

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

ROBERT W. KELSEY

Complainant

and

WAL-MART STORES, INC.

Respondent

Complaint #8035

(CIN) 25042596 (25675) 071296

221-96-0832

HEARING EXAMINER'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATION

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INTRODUCTION AND PROCEDURAL HISTORY

Robert Kelsey (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on July 12, 1996.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by Wal-Mart Stores, Inc. (Respondent) (Wal-Mart) 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 July 10, 1997.

The Complaint alleges that Respondent discharged Complainant because of his race.¹

¹ The Complaint alleged "that the Complainant's race was a consideration in the Respondent's decision to discharge him."

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

A public hearing was held on February 24-25, 1998 at the Commission's office in Cincinnati, Ohio.

The Record consists of the previously described pleadings; the transcript consisting of 383 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on May 12, 1998 and by Respondent on June 12, 1998.

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 July 12, 1996.

2. The Commission determined on May 15, 1997 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 corporation doing business in Ohio and an employer.

5. Complainant is a black person.

6. Complainant was employed by Respondent as photo lab manager in the Tylersville store in Cincinnati, Ohio. He began his employment with Wal-Mart as a lab technician at the Ridge Avenue store in December 1994. He was trained by Mario Lemuel, photo lab manager at the Ridge Avenue store. Lemuel had a practice of giving customers extra copies of photos that were printed as part of the process of obtaining a quality enlargement. He also did not charge them for pictures that he judged were not good quality pictures.

7. Lemuel's practice was not consistent with Wal-Mart's policies.² Pursuant to Wal-Mart's policies, customers were never to be given free photos.

² Wal-Mart's policy handbook states, "If the customer is unhappy with the quality of a picture, offer to reprint that picture at no charge." (Tr. 164) A notice posted in the photo lab states: "For customers unhappy with their pictures, we will gladly remake the pictures or refund their money." (Tr. 165)

Photos that were not of good quality were not to be given to the customer;

they were to be redone. If a customer decided that photos were not acceptable, Wal-Mart would refund their money or offer to redo their photos. Extra copies that were made as part of the developing process that were not ordered by the customer were to be destroyed.

8. Becky Schultz, Caucasian, was a Wal-Mart associate at the Ridge Avenue store. Some time prior to April 1996, she brought a picture to the photo lab for copying. Schultz gave the photo to Complainant. Complainant told her the machine was down and that he could use her picture to calibrate the machine. Complainant reset the machine and copied the photograph. Some of the copies were not the size that Schultz wanted. Complainant gave Schultz the copies that she ordered and also gave her some copies that were the wrong size. He did not charge Complainant for any of the copies.

9. Shortly thereafter, Schultz brought another photo to Complainant for copying. She wanted the original photo enlarged. When Complainant printed the copies, they came out the same size as the original. Complainant adjusted the machine and printed an enlarged copy as Schultz had requested.

Complainant told Schultz he used her photograph to calibrate the machine and gave Schultz the enlargement and the copies at no charge.

10. Schultz told a co-worker about receiving free photographs. The co-worker advised her that she should not have received the photographs free of charge. Schultz went back to Complainant and asked him if he did not want her to pay for the enlargement. Complainant made a gesture which she interpreted as “never mind”. Schultz had another conversation with her co-worker and told her she did not know what she should do. Her co-worker told her she should talk to the store manager.

11. Schultz reported both incidents to the store manager, Dane Bryan, Caucasian. Bryan contacted Keith Johnson, Caucasian, the district loss prevention supervisor. The district photo lab manager, Keith Ehlers, Caucasian, was also contacted.

12. It was Ehlers’ understanding that it was Wal-Mart’s policy *not* to give away any pictures. Pictures that were developed by mistake were to be

destroyed. Pictures that were of poor quality were to be done over. Poor quality pictures were never to be given to the customer at no charge.

13. Ehlers believed that Complainant's violation of company policy should result in his termination of employment. He contacted the person at Wal-Mart's headquarters who was in charge of all the photo labs to make sure that his understanding of the policy was correct. She agreed that Complainant's employment should be terminated. Complainant's employment was terminated on April 25, 1996.

14. After Complainant was discharged, Joseph Woods, district manager over the Tylersville store, learned from Keith Johnson, loss prevention supervisor, that John Collins, assistant store manager, had accepted free photographs from 13 rolls of film that Complainant had developed of Collins' daughter's wedding and honeymoon. Complainant told Collins that he had taken care of the charges and that Collins should consider it a wedding present. Woods decided not to terminate Collins' employment. Instead, Collins was given a final written warning and transferred to another

store. Woods did not play a role in the decision to terminate Complainant's employment.

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.³

1. The Commission alleges in its complaint that Respondent discharged Complainant because of his race.

³ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the . . . race, . . . of any person, to discharge without just cause, 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 Section 4112.02(A) by a preponderance of reliable, probative and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. The Commission is not required to prove that Complainant's race was the sole reason for the employer's decision. The Commission must prove by a preponderance of reliable, probative, and substantial evidence that Complainant's race was at least a "motivating factor" in the employment decision. *Price Waterhouse v. Hopkins*, 49 FEP Cases 954, 959 (1989).

5. 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.

6. 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).

7. Once the Commission establishes a *prima facie* case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802, 5 FEP Cases 965 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 1093, 25 FEP Cases 113 (1981).

8. The employer articulates a legitimate, nondiscriminatory motive when it produces admissible evidence which allows the trier of fact to rationally conclude that the employer's decision was not motivated by discriminatory animus. The Commission retains the burden of persuasion throughout the proceeding. *Burdine*, 450 U.S. at 254, 25 FEP Cases at 116.

9. An employer is not required to prove absence of discriminatory intent. *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), 18 FEP Cases 520; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978), 17 FEP Cases 1062.

10. However, it is not necessary to follow the traditional allocation of the burdens of proof when, as here, Respondent responded to the Commission's case in chief by offering a legitimate, nondiscriminatory reason for its action. *U.S. Postal Svc. Bd. of Governors v. Aikens*, 460 U.S. 711, 31 FEP Cases 609 (1983). The articulation of a legitimate, nondiscriminatory reason by Respondent removes any need to determine if the Commission proved a *prima facie* case, and the "factual inquiry proceeds to a new level of

specificity." *Id.*, 460 U.S. at 713, 31 FEP Cases, at 611, *quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, 25 FEP Cases 113, 116.⁴

11. Respondent's articulated nondiscriminatory reason for discharging Complainant was that he gave away free photo finishing services to an associate on two occasions. The decision was also based on Complainant's overall work record.⁵ (Tr. 362)

12. Respondent having met its burden of production, the Commission must prove that Respondent intentionally discriminated against Complainant because of his race. The factfinder must be persuaded that Complainant "has been the victim of intentional discrimination" *St. Mary's Honor Center v. Hicks*, 62 FEP Cases 96, 103 (1993). The Commission must "demonstrate by competent evidence" that the legitimate, nondiscriminatory

⁴ "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*, 460 U.S. at 713, 31 FEP Cases at 611.

⁵ Although the decision to discharge Complainant was primarily based on the free film incidents, Bryan testified that if Complainant had been an outstanding manager, he might have given him a final warning instead of terminating his employment. Complainant's evaluation showed he was not an outstanding performer. Although his technical skills were in the "meets" category, his people skills were mixed. In five of ten categories he was deemed not to meet performance standards. (R.Ex. O)

reasons given by Respondent "*were in fact a coverup for a racially discriminatory decision.*" *Id.*, at 103 (emphasis theirs).

13. Thus, even if the Commission proves that Respondent's proffered reasons were false, 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 106.

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.
Id., at 100.⁶

14. The essence of discrimination, of course, is disparate treatment. Thus, the ultimate decision to be made in a discrimination case where the Complainant alleges disparate treatment was explained as follows in *Boyd v. U.S. Steel Corp.*, 20 FEP Cases 727 (W.D. Pa. 1979):

⁶ Even though rejection of a respondent's legitimate, nondiscriminatory reason is "enough at law to *sustain* a finding of discrimination, *there must a finding of discrimination.*" *Hicks*, 113 S. Ct. at 2749, 62 FEP Cases at 100, n.4.

The ultimate decision to be made . . . is whether it is reasonable to infer from all the evidence that the challenged action was based in whole or in part on race. The focus must be on the similarity between the situations of different employees -- whether the situations are comparable for purposes of applying the doctrine of *McDonald* and *McDonald Douglas*. The more distinct the situations of the two employees of different races [protected classes] who are treated differently, the less compelling is the inference that race played a role in the disparate treatment. *Id.*, at 730.

15. The Commission must prove that the "comparables" are similarly situated in all relevant respects:

A "similarly situated non-minority employee" is one who has "dealt with the same supervisor, [has] been subject to the same standards and [has] engaged in the same conduct without such differentiating or mitigating circumstances [as] would distinguish their conduct or the employer's treatment of them for it." [*Mitchell v. Toledo Hospital*, 59 FEP Cases 76 (6th Cir. 1992)] A "precise equivalence in culpability" . . . is not required; misconduct of "comparable seriousness" is sufficient. [*Harrison v. Metro Gov't. of Nashville and Davidson County*, 73 FEP Cases 109 (6th Cir. 1996)] Similarly situated employees "need not hold the exact same jobs; however, their duties, responsibilities and applicable standards of conduct must be sufficiently similar in all relevant aspects so as to render them comparable." *Jurru v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

Hollins v. Atlantic Company, 76 FEP Cases 553, 557 (N.D. Ohio 1997).

16. The Commission argues that two Caucasian employees were treated more leniently than Complainant was treated under similar circumstances. This could be evidence that Respondent's reasons for discharging Complainant were pretextual. However, the employees were not similarly situated.

17. The first employee, Becky Schultz, was not a management employee. Respondent holds employees in management to a higher standard of conduct because they have to serve as examples to the persons they supervise.⁷ (Tr. 367; R.Ex. B) Therefore, Schultz would not be similarly situated to Complainant because her duties, responsibilities, and applicable standards of conduct were not similar to his duties and responsibilities. Likewise, her conduct in accepting free photographs is not conduct of "comparable seriousness". Schultz offered to pay for the photos, and Complainant made it clear payment was not necessary.

⁷ "Integrity" is one of Respondent's ten basic principles set out in the associate handbook. Integrity includes honesty. The handbook states, "Dishonesty in any form will result in immediate termination . . . You should always conduct yourself in a manner that will leave no doubt about your honesty." (R.Ex. B)

18. The second employee that the Commission argues was similarly situated to Complainant and not discharged was the assistant manager at the Tylersville store. Shortly after Complainant was discharged, it was discovered that he also received free photographs from Complainant. However, the assistant manager was not similarly situated to Complainant. He was not similarly situated because the person who decided the level of discipline in his case was not involved in the decision that Complainant should be discharged. Also, accepting free photographs is not conduct of “comparable seriousness”. There was no evidence that the photographs the assistant manager received were not paid for by Complainant.

19. After Complainant’s employment was terminated, another incident occurred involving Becky Schultz. Schultz was given some pictures she ordered when she was passing by the photo lab while she was working. She could not pay for the pictures at the time because Wal-Mart policy prohibits employees from paying for merchandise while they are on the clock. Schultz took the pictures back to her work area intending to pay for them after she was off the clock. She forget she had not paid for them, and apparently walked out of the store with them. She was disciplined. She was given a

second written warning which is the highest form of discipline at Wal-Mart short of termination. Again, Complainant was not similarly situated to Schultz because Schultz was not in management, and her misconduct was not of comparable seriousness to Complainant's misconduct.

20. The Commission also introduced evidence regarding conduct of Complainant's subordinate (Sharp). Complainant testified that Sharp gave free pictures to an associate on one occasion just after the store opened and counseled him about it. He told him it was a "dismissal offense". (Tr. 26) Complainant testified Sharp also gave double prints to an associate on another occasion and charged her for single prints. Complainant testified he gave Bryan counseling forms for his signature, and they were never returned to him. Bryan testified that he never received any documents from Complainant and that Complainant had authority to give his subordinate counseling forms on his own. Even if the conflict in testimony is resolved in Complainant's favor, this evidence is insufficient to support the conclusion that Complainant's discharge was racially motivated. See *Shank v. Kelly-Springfield Tire Co.*, 75 FEP Cases 36 (7th Cir. 1997) (" . . . one example of better treatment is not enough to support an inference of discrimination."

Citation omitted). *See also Gleason v. Mesirow Financial Inc.*, 74 FEP Cases 1365 (7th Cir. 1997) (“Our opinions emphasize the need to go beyond a few comparison cases, and we cannot stress this point enough.” Citation omitted).⁸

21. Complainant also testified about a series of incidents that led him to believe that the store manager approved of his practice of giving free photos to customers. For example, Complainant testified that Bryan instructed him to give free photos on one occasion to a Girl Scout troop touring the photo lab. However, the evidence showed that Complainant had contacted Ehlers in advance and gotten permission to give the group disposable cameras and to develop the pictures on site at no charge. This is not the same as giving pictures to customers who bring film to be developed and expect to pay for it.

22. The Commission also offered testimony from a former Wal-Mart employee who was supervised by Bryan who testified that another employee once complained to her that Bryan had made racially discriminatory remarks in her presence. Although double hearsay is inherently unreliable, assuming

⁸ Other alleged violations of Wal-Mart’s policies by Complainant’s subordinate were not relevant because they were not similar to the violation that led to Complainant’s

that the remarks were made, they would be classified as “stray remarks” and would not be probative of Bryan’s intent regarding his role in the decision to terminate Complainant’s employment. Although such remarks are admissible into evidence,

their probativeness is circumscribed if they were made in a situation temporally remote from the date of the employment decision or if they were not related to the employment decision . . . Stray remarks by . . . decisionmakers unrelated to the decision process are rarely given great weight
McMillan v. Mass. SPCA, 77 FEP Cases 589, 596 (1st Cir. 1998)
(Citations and quotations within a quotation omitted).

Furthermore, the evidence showed that Bryan was not a key decision-maker. His role was more like the role of an investigator. The decision-makers were Keith Johnson, district loss prevention supervisor, and Keith Ehlers, the district photo lab manager, who shared the responsibility with Bryan for supervising Complainant.

23. Having considered all of the arguments and reviewed all of the evidence in the record, this is another one of those cases where the employer made a business decision to discharge an employee for violating a company

discharge.

policy that, in the opinion of the employer, warranted discharge.⁹ There was no direct evidence and insufficient circumstantial evidence from which one could infer that Complainant's race was a motivating factor in this decision. Therefore, the Complaint must be dismissed.

⁹ Although there was a dispute about the company policy regarding those occasions when customers were to be given free photographs, the issue was never really brought to Respondent's attention by Complainant. Complainant was given the opportunity before he was discharged to submit a written statement where he could have indicated that he had been trained to give customers extra copies of photos that were used to make enlargements or to calibrate the machine. He could have indicated that he was trained to give customers free photographs when, in his judgment, the photographs were not of good quality. Instead, when he was given the opportunity, he wrote: "Machine broken . . . used test paper for results." Thus, the issue of Complainant's interpretation of Wal-Mart policy was never brought to Wal-Mart's attention when they were considering the level of discipline. Complainant also testified that he had been instructed by Bryan to give the customer poor quality pictures at no charge. It would also seem reasonable that he would have communicated this to Ehlers when he was given an opportunity to make a written statement. Therefore, his testimony in this regard was not credible.

Complainant's testimony about his rationale for giving free photos to Schultz was also not credible. He testified that he gave her the photos because they were of poor quality. Respondent introduced the photos into evidence. A reasonable person would find them to be of good quality. Also Schultz testified that she had no problem with the quality of the photos. Thus, even assuming that Complainant was trained to give photos that were developed as part of the enlargement process, he was not trained to give the enlargement to the customer at no charge.

Complainant's testimony regarding his understanding of Wal-Mart's policy regarding returning photos that were of poor quality to the customer was also not credible. Although he testified that he was trained that it was appropriate for him to make the judgment regarding whether the film was of good quality, he testified that he was instructed by Bryan to give pictures *at no charge when a customer complained*. (Tr. 34) Wal-Mart policy states that the issue of quality only arises when *the customer* brings it to Wal-Mart's attention.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8035.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

December 31, 1998