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9 UNITED STATES DISTRICT COURT

10 IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

<p>11 DEBORAH SALACH 12 Plaintiff, 13 v. 14 LEVEL 3 COMMUNICATIONS LLC and DOES 1 through 100, inclusive 15 Defendants. 16</p>	<p>) Case No. C 03 3712 MJJ) Superior Court Case No.) CGC 03418550)) MOTION IN LIMINE TO EXCLUDE) IMPROPER LAY OPINION) TESTIMONY)) Pretrial Conf. Date: October 19, 2004) Time: 3:30 p.m.) Ctrm: 11</p>
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17 Complaint Filed: March 20, 2003
 18 Trial Date: November 1, 2004

19 TO PLAINTIFF DEBORAH SALACH AND HER ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE that on October 19, 2004, at 3:30 p.m., or as soon
 21 thereafter as the matter may be heard, in Courtroom 11 of the above-entitled Court,
 22 located at 450 Golden Gate Avenue, San Francisco, California, defendant Level 3
 23 Communications LLC ("Level 3" or "Defendant") will, and hereby does, move, *in*
 24 *limine*, pursuant to Federal Rules of Evidence, Rule 602 ("Rule 602") and 701 ("Rule
 25 701"), for an order directing plaintiff, her counsel and/or her witnesses not to testify,
 26 present questions about, or make any reference to: (1) lay opinions about the selection of
 27 Plaintiff for layoff and/or (2) lay opinions about whether or not certain accounts should
 28 have been assigned to Plaintiff.


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This motion is made on the ground that the anticipated opinion testimony of lay witnesses is inappropriate because it is has no probative value; is not made of personal knowledge and is not helpful to a determination of any fact in issue.

This motion is based on this notice of motion and motion; the accompanying memorandum of points and authorities and Declaration of Ann Haley Fromholz; the pleadings and papers on file in this matter; and on such oral and documentary evidence as may be presented at or before the hearing on this matter.

DATED: October 5, 2004

SEYFARTH SHAW LLP

By 
Ann Haley Fromholz
Attorneys for Defendant
LEVEL 3 COMMUNICATIONS, LLC

1 **Memorandum of Points and Authorities**

2 **I. INTRODUCTION**

3 This action arises out of Plaintiff Deborah Salach’s employment with Defendant
4 Level 3 Communications LLC (“Defendant” or “Level 3”). Plaintiff was employed by
5 Level 3 as a Sales Manager for just over 2 years. In June 2001, Plaintiff was one of
6 approximately 1,400 employees laid off by Level 3—a layoff that reduced Level 3’s total
7 sales forces by nearly 25%. Plaintiff alleges that she was included in this layoff because
8 of her gender and her age.

9 Level 3 expects that during trial of this matter, Plaintiff will attempt to elicit
10 opinions from numerous lay witnesses as to whether the decision to lay Plaintiff off from
11 Level 3 was appropriate. During depositions in this case, Plaintiff’s counsel asked
12 several current and former Level 3 employees – none of whom made the layoff decision -
13 whether they believed Plaintiff should have been selected for layoff. (Declaration of Ann
14 Haley Fromholz “Fromholz Dec.”) ¶¶ 2, 3, Exs. A, B, C and D) In addition, based on the
15 identification of several witnesses and conversations that Defendant’s counsel has had
16 with those witnesses, Defendant believes that Plaintiff intends to present evidence of
17 whether or not those witnesses believe Plaintiff should have been selected for layoff.
18 (Fromholz Dec. ¶ 4)

19 During depositions in this case, Plaintiff’s counsel also asked current and former
20 Level 3 employees whether they believed that the assignment of certain accounts to sales
21 representatives other than Plaintiff was fair. (Fromholz Dec. 5, Exs. E. F. G and H)

22 **II. ARGUMENT**

23 Defendant anticipates that Plaintiff will attempt to elicit testimony from current
24 and former Level 3 employees Michael Kokinos, Sheila Wood, David Rosenberg Julie
25 Riley and others about whether Plaintiff should have been laid off. None of these
26 individuals, however, were involved in the layoff selection process. In addition,
27 Defendant anticipates that Plaintiff will attempt to elicit testimony from current and
28 former Level 3 employees Wood, Sherri Bakos and others whether the assignment of

1 certain accounts to employees other than Plaintiff was fair. Again, none of these
2 individuals were involved in the assignment of the accounts. Accordingly, as set forth
3 below, their testimony is inadmissible pursuant to Rules 602 and 701.

4 Pursuant to Rule 602, a witness must have personal knowledge of a matter in order
5 to testify to it. The opinions of those who played no role in the process of either selecting
6 Plaintiff for the layoff or assigning (or failing to assign) accounts to Plaintiff are not
7 based on personal knowledge. Because the witnesses played no role in the decision-
8 making process, they cannot testify on personal knowledge to the reasons for the
9 decisions. Accordingly, the testimony is inadmissible. *Visser v Packer Engineering*
10 *Assoc., Inc.* 924 F.2d 655 (7th Cir. 1991).

11 Further, pursuant to Rule 701, a witness may not present lay opinion unless the
12 opinion is: (a) rationally based on the perception of the witness, and (b) helpful to a clear
13 understanding of the witness' testimony or the determination of a fact in issue, and (c) not
14 based on scientific, technical, or other specialized knowledge within the scope of Rule
15 702. As Rule 701 recognizes, it is the jury's function to draw whatever conclusions are
16 to be deduced from the evidence. *Price v. Kramer*, 200 F.3d 1237, 1251 (9th Cir. 2000).
17 Accordingly, lay opinions are inadmissible when the jury can readily draw the necessary
18 inferences and conclusions from the facts presented without the aid of an opinion. *Lynch*
19 *v. City of Boston*, 180 F.3d 1, 17 (1st Cir. 1999); *United States v. Koon*, 34 F.3d 1416,
20 1431 (9th Cir. 1994).

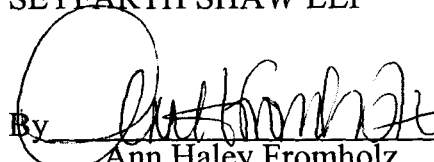
21 In addition, although lay opinion testimony may embrace the ultimate issue of the
22 case, the benefit of such testimony diminishes the closer the opinion approaches the
23 crucial issues in the case. *Hester v. BIC Corp.*, 225 F.3d 178 (2nd Cir. 2000). If the
24 testimony amounts to little more than telling the jury what result to reach, the opinion is
25 not "helpful" and thus should be excluded under Fed. R. Ev. 701(b). *Lightfoot v. Union*
26 *Carbide Corp.*, 110 F.3d 898 (2nd Cir. 1997).

1 **III. CONCLUSION**

2 For the foregoing reasons, Defendant respectfully requests the Court to issue an
3 order directing plaintiff, her counsel and/or her witnesses not to testify, present questions
4 about, or make any reference to: (1) opinions expressed by individuals who were not
5 involved in the selection process about the selection of Plaintiff for layoff and/or (2)
6 opinions expressed by individuals who were not involved in the assignment process about
7 whether or not certain accounts should have been assigned to Plaintiff.

8 DATED: October 5, 2004

SEYEARTH SHAW LLP

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10 By 

11 Ann Haley Fromholz
12 Attorneys for Defendant
13 LEVEL 3 COMMUNICATIONS, LLC
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