

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

OTIS DAVENPORT

Complainant

and

Complaint #7192

(DAY-COL) 71070193 (20781) 092893

22A-93-5144

**STATE OF OHIO,
BUREAU OF WORKERS' COMPENSATION**

Respondent

**HEARING EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATION**

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INTRODUCTION AND PROCEDURAL HISTORY

Otis Davenport (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on September 28, 1993.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by the State of Ohio, Bureau of Workers' Compensation (Respondent) (BWC) in violation of Revised Code (R.C.) § 4112.02(A).

The Commission's efforts to eliminate the alleged unlawful discriminatory practices by conciliation were unsuccessful. A complaint was issued on September 19, 1994.

The Complaint alleged that Complainant was suspended and denied two promotions because of his race and sex.¹

¹ Subsequent to the hearing, the Commission and Respondent stipulated that the issues regarding the allegation that Complainant was suspended because of his race and sex were moot. Therefore, those issues will not be discussed in this Report.

Respondent filed an Answer to the complaint, admitting certain procedural allegations but denying that it engaged in any unlawful discriminatory practices.

Complainant filed an action in federal court against Respondent in which he raised the same facts and issues as those raised before the Commission. This matter was stayed pending the outcome of the federal action. The federal action did not resolve the issues on their merits. Therefore, a Motion to Remove the Stay and Set a Hearing was filed on August 17, 1998.

A public hearing was held on January 12-13, 1999 at the Commission's Central Office in Columbus, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 388 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on March 2, 1999 and by Respondent on March 22, 1999. Complainant filed a brief on March 25, 1999.

FINDINGS OF FACT

The following findings are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed; each witness's strength of memory; frankness or the lack of frankness; and the bias, prejudice, and interest of each witness. Finally, the Hearing Examiner 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 September 28, 1993.

2. The Commission determined on September 8, 1994 that it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of R.C. 4112.02(A).

3. The Commission attempted to eliminate the alleged unlawful discriminatory practices by conciliation. The Commission issued its complaint after conciliation failed.

4. Respondent is a state agency and an employer.

5. Complainant is a male and a black person.

6. Complainant has been employed by Respondent since May 1990. In 1993, he was employed in the Department of Provider Affairs as a data entry operator (DEO).

7. In 1993, Respondent was in the process of filling between 800 and 1,000 Claims Representative (CR) positions. These positions came about as part of a BWC reorganization, which drastically changed the job duties of a CR. CRs under the new job description had responsibility for processing a

claim from its inception until the claimant either returned to work or the claim was closed for other reasons. The position required more skills than the previous claims examiner position and Complainant's DEO position and was accordingly classified at pay range 28.

8. The new CR positions were subject to the Ohio Civil Service Employees Association (OCSEA) Collective Bargaining Agreement (CBA). The CBA provided that promotions be awarded to the senior most qualified proficient applicant.

9. In order to determine which applicant was the most proficient, Respondent created minimum qualifications for the position. If an applicant possessed the minimum qualifications, they proceeded to the next stage of the selection process, a proficiency test.

10. The test had three parts. The first part was a simple math test; the second part was a writing sample; and the third part was an oral interview. Applicants who passed the proficiency test became part of a pool of applicants who were grouped by classification series. Complainant and all other employees of BWC who applied for CR positions were Group 2

applicants. The most senior applicant in the group was awarded the position.

11. Generally, applicants were only considered for the position they applied for. Each position had a different Position Control Number (PCN). Thus, applicants had to reapply for each PCN that was posted. They also had to retake the proficiency test for each PCN if they had not taken the proficiency test within two weeks. It was possible to have a different score each time one took the proficiency test because the interview portion could be conducted by a different interviewer who would have a different perception of the interviewee's interviewing skills. There were also four different versions of the written test.

12. The selection process was controversial and criticized by the bargaining unit employees. Ultimately, over 150 grievances were filed complaining about the manner in which CR positions were filled. All of these grievances were settled in a global agreement with the OCSEA which provided that a new test would be developed, all previously unsuccessful applicants would be given an opportunity to take it, and those who passed

would be awarded an CR position with back pay from the date of their grievance.

13. Complainant was eligible to participate in the settlement agreement but did not participate. Nor did Complainant apply for any additional CR vacancies that were posted after the positions he applied for in 1993 and prior thereto.

14. Complainant applied for between 50 and 60 CR positions. He applied for 37 of them within one month.² He also applied for PCN 13708.0. He met the minimum qualifications; he took and passed a proficiency test. Initially, he was identified by Regional Administrative Manager Amy Blateri as the most senior, qualified, proficient applicant. Complainant came to believe that he had been awarded the position.

15. This was incorrect. Prior to being awarded any position, the position was subject to review by Labor Relations. The packet containing Complainant's selection and the materials regarding all the other applicants was reviewed by Kathleen Raparelli, Labor Relations Officer. The packet Raparelli reviewed contained the applicant log.

16. The applicant log listed Brenda Boley, (Caucasian, female), as an applicant. However, there was no information in the packet regarding the disposition of Boley's application. Raparelli checked Boley's seniority date and learned that she was more senior than Complainant, but had never been tested. Raparelli reviewed Boley's application and found that it was unsigned and undated. She decided it had to have been timely filed because Boley's name was on the applicant log, which only contains the names of applicants whose applications are timely filed. Raparelli passed this information along to Human Resources. Boley was allowed to take a proficiency test. She took the test and passed it on June 9, 1993. Pursuant to the CBA, Raparelli decided she had no choice but to offer the position to Boley.

17. In May 1993, Complainant also applied for PCN 13704.0. Blateri received the packet for this position more than two weeks after Complainant had passed the proficiency examination. Therefore, pursuant to Respondent's usual practice, she contacted Complainant and told him that he would have to

² Apparently, Complainant did not pass the proficiency test for any of the 37 positions. The positions discussed in this Report were additional positions he applied for.

take another proficiency examination to be considered for the position. He told her he would not take any more proficiency tests.

18. Pursuant to Respondent's usual practice, Blateri asked him to document his refusal with a letter. Complainant never sent her one. Julia Dent, Blateri's executive secretary, also contacted Complainant and scheduled him for the proficiency examination for PCN 13704.0. Complainant told her he had already been selected for another position (the position ultimately awarded to Boley) and declined to take the examination. Dent also asked Complainant for a letter. Dent documented Complainant's refusal on the interview summary. She noted he "refused to participate – interview process, declined without letter." (Jt. Ex. 66)

19. Complainant was not recommended for PCN 13704.0 because he refused to retake the proficiency examination. The position was awarded to Mary Grubb, a Caucasian female who was less senior than Complainant.³

³ Complainant received a form rejection letter stating that a more senior applicant had been chosen for one of the positions he applied for. Although he believed the letter was referring to PCN 13704.0, it could have been referring to one of the other positions.

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 herein, it is not credited.⁴

1. The Commission alleged in the Complaint that Respondent failed to promote Complainant because of his race and sex.

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

⁴ Any Finding of Fact may be deemed a Conclusion of Law and any Conclusion of Law may be deemed a Finding of Fact.

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the race, . . . sex, . . . of any person, . . . 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 Chapter 4112 of the Revised Code. The Commission must prove a violation of R.C. § Section 4112.02(A) by a preponderance of reliable, probative and substantial evidence. R.C. § 4112.05(G) and § 4112.06(E).

4. Title VII standards are to be used in evaluating alleged violations of Chapter 4112 of the Revised Code. Therefore, reliable, probative and substantial evidence means evidence sufficient to support a finding of discrimination under Title VII of the Civil Rights Act of 1964, U.S.C. Sec. 2000e *et. seq.*, *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm.* (1991), 61 Ohio St.3d 607.

5. Normally, the order of proof in a Title VII case requires the Commission to prove a *prima facie* case of discrimination.

The plaintiff in a Title VII case possesses the ultimate burden of persuasion and the intermediate burden of proving by a

preponderance of the evidence a *prima facie* case of discrimination.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 1093, 25 FEP Cases 113 (1981).

6. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for its actions.⁵ *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 254-55, 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 its actions. *Hicks, supra* at 511, 62 FEP Cases at 100.

⁵ Although the burden of production shifts to Respondent once a *prima facie* case is established, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254, 25 FEP Cases at 116.

7. However, 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 its decision removes any need to determine whether the Commission proved a *prima facie* case, and the "factual inquiry proceeds into 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.

Aikens, *supra* at 713, 31 FEP Cases at 611 (emphasis added).

8. Respondent met its burden of production. Respondent's legitimate, nondiscriminatory reason for not awarding Complainant the first position was that he was not the most senior qualified applicant. Respondent's legitimate, nondiscriminatory reason for not awarding Complainant the second position was that he refused to participate in the selection process when he declined to take another proficiency test.

9. Respondent having met its burden of production, the Commission must show by a preponderance of the evidence that Respondent's articulated reasons were not its true reasons but were a pretext for discrimination.

Hicks, supra at 511, 62 FEP Cases at 100.

[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.

10. 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 race is correct. That remains a question for the factfinder to answer

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

In other words,

nothing in law permit[s] . . . substitut[ion] for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Id., at 514-515, 62 FEP Cases at 102.

11. Although it is not enough to simply disbelieve Respondent's

articulated reasons to infer intentional discrimination,

[t]he 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 a *prima facie* case, suffice to show intentional discrimination.⁶

Id., at 511, 62 FEP Cases at 100.

Ultimately, the factfinder must be convinced that Complainant was “the victim of intentional discrimination.” *Id.*, at 508, 62 FEP Cases at 99, *quoting Burdine, supra* at 256, 25 FEP Cases at 116.

12. There is no dispute that the Commission has the burden of proof throughout the proceedings. The Commission cannot shift the burden of proof to Respondent. The Commission cannot satisfy its burden of proof by merely arguing that the manner in which Boley's application was resurrected was “suspicious”. (Comm.Br. 23)

⁶ Even though rejection of Respondent's articulated reasons under these circumstances is “enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*” *Hicks, supra* at 511, 62 FEP Cases at 100, n.4.

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.

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

13. In effect, the Commission is challenging the procedures used by Respondent to process Boley's application. If Respondent deviated from its usual procedures, an argument could be made that they were doing so to avoid awarding the position to Complainant. Whether they were doing so because of his race would still be an open question. However, it is hard to believe and difficult to prove that there was a conspiracy to keep Complainant from getting the position because he was a black male, given 800 to 1,000 new CR positions.

14. There was conflicting testimony regarding the processing of Boley's application; however, I resolved the conflict in favor of the version offered by Raparelli. Based on her version, there was no deviation from normal procedures. Normal procedures were followed once it was discovered that Boley's application had not be processed. Even if her version of what

happened was incorrect, I find that it was not intentional. She may have been mistaken. An honest, mistaken belief is not evidence of discrimination.

It is not enough for the plaintiff to show that the employer's decision was wrong or *mistaken*, because the factual dispute at issue is whether the employer was motivated by a discriminatory animus, not whether it was wise, shrewd, prudent, or competent.

Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 69 FEP Cases 753, (3d Cir. 1995).

A reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination. . . . Bad or mistaken reasons for a decision may yet be non-discriminatory.

Holder v. City of Raleigh, 49 FEP Cases 47 (4th Cir. 1989).

. . . a mistaken belief or motive can be a legitimate reason for an employment decision and is not necessarily pretextual.

Nix v. WLCY Radio/Rahall Communications, 35 FEP Cases 1104 (11th Cir. 1984), *cited in EEOC v. Flasher Co.*, *supra* at fn. 12.

15. A somewhat different analysis must be applied to the promotion that was ultimately awarded to Mary Grubb, PCN 13704.0. The Commission argued that Respondent did not follow their own procedures when filling this position. The Commission argued Complainant did not have to take another proficiency test because the posting deadline for the position he applied for

was less than fourteen days after he took his last proficiency test. This is incorrect.

16. Respondent counted the fourteen days from the date the application packet was received by Blateri. Blateri received the packet more than two weeks after Complainant had taken and passed the proficiency examination. Therefore, under Respondent's policy, he was required to take another proficiency test.

17. The Commission questions the wisdom of such a policy. That is not the issue. The issue is whether the policy was applied equally to all persons regardless of their race. There is no evidence that it was not applied equally. The Commission's criticism of the policy may be well-founded. Respondent admits that the policy was inefficient and unpopular. Ultimately, it was changed in response to 150 grievances over its implementation. However, that does not prove that the policy was used to deny Complainant a promotion because of his race.

18. The Commission cannot make a finding of intentional discrimination merely because it disagrees with Respondent's business judgment.

[A] . . . discrimination action is not a device which permits the jury to examine an employer's reasons . . . and determine that an employer's business judgment or policies do not appeal to its sensibilities.

Brocklehurst v. PPG Industries, 74 FEP Cases 984, 990 (6th Cir. 1997) (citation and quote within a quote omitted).

“. . . [W]e will not review ‘the wisdom or fairness of the business judgment made by employers, except to the extent that those judgments involve intentional discrimination’.”

Krumwiede v. Mercer Co. Ambulance Service, 74 FEP Cases 188, 191 (8th Cir. 1997) (Citation omitted).

[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.

Combs v. Meadowcraft, Inc., 73 FEP Cases 232, 249 (11th Cir. 1997).

The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with.

Hartsel v. Keys, 72 FEP Cases 951, 955 (6th Cir. 1996).

19. Since the Commission was unable to prove Respondent's legitimate, nondiscriminatory reasons for denying Complainant two promotions were a pretext for race and sex discrimination, the Complaint must be dismissed.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #7192.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

November 2, 1999