LMI employee and former co-worker of Complainant's, who testified on Respondents' behalf. (Moretti testified that she heard the statement twice, but Black testified to only one occurrence.) Moreover, Moretti testified that Complainant began yelling at Black when he tried to talk to her. In making such statements, Complainant may have been attempting to elicit a response that would have justified bringing a retaliation claim.

In addition, in a rather bizarre development, Complainant went looking through McRae's computer looking for evidence to back her claims. In early March of 2002, Complainant accessed McRae's computer. Without permission, she downloaded several photographs that were marked for the public hearing as Complainant's exhibits 6A, 6D, 6E, 6F and 6G. Complainant downloaded the photos onto a disk and gave that disk to her lawyer. McRae never showed those photographs to Complainant. Complainant only saw them because of her search of McRae's computer. That search strongly suggests that Complainant was less interested in her job than in her case against Respondents.

Quite simply, after the remote computer incident, it appears that Complainant lost interest in doing her job. Instead of performing her job duties, she concentrated her efforts on strengthening her sexual harassment claim. Unfortunately for Complainant, her efforts backfired.

To try to prove pretext, Complainant relied in part on a statement made by Boruta when he informed her of her discharge. When Complainant tried to argue with him about the discharge decision, Boruta cut her off and told her that she had an attorney, they [Respondents] had an attorney, and that they should just leave it at that. Complainant suggests that Boruta's statement indicates that the lawsuit was a deciding factor in the discharge. That suggestion should be rejected. Boruta tried to keep the discharge meeting short and clearly did not want to get into an argument. He testified that Complainant tried to bring things up and talk about them. Because he wanted to make the meeting short, he thought it best if they conducted any further discussions through their lawyers. Jill Moretti was a witness at the discharge meeting and she testified that the lawyer remark was used to cut off Complainant. That testimony supports a finding that Boruta's statement was nothing more than a justification for ending the discussion. It was not an explanation of the reason for the discharge.

In sum, Complainant failed to prove that Respondent's claim of poor performance was a pretext for unlawful retaliation. As a result, her retaliation claim must fail.

## RECOMMENDATION

Based upon the foregoing, Complainant failed to prove by a preponderance of the evidence that Respondents sexually harassed her. She also failed to prove that Laser Modeling, Inc. unlawfully retaliated against her when it discharged her. Accordingly, it is recommended that the complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____
MICHAEL J. EVANS

CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: FEBRUARY 24, 2006