

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION and HELEN KAMPION,
Complainant

v.

Docket No. 97-BEM-3693

CISCO SYSTEMS, INC.,
Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

Appearances: Alan Joel Finkel, Esq., and Herbert Zimmerman, Esq.,
for Complainant.
Mark W. Batten, Esq., for Respondent.

I. PROCEDURAL HISTORY

On September 11, 1997, Complainant, Helen Kampion (“Complainant” or “Kampion”), filed a complaint with the Massachusetts Commission Against Discrimination (the “Commission”), against her former employer, Cisco Systems, Inc. (“Respondent” or “Cisco”). In her complaint, Complainant alleged that Respondent engaged in unlawful discrimination on the basis of gender and age in violation of G.L. c. 151B, §§ 4(1) and (1B).

On April 29, 1999, the Commission initially issued a lack of probable cause decision with respect to Complainant’s charges. Complainant then filed an appeal and on September 12, 2000, the Commission found probable cause to credit Complainant’s allegations. On June 7, 2001, the Commission certified the case for Public Hearing. A Public Hearing was held before me in Boston, MA on

March 6 and 7, 2003. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the Public Hearing, and the stipulations of the parties. I have likewise considered the proposed Findings of Fact and Conclusions of Law submitted by the parties after the Public Hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. Complainant, Helen Kampion, is a female individual who worked for Respondent as an account manager from April 15, 1996 to March 28, 1997. She was 46 years old at the time she left Respondent. Complainant is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. Respondent, Cisco Systems, Inc., is a corporation with an office at 950 Winter Street, Waltham, MA. It is undisputed that Respondent employs more than six persons and, therefore, Respondent is an employer within the meaning of M.G.L. c. 151B, § 1(5).

3. At all times relevant hereto, Peter Cary worked for Respondent as a regional sales manager and his duties included supervising all sales personnel in his region including account managers. Prior to coming to work for Respondent, Complainant held a comparable sales position at Motorola. She testified that while working at Motorola, Cary contacted and invited her to apply for an open

account manager position at Respondent. Account managers are essentially sales personnel responsible for selling Respondent's products. Cary corroborated Complainant's testimony and stated he contacted Complainant after other employees recommended her for the job. He stated that he sought to fill a vacancy created by the recent death of a female account manager. He admitted that Complainant had a successful career at Motorola and she had achieved a reputation of being a major producer in the sales field. According to Cary, he interviewed a number of candidates for the position, including several male candidates, and then offered the job to Complainant. I credit Cary's testimony.

4. Complainant testified that when she began working at Respondent, she was the only female account manager among the more than twenty account managers in the Waltham office. Cary also acknowledged that during Complainant's eleven months with Respondent, he did not hire any other female account managers. In addition, after Complainant left the company, Cary did not replace her with another woman. Notwithstanding, Complainant admitted that throughout her employment with Respondent, Cary always treated her with respect, professionalism, and courtesy. Moreover, Complainant has not alleged that Cary or any other employee or supervisor harassed her in any way.

5. Cary testified that Respondent sets annual sales quotas for its account managers and evaluates their performance on a fiscal year basis (i.e., August 1 to July 31). Complainant began working for Respondent in April 1996 near the start of the fourth quarter for fiscal year 1996. As stated in Complainant's performance review, for the fourth quarter of fiscal year 1996, Complainant had a

quota of \$566,000, and she was credited with \$607,000 in sales. The parties stipulated that a standard quota for an account manager in 1996 was \$5 million per year. Cary testified that Respondent started Complainant at a significantly lower quota than typically expected of a regular account manager because it was her first quarter with the company. He stated that for fiscal year 1997, beginning August 1, 1996, Respondent assigned Complainant an annual sales quota of \$5 million, the minimum amount assigned to the account managers in his region for that fiscal year. I credit Cary's testimony.

6. In her first performance review dated August 15, 1996, Cary gave Complainant a very positive evaluation. Although Cary indicated that Complainant needed to improve her knowledge of Respondent's products, he emphasized, "With only 2½ months in the position, Helen has made incredible progress in this area. There is no doubt that Helen will assimilate the product and industry required to be successful very quickly. "

7. Like all account managers, Complainant was paired with a systems engineer, named John Vosburg. System engineers are responsible for handling the detailed technical aspects of Respondent's products. Cary testified that despite the assistance of the system engineer, account managers had the primary role with respect to the success of the sales effort and assumed responsibility for leading the sales team, devising the sales strategy for each customer, and making the sale. Vosburg testified that in the later part of 1996, he asked his manager to transfer him from Complainant to another account manager. Although Vosburg claimed that Complainant exhibited a lot of energy

and dedication to her job, he stated she lacked technical knowledge of Respondent's products and had become excessively dependent on him for this information. Vosburg also claimed that Complainant lacked the ability to properly manage the accounts and develop sales strategies. I credit Vosburg's testimony.

8. Cary testified that Complainant handled the account with Bolt, Beranek & Newman ("BBN"), one of largest customers in Cary's region, with projected sales between \$2.5 million and \$3 million in fiscal year 1997. According to Cary, sometime in late 1996 or early 1997, a senior official at BBN, Laz McKenzie, called him and requested that Complainant be taken off the account and replaced with another account manager. Cary claimed that McKenzie requested another account manager because BBN was dissatisfied with Complainant's performance. Cary testified that Respondent typically replaced an account manager at the request of a customer. However, he decided to keep Complainant on the account notwithstanding BBN's request and its importance as a customer. Cary stated that he kept Complainant on the account because he believed she could correct the problems and become an effective manager. I credit Cary's testimony.

9. Complainant acknowledged that her account with BBN was fraught with problems; however, she attributed her difficulties to ongoing product design problems. Although she admitted she was ultimately responsible for all aspects of the account, she had no control over the problems related to the design of Respondent's products. She stated that Respondent's engineers, including "special teams" assigned out of Respondent's headquarters in California, could

not correct the problems with the products delivered to BBN. Ultimately, Respondent lost the BBN account and as a result, Complainant's sales figures dropped dramatically. Complainant claimed she brought these problems to Cary's attention and requested that her sales quota be reduced to make up for the shortfall from the BBN account. She testified that the failure of Respondent to address her request to lower her quota created an intolerable working condition because it almost assuredly guaranteed that she would not meet her annual quota. I credit Complainant's testimony that her difficulties with the BBN account stemmed in part from product design problems; however, I refuse to credit the remainder of her testimony on this matter.

10. Cary testified that by February 1997, he had developed concerns about Complainant's performance. Most significantly, he claimed he became concerned about her failure to meet monthly or quarterly sales targets toward her \$5 million quota. The parties stipulated that by the end of the first quarter of fiscal 1997 (end of October 1996), Complainant's sale results amounted to only 59% of her year-to-date ("YTD") quota; and for the second quarter (ending January 1997), her sales amounted to only 51% of her YTD quota. Consequently, after the first half of the 1997 fiscal year, Complainant had sales of only \$1,128,000, less than 25% of her \$5 million quota. Cary testified that in response to her low sales figures, he had several meetings with Complainant from August 1996 through January 1997 about her sales forecasts, results, strategy, and activities. I credit Cary's testimony

11. On Friday, February 14, 1997, Cary gave Complainant a memorandum dated February 12, 1997, which contained a written performance improvement plan (the "plan"). Cary claimed that he had prepared the plan over the course of about a week, working from a standard template. He further testified that his supervisor, Buzz Doucette, and the director of human resources, Roy Gross, assisted him in preparing the memo. The plan outlined several goals for Complainant to achieve over the following month, including selling \$450,000 of products, arranging a minimum number of sales calls and meetings with her customers, and preparing and delivering a technical presentation. Both Cary and Complainant stated that they did not discuss the details of the plan at their meeting on February 14.

12. Complainant stated that the goals set forth in the plan were unreasonable and so unduly harsh that they appeared to be punitive in nature. She also testified that she believed the goals were subjective in nature and, therefore, she feared Respondent could terminate her employment at any point regardless of whether she completed the goals of the plan. Because she believed that the goals of the plan were unattainable, she concluded that Respondent was forcing her to quit. However, the plan did not state or imply that Complainant would be terminated for failing to attain the goals. To the contrary, it clearly and concisely stated, "Failure to achieve all standards by March 12, could result in you being issued a formal, documented written warning, and associated improvement plan." Moreover, Complainant acknowledged that Cary never stated or implied that she would be terminated if she failed to achieve the goals of the plan.

13. Contrary to Complainant's testimony, Cary stated that each of the goals set forth in the plan were reasonable, particularly since each goal was either consistent with or more lenient than Respondent's normal requirements for account managers. For example, Cary testified that under the plan, Complainant only needed to achieve \$450,000 in sales per month for the remainder of the fiscal year, which would have resulted in her only meeting 76% of the minimal annual quota (\$5 million) required of account managers. Cary also testified that the plan merely required Complainant to meet with each of the "key decision makers" for her accounts and make at least six sales calls per week, which were less than the expected number of contacts normally made by account managers. With respect to the goals in the plan requiring sales forecasts and technical proficiency, Complainant admitted on cross-examination that these requests were likewise reasonable. I credit Cary's testimony.

14. Although Cary and Complainant did not discuss the goals of the plan in any detail, at the conclusion of her meeting on February 14, Complainant asked him if she had any options other than improving her performance. In response, Cary stated that she had the option of electing a mutual separation package that would include a severance payment. Complainant then asked Cary to have the human resources department prepare a proposed separation agreement for her review.

15. Complainant did not introduce any credible evidence that Cary or anyone else at Respondent told her either that her job was in danger, or that she could be terminated if she failed to comply with the requirements of the plan.

Complainant also never subsequently discussed the details of the plan with Cary, nor expressed to him or to anyone else that the goals were unreasonable. In fact, the parties stipulated that “at no time between February 12, 1997 and March 28, 1997, did [Complainant] challenge or question any element of the performance plan set out in the February 12 memo in any conversation with [Cary].” Additionally, Complainant admitted that she essentially made no effort to meet the goals set out in the plan.

16. Complainant claimed that Respondent treated her differently from two other similarly situated younger male Account managers: Gregory Butt and Michael Turzanski. She stated that Respondent hired Butt and Turzanski at about the same time it hired her and they likewise had poor sales figures, but she was the only one of the three to be given a performance plan. She also claimed that she had highest sales of the three as of February 1997. Cary acknowledged that both Butt and Turzanski had lower sales figures than Complainant. However, Cary testified that as of February 1997, Butt had transferred out of his region and reported to other regional managers. Because he no longer supervised Butt, Cary claimed he could not issue him a performance plan. Cary also testified that Respondent did not have a formal policy on when account managers would receive performance plans and regional managers had the discretion of dealing with poorly performing account managers in different ways. Complainant did not introduce any credible evidence to the contrary. With respect to Turzanski, Cary testified that Turzanski’s sales performance figures were so poor that it would be have been futile to give him a performance plan.

Instead, Cary claimed that he took immediate steps to remove Turzanski from his position. According to Cary, at about the same time he was meeting with Turzanski to discuss his performance problems, Turzanski's former supervisor in Respondent's marketing department called Turzanski to offer him another job, which he accepted. Cary also claimed that unlike Turzanski, he believed Complainant could improve her performance and meet her quota; hence, he gave her a performance plan as opposed to seeking her removal. I credit Cary's testimony.

17. Complainant testified that on Monday, February 17, 1997, she contacted Bonnie Donnelly, a recruiter at an executive search firm entitled, "The Hamblin Group." However, notations in Complainant's calendar indicate that she also apparently spoke to Donnelly on Thursday, February 13, before she met with Cary and received the performance plan. On February 19, 1997, Complainant authorized Donnelly to circulate her resume to a prospective employer, Quantra Corporation. On or about February 21, 1997, in response to Complainant's request, Cary gave Complainant a draft of a mutual separation agreement letter, which offered her a severance payment in exchange for a release of any and all claims against Respondent.

18. Quantra subsequently interviewed Complainant for a job and offered her a position, which she accepted. On March 21, 1997, Complainant submitted her resignation to Respondent, effective March 28, 1997. Complainant did not accept the mutual separation package offered by Respondent. The parties stipulated that before resigning, Complainant did not complain to Cary or to

Respondent's Human Resources Department that Respondent had engaged in discrimination. Complainant also acknowledged that she was aware of Respondent's Open Communication Policy and Employee Action Request procedures.

19. Complainant claimed Respondent's subsequent actions constituted an admission that it terminated her employment. She testified that after Cary gave her the performance improvement plan in February 1997, other employees approached her and told her they thought she had been terminated. In addition, Complainant stated that prospective employers mentioned in interviews that they had heard Respondent had terminated her employment. Lastly, Complainant obtained a voice mail message sent by Cary to other employees after she had left the company that stated Complainant had been dismissed. Cary testified that he sent a voice mail message regarding Complainant to Respondent's employees because Complainant had still been contacting her former coworkers. He stated that he did not remember why he used the word "dismissal", but recalled merely trying to convey to Respondent's employees that Complainant no longer worked for the company. I credit Cary's testimony. I also refuse to give any weight to Complainant's testimony that Respondent admitted it had "terminated" her employment since her testimony is based entirely on hearsay comments made to her from other employees and prospective employers, and such remarks would just as likely be the product of unsubstantiated gossip, rumor, or innuendo.

20. John Wragg, a financial analyst who identified himself as Complainant's friend and financial adviser, testified that he estimated Complainant lost a total of \$385,700 in wages as a result of her separation of employment from Respondent. He claimed that he calculated this estimate by taking into account her prior salary and commissions at Motorola, her salary and commissions at Respondent, and her salary and commissions at her subsequent employers. He also claimed that as a result of Complainant's separation of employment from Respondent, she lost the value of participating in Respondent's employee stock option plans. As an employee of Respondent, Complainant could participate in a stock purchase option, which permitted her to buy a certain amount of Respondent's stock each year at market prices. Respondent also had a practice of awarding stock options to its employees, although the award of stock options was totally discretionary and based on the performance of both the company and the individual account manager. Wragg estimated that Complainant lost \$367,900 as a result of not being able to participate in Respondent's stock purchase plans. I found Wragg's testimony to be completely lacking in credibility and I decline to credit his testimony. The evidence in the record revealed that Complainant's salary consistently rose after she left Respondent. When she left Respondent for Quantra, her salary increased from \$40,000 to \$75,000. She subsequently left Quantra to work at Vantive Corporation, where she earned a base salary of \$70,000. Complainant then left Vantive to take a position at Oracle, where she received a salary of \$99,000 comprised of cash plus a monthly car allowance. She also earned commissions at Quantra, Vantive, and

Oracle, but neither Wragg nor Complainant presented any credible testimony concerning the structure of her commissions or the details on her gross compensation at any of her subsequent employers. With respect to Respondent's stock plan, Wragg admitted that Respondent's stock plan declined substantially since 2000, losing 85% of its value in recent years.

III. CONCLUSIONS OF LAW

A. GENDER AND AGE DISCRIMINATION

Complainant claimed that Respondent subjected her to adverse terms and conditions of her employment based on her female status and age. Specifically, she alleged that Cary engaged in unlawful discrimination by treating her differently from similarly situated younger male coworkers when he issued her a performance plan on February 14, 1997.

M.G.L. c. 151 B, § 4 (1), prohibits an employer from discriminating against an employee on the basis of sex with respect to the terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification. In order to prove a prima facie case of disparate treatment sex discrimination, Complainant must show that she is a member of a protected class; she was adequately performing the essential duties of the job; and, Respondent treated her differently from other similarly situated persons not of her protected class with respect to terms, conditions or privileges of employment. Wheelock College v. MCAD, 371 Mass 130, 134-136(1996); Perotta v. Rivkind, Baker & Braverman, 24 MDLR 30, 35 (2002); Williams v. New Bedford Free

Public Library, 18 MDLR 123 (1996). M.G.L. c. 151B, § 4(1B) prohibits an employer from discriminating against an employee on the basis of age with respect to the terms, conditions, or privileges of employment unless pursuant to any other general or special law. In order to establish a prima facie case of age discrimination, Complainant must show that she was over 40 years of age; she was performing her job adequately; and, Respondent treated her differently from other similarly situated younger persons with respect to terms, conditions or privileges of employment. Knight v. Avon Products, 438 Mass. 413, 425 (2003).

Complainant's claim that Cary engaged in disparate treatment is undermined in part by the fact that less than a year before he gave her the performance plan, Cary actively recruited and hired her to work at Respondent, notwithstanding her sex and age, after interviewing several male candidates. He also initially gave her a lower sales quota than typically given to account managers and gave her a positive performance review in August 1996. In addition, Complainant admitted that throughout her employment, Cary consistently treated her in a respectful, professional, and courteous manner. He also kept her on the BBN account, contrary to Respondent's typical practice, after BBN complained about her performance and requested she be replaced with another account manager.

With respect to establishing a prima facie case of discrimination, Complainant has proven that she is a member of a protected class by virtue of her status as both a female and being over forty years of age. However, she failed to establish that she was adequately performing the essential duties of her

job at the time Cary gave her the performance plan. Complainant admitted that as of February 14, 1997, her sales were substantially below her annual sales quota. In addition, Respondent had just lost BBN as an account, after BBN had complained about her performance.

Moreover, even if Complainant could show that she was adequately performing the essential duties of her job, she failed to establish that Respondent treated her differently from similarly situated younger male co-workers. I credited Cary's testimony that Butt had been transferred out of his region and, therefore, he had no authority to issue Butt a performance plan. Consequently, Butt cannot be considered a similarly situated co-worker. With respect to Turzanski, Cary testified credibly that a performance plan for Turzanski would have proved futile since his sales figures were so poor. Instead, Cary sought to remove Turzanski as an account manager. I credited Cary's testimony that he believed Complainant, unlike Turzanski, could eventually improve her performance and meet her quota. Cary thus treated Complainant better than Turzanski by offering her the opportunity to improve her performance.

Under these circumstances, Complainant has failed to prove that Respondent treated her differently from similarly situated younger male coworkers; and, therefore, failed to establish that Respondent engaged in unlawful sex or age discrimination in violation of M.G.L. c. 151B, §§ 4(1) and (1B).

B. CONSTRUCTIVE DISCHARGE

Complainant has also failed to establish a claim of constructive discharge. In order to prove that Respondent constructively discharged Complainant from her employment, she must demonstrate that Respondent made her work environment so intolerable that a reasonable person would, in her position, feel compelled to resign. GTE Products Corp. v. Stewart, 421 Mass. 22, 35 (1995); Dean v. Massachusetts Turnpike Authority, 23 MDLR 97, 100 (2000). To prove that “intolerable” working conditions existed, Complainant must show that the “working conditions were so difficult or unpleasant that a reasonable person in [the employee’s] shoes would have felt compelled to resign.” Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir. 1986).

Complainant has failed to introduce any credible evidence that Respondent subjected her to intolerable working conditions. Her claim is solely based on her belief that the goals set forth in the performance plan were unattainable and unreasonably harsh. She believed that Respondent set such unattainable and unreasonable goals in order to force her to quit; consequently, after receiving the plan she decided to look for another job. Complainant admitted that aside from issuing her the performance plan, Respondent had never taken any other adverse action against her. As stated above, she also acknowledged that Cary always treated her in a respectful, professional, and courteous manner during the course of her employment. With respect to the plan, I credited Cary’s testimony that the goals were reasonable, particularly since they were either consistent with or more lenient than Respondent’s normal

requirements for account managers. For example, Cary testified that under the plan, Complainant only needed to achieve \$450,000 in sales per month for the remainder of the fiscal year, which would have resulted in her only meeting 76% of the minimal annual quota (\$5 million) required of account managers. Cary likewise testified credibly that the requirements to meet with each of the “key decision makers” for her accounts and make at least six sales calls per week were entirely reasonable considering they were less than the expected number of contacts normally performed by account managers. Complainant also admitted on cross-examination that the goals requiring sales forecasts and technical proficiency were reasonable. More importantly, the plan did not state or imply that Complainant would be terminated for failing to attain the goals. To the contrary, it clearly and concisely stated, “Failure to achieve all standards by March 12, could result in you being issued a formal, documented written warning, and associated improvement plan.” In addition, Complainant offered no credible evidence that Cary or anyone else at Respondent stated or implied that her failure to achieve the goals would result in her termination. Complainant also did not make any effort to try to meet these goals and instead immediately sought new employment.¹ Lastly, despite her otherwise good relationship with Cary, she never sought to discuss or complain about the goals described in the plan. Consequently, Complainant has failed to establish that Respondent subjected her to difficult, unpleasant, or intolerable working conditions compelling her to quit.

¹ Notations in Complainant’s calendar indicated that she called the employment recruiter the day before she received the performance plan, which suggest she already considered leaving Respondent prior to her receipt of the “intolerable” plan.

IV. ORDER

For the reasons set forth above, the complaint in this matter is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 15th day of December, 2003.

EDWARD R. MITNICK
Hearing Officer