

## INTRODUCTION AND PROCEDURAL HISTORY

Rita M. Roper (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on March 18, 1997 and August 7, 1997, respectively. Complainant amended the first charge on July 10, 1997.

The Commission investigated the charges and found probable cause that Raiké Associates, Inc. d/b/a The Great Wave Company, Inc. (Respondent) engaged in unlawful discrimination and retaliation in violation of Revised Code Sections (R.C.) 4112.02(A) and (I).

The Commission attempted, but failed to resolve these matters by informal methods of conciliation. The Commission subsequently issued Complaint #8093 on March 12, 1998 and Complaint #8346 on July 24, 1998.

Complaint #8093 alleged that Respondent denied Complainant sick pay and sought to exclude her from its group health insurance coverage because of her age. Complaint #8346 alleged that Respondent subjected

Complainant to different terms and conditions of employment because of her age and refused to return her to work in retaliation for filing a previous charge of discrimination.

Respondent filed Answers to the Complaints. Respondent amended its Answers on March 19, 1999. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory or retaliatory practices.

A public hearing was held on April 13, 1999 at a district office of the Ohio Department of Transportation in Ashland, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 82 pages, exhibits admitted into evidence during and after the hearing, post-hearing briefs filed by the Commission on June 8, 1999 and by Respondent on July 2, 1999, and a reply brief filed by the Commission on July 19, 1999.

## **FINDINGS OF FACT**

The following findings of fact 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 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 sworn charge affidavits with the Commission on March 18, 1997 and August 7, 1997, respectively. She amended the first charge on July 10, 1997.

2. The Commission determined on February 19, 1998 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A). The Commission determined on June 5, 1998 that it was probable that Respondent engaged in unlawful discrimination and retaliation in violation of R.C. 4112.02(A) and (I).

3. The Commission attempted to resolve these matters by informal methods of conciliation. The Commission issued the Complaints after conciliation failed.

4. Respondent is a corporation and an employer doing business in Ohio.<sup>1</sup> Respondent manufactures “wave generation equipment.” (Tr. 5, 56)

5. Complainant was born on October 22, 1931.<sup>2</sup> (Comm.Ex. H)

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<sup>1</sup> The evidence shows that Raika Associates, Inc. (Raika Associates) and The Great Wave Company, Inc. (Great Wave) were separate, but related corporate entities under the common ownership and management of George Raika and his wife, Lavonne “Kelley” Raika. Raika Associates owned 50% of Great Wave and paid Complainant and other employees who worked for Great Wave during the relevant periods.

<sup>2</sup> The Commission provided a copy of Complainant’s current driver’s license after the hearing. This document is hereby admitted into evidence and marked as Comm.Ex. H.

6. Raikes Associates hired Complainant in 1978 as an accounting assistant. Complainant later became the company's accountant. She also assumed the duties of office and personnel manager in 1983. She was a salaried employee from that time until March 1996.

7. In March 1996, Mrs. Raikes changed Complainant's pay status from salary to hourly.<sup>3</sup> Respondent paid Complainant her salary divided by 40 hours or \$14.98 per hour. As an hourly employee, Respondent paid Complainant for any overtime that she worked or allowed her to accrue compensatory time. Hourly employees, unlike those on salary, were ineligible for paid sick leave under Respondent's written policy.

8. In April or May 1996, Complainant spoke with Mrs. Raikes and later Mr. Raikes about working part-time once she became eligible to receive social security benefits in October 1996. They agreed with this proposal. Complainant believed at the time that if she made over a certain amount (approximately \$14,000) in a year she would lose one dollar of social security benefits for every three dollars earned.

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<sup>3</sup> Raikes Associates was apparently winding down its business at this time, and Complainant worked for Great Wave. Meanwhile, Complainant experienced "some physical problems" that required surgeries later in the year. (Tr. 6)

9. Complainant underwent the first of two surgeries in May 1996. Complainant missed two days of work. Respondent paid Complainant for both days upon her request.

10. Complainant underwent the second surgery in October 1996. Complainant missed three weeks of work. Respondent did not pay Complainant sick leave for her time off. Complainant took one week's vacation and used 1½ weeks of compensatory time that she had accrued since March 1996.

11. Complainant continued to work full-time upon her return to work. Complainant postponed her plans to work part-time because Respondent was short staffed in November and December 1996.<sup>4</sup>

12. In late December 1996, Mrs. Raike informed Complainant that Respondent hired someone to replace her. Complainant and Mrs. Raike then met with Mr. Raike in his office. Mrs. Raike stated during the meeting that Complainant "told us she was retiring." (Tr. 22) Mr. Raike indicated

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<sup>4</sup> Respondent lost two office personnel, Carol Grimm and Laura Ward, in May and October 1996, respectively.

that Complainant never told him that she was retiring. Mr. Raike told Complainant that he knew she wanted to reduce her hours, but he did not believe it was feasible at that time.

13. Meanwhile, Central Reserve Life (CRL) cancelled Respondent's group health insurance coverage because Respondent failed to pay its November premium within the grace period.<sup>5</sup> (R.Ex. 1) CRL informed Respondent that its coverage would be reinstated under the following conditions:

- (1) Respondent completed an application for reinstatement;
- (2) Respondent submit a statement of good health for all employees and their dependants;
- (3) Respondent pay premiums totaling \$2,898.36 for November, December, and January; and
- (4) Respondent pay a \$25 reinstatement fee.

14. CRL also requested in December 1996 that Respondent provide information about employees who were eligible for group health insurance. (Comm.Ex. B) Respondent initially identified Mrs. Raike, Kelley, and

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<sup>5</sup> CRL's records indicated that four employees were covered under the policy: Thomas Wienclaw, Complainant, Mrs. Raike, and her son, Terry Kelley. (R.Ex. 1, p.2)

Wienclaw, but it did not provide CRL any payroll records or W-2 forms to verify their employment. (Comm.Ex. C) CRL sent another letter to Respondent. *Id.* This letter requested the payroll records and W-2 forms of those employees already identified; it notified Respondent that CRL was still awaiting information on Complainant; and it established January 10, 1997 as the deadline to provide the information.

15. In early January 1997, Melinda “Peach” Knell began working for Respondent as a part-time accountant.<sup>6</sup> Shortly thereafter, Mrs. Raike and Knell purchased a new accounting program called “Quick Pro” for company use. (Tr. 58) Mr. Raike informed Complainant that Respondent intended to switch to Quick Pro from its current accounting program, “Dak Easy”, once Complainant had accurate balances to transfer to the new system. (Tr. 33) Mr. Raike instructed Complainant to continue to use Dak Easy until she reached that point.

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<sup>6</sup> Respondent provided Knell’s current driver’s license after the hearing. Her license indicates that she was born on October 9, 1960. This document is hereby admitted into evidence and marked as R.Ex. 3.

16. On January 9, 1997, Complainant called Martha McLaughlin, a representative of CRL, to determine whether Respondent had verified her employment with the company. McLaughlin informed Complainant that Respondent had not provided such information. Following this conversation, Complainant sent CRL her payroll statements and W-2 form for 1996 to avoid nonpayment of claims that she made because of her surgery in October 1996. (Comm.Ex. D)

17. In mid-January, 1997, Mrs. Raike told Complainant that Respondent did not need her “anymore.” (Tr. 24) Mrs. Raike indicated that Respondent had hired an outside firm to prepare its taxes and had Knell to perform its accounting functions. Complainant informed Mrs. Raike that Mr. Raike had given her “a whole list of things to do.” *Id.* Complainant continued to work full-time after this conversation.

18. In early March 1997, Mrs. Raike sent CRL the employee information that the insurance company had previously requested in December 1996. (R.Ex. 2) CRL sent Respondent a letter later in the month indicating that eligibility requirements had been met and claims

would be processed accordingly. (Comm.Ex. 1, p.4) CRL subsequently paid Complainant's outstanding claims. (Tr. 40)

19. On March 12, 1997, Mrs. Raike confronted Complainant about putting accounts on Dak Easy. Mrs. Raike told Complainant that the company did not need duplicate bookkeeping. Complainant replied that Mr. Raike instructed her to continue using the old program until "everything was caught up." (Tr. 24)

20. Complainant and Mrs. Raike then argued about the number of hours that she was supposed to work. Mrs. Raike became angry and told Complainant to "Get out of here." (Tr. 60) Complainant requested "something in writing." *Id.* Mrs. Raike refused and again ordered Complainant to leave. Mrs. Raike told Complainant not to return to work until Mr. Raike called her upon his return from Mexico. As Mrs. Raike walked passed the partition in front of Complainant's office, she told Complainant to "Go home and draw your social security like you're suppose[d] to." *Id.* Complainant left the premises after this statement.

21. In the following months, Complainant spoke with Mr. Raike on several occasions. They scheduled meetings to discuss her employment status. Mr. Raike cancelled all but one of those meetings. On one occasion, Mr. Raike called Complainant and wanted to meet her at a local restaurant. Complainant informed Mr. Raike that she was not allowed to drive because of medication that she took earlier that day. Mr. Raike never met with Complainant nor called her for work.

### **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 therein, it is not credited.

## JURISDICTION

1. Respondent argues in its brief that the Commission lacks jurisdiction in Complaint #8346 because it did not have four or more employees within the state on March 12, 1997. Respondent relies, in part, on Complainant's testimony that Respondent only had three employees at that time: Wienclaw, Knell, and herself.

2. R.C. 4112.01(A)(2) defines "employer", in pertinent part, to be "any person employing four or more persons within the state." R.C. 4112.08 mandates that this definition and the statute as a whole be liberally construed to effectuate its purposes of eliminating unlawful discrimination and making victims of such discrimination whole. A liberal construction of R.C. Chapter 4112 is consistent with "Ohio's strong public policy against workplace discrimination." *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St.3d 293, 297.

A majority of this court have, time and time again, found that there is no place in this state for any sort of discrimination no matter its size, shape, or form or in what clothes it might masquerade. This, of course, includes discrimination in the workplace.

*Id.*, at 296.

3. The evidence demonstrates that Raike Associates and Great Wave, although separate corporate entities, were highly integrated with respect to ownership and operations. Both corporations were owned and operated by George and Lavonne Raike. Raike Associates owned 50% of Great Wave and paid Great Wave's employees throughout Complainant's employment. Under these facts and circumstances, the Commission may consider Raike Associates and Great Wave as a single employer for determining jurisdiction under R.C. 4112.01(A)(2). See *Armbruster v. Quinn*, 32 FEP Cases 369 (6<sup>th</sup> Cir. 1983) (former employees showed that parent and subsidiary corporations should be treated as single employer under Title VII because of common ownership, close interrelationship of operations, and substantial interrelation of labor relations).

4. In determining the number of employees that Raike Associates and Great Wave had collectively on March 12, 1997, corporate directors, officers, and owners, such as Mrs. Raike, should be counted if they performed "traditional employee duties." *EEOC v. Pettegrove Truck Serv., Inc.*, 49 FEP Cases 1452, 1454 (S.D. Fla. 1989) (citation omitted). Complainant testified that Mrs. Raike was more active in Respondent's daily operations at the time she placed her on call. Respondent does not

dispute this testimony. In fact, Respondent acknowledged in its brief that Mrs. Raike “returned to Ohio full-time to help manage the Company” in early 1996. (R.Br. 17)

5. Other evidence suggests that Mrs. Raike viewed herself as more than an owner and corporate officer of the corporations. For example, Mrs. Raike identified herself as an employee of Great Wave in a letter to CRL dated March 4, 1997. (R.Ex. 2)

6. In summary, the record contains sufficient evidence to conclude that Mrs. Raike performed traditional employee duties on the date of harm. Therefore, she should be counted as an employee for jurisdictional purposes. With her inclusion, Respondent employed at least four employees on March 12, 1997 and was an employer at that time.<sup>7</sup>

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<sup>7</sup> It is questionable whether Respondent had at least four employees from Ward’s resignation in October 1996 to Knell’s hire in January 1997. This issue appears to hinge on whether either John or Terry Kelley worked for Respondent in Ohio during that period. The record lacks sufficient evidence to determine this issue. In any event, the Hearing Examiner prefers to recommend dismissal of Complaint #8093 on its merits.

## **AGE DISCRIMINATION / COMPLAINT #8093**

7. The Commission alleged in Complaint #8093 that Respondent denied Complainant sick pay and sought to exclude her from its group health insurance coverage because of her age.

8. These allegations, 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 . . . age, . . . 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.

R.C. 4112.01(A)(14) defines age as “at least forty years old.”

9. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) and the other provisions under that section by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G).

10. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination or retaliation under Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA).

11. Under ADEA and Title VII case law, the Commission is usually required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 70 FEP Cases 486 (1996); *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, 116 (1981). It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at n.8.

12. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas*,

*supra* at 802, 5 FEP Cases 969, n.13. In the context of a denial of employment benefits, the Commission may establish a *prima facie* case of age discrimination by proving that:

- (1) Complainant was a member of the protected age class;
- (2) Respondent denied Complainant a benefit of employment; and
- (3) Respondent treated Complainant less favorably than comparable younger employees.

13. It is undisputed that Complainant, who turned 65 years of age in October 1996, was a member of the protected age class. The Commission, however, was unable to establish the second and third elements of a *prima facie* case. Specifically, the Commission failed to prove that Respondent denied Complainant any benefit of employment afforded to comparable younger employees.

14. The evidence shows that Complainant and other hourly employees were ineligible for paid sick leave under Respondent's written policy in 1996. Complainant testified that Respondent exercised discretion in applying this policy and occasionally paid hourly employees for sick leave. Complainant admitted that she benefited from such discretion when

Respondent paid her sick leave for the two days that she missed in May 1996.

15. The Commission argues that Respondent treated Complainant less favorably than Laura Ward, a younger hourly employee, by requiring Complainant to use vacation and compensatory time for the three weeks that she missed in October 1996. This argument lacks support in the record. Complainant testified that she was unsure of how many days that Ward missed in 1996, but she knew that “it was not near three weeks.” (Tr. 45-46) This testimony suggests Complainant and Ward were not comparable in terms of the number of sick days that they took in 1996.<sup>8</sup> Overall, the Commission did not provide any evidence that a younger hourly employee took an extended sick leave and received payment for the time off without using vacation or compensation time.

16. The Commission also argues that Respondent *sought* to exclude Complainant from its group health insurance coverage in late 1996 and

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<sup>8</sup> The Commission incorrectly argues that Commission Exhibit A supports the conclusion that Complainant was treated less favorably than Ward. The first page of this exhibit, which is Ward’s attendance record for 1996, was the only part of this exhibit admitted into evidence. This document indicates that Ward, who left in October 1996, did not take any sick leave during that year.

early 1997. The evidence shows that Respondent's coverage with Central Reserve Life (CRL) was cancelled because the company inadvertently failed to pay its November premium in a timely manner. All employees lost their coverage as a result of this mistake. Even if Respondent attempted to obtain coverage without Complainant, there is no evidence that Respondent was successful. Complainant suffered no harm. The record is void of any evidence that Respondent denied Complainant health insurance benefits while she worked there, which were provided to a younger employee, or for that matter, any other employees.

17. In conclusion, the Commission failed to provide sufficient evidence to infer that Respondent denied Complainant paid sick leave, health insurance coverage, or any other benefit of employment that the company afforded to comparable younger employees. Without such evidence, the Commission was unable to establish a *prima facie* case of age discrimination in Complaint #8093. Therefore, this complaint must be dismissed.

## AGE DISCRIMINATION / COMPLAINT #8346

18. The Commission alleged in Complaint #8346 that Respondent subjected Complainant to different terms and conditions of employment because of her age. This allegation, if proven, would also constitute a violation of R.C. 4112.02(A).

19. The Commission may establish a *prima facie* case of age discrimination in Complaint #8346 by proving that:

- (1) Complainant was a member of the protected age class;
- (2) Complainant was qualified for her position;
- (3) Respondent subjected Complainant to an adverse employment action; and
- (4) Respondent replaced Complainant with a younger person.

*Barnett v. Dept. of Veterans Affairs*, 77 FEP Cases 1218 (6<sup>th</sup> Cir. 1998).

20. The Commission established the first two elements of a *prima facie* case. As previously discussed, Respondent does not dispute that Complainant was a member of the protected age class. The evidence shows that Complainant performed various functions for Respondent, such

as accounting and the duties of office and personnel manager, since her hire in 1978. Such evidence suggests that Complainant was qualified for various tasks that she performed for Respondent. See *Sempier v. Johnson & Higgins*, 66 FEP Cases 1214 (3<sup>rd</sup> Cir. 1995) (plaintiff who held executive positions with employer for over twenty years was objectively qualified for his position).

21. The Commission also established the third element of a *prima facie* case. Respondent subjected Complainant to an adverse employment action by placing her on call on March 12, 1997. This change of status caused Complainant material economic harm when Respondent refused to call her for work after that date; it became tantamount to a discharge.

22. Respondent argues that “if Complainant was removed from her position, her removal can only be characterized as a constructive discharge which occurred sometime after March 12, 1997.” (R.Br. 16) The Hearing Examiner disagrees. A constructive discharge occurs when *the employee leaves* his or her work environment due to intolerable work conditions that would cause the reasonable person to resign under the circumstances. In contrast, Complainant never removed herself from Respondent’s

workplace. Respondent sent her home on March 12, 1997 and never asked her to return. Although Complainant was never formally discharged, Respondent's actions had the same effect.

23. Lastly, the Commission proved the fourth element of a *prima facie* case with evidence showing that Respondent replaced Complainant with a younger person. The evidence shows that Respondent hired Melinda Knell as a part-time bookkeeper in early January 1997. Knell was 36 years of age at the time of her hire. (R.Ex. 3)

24. While Complainant continued to work full-time for approximately two months after Knell's hire, there is sufficient evidence to conclude that Respondent hired Knell to replace Complainant. For example, Complainant testified that Mrs. Raike told her in late December 1996 that Respondent had hired someone to replace her. Complainant also testified that Mrs. Raike informed her in mid-January 1997 that Respondent did not need her "anymore" because Respondent hired an outside firm to prepare its taxes and had Knell to perform its accounting functions. (Tr. 24)

25. Other evidence supports the conclusion that Respondent hired Knell to replace Complainant. Mrs. Raike and Knell purchased a new accounting program without consulting Complainant. Knell immediately began the process of “setting up the accounting on the new system.” (Tr. 23) Meanwhile, Complainant never received any training on the new program. Such evidence undermines Respondent’s contention that it was splitting the job in half because of Complainant’s desire to work part-time.

26. The Commission also provided additional circumstantial evidence that created an inference that Respondent’s actions toward Complainant were motivated by her age. Complainant testified that Mrs. Raike told her on March 12, 1997 to “Go home and draw your social security like you’re suppose[d] to.” (Tr. 60) The Hearing Examiner credited Complainant’s testimony about this statement.

27. In addition to credibility, the Hearing Examiner considered the nature of the statement, the speaker and the context in which it was made, and whether it was a stray remark unrelated to the decisional process. In determining whether a statement is a stray remark:

[C]ourts look to the relationship between the remarks and the decisional process, the age-based substance of the statements, the specificity of the statements, both with regard to the actual employment decision at issue . . . as well as the relationship of the remarks to the plaintiff's situation, and the remoteness in time from the personnel decision.

*Schallehn v. Central Trust & Savings Bank*, 69 FEP Cases 1292, 1300 (N.D. Iowa 1995).

28. Based on these criteria, the Hearing Examiner concludes that the statement was not a stray remark. Mrs. Raike made the statement to Complainant on March 12, 1997 almost immediately after she placed her on call. Although this statement is not direct evidence of age discrimination, it may be considered as additional circumstantial evidence for purposes of proving a *prima facie* case.

29. The Commission having established a *prima facie* case of age discrimination, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for its actions. *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 decision.

*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.

The presumption of unlawful discrimination 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.

30. Respondent failed to meet its burden of production. Respondent did not call any witnesses or provide documentation to explain why Complainant was placed on call and never called for work. Neither Mrs. Raike nor Mr. Raike appeared at the hearing. Respondent failed to articulate a legitimate, nondiscriminatory reason for its actions.<sup>9</sup> Respondent's failure to meet its burden of production, coupled with the

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<sup>9</sup> The Commission offered unsigned documents that the Commission Investigator testified were sent to her by Respondent in response to Complainant's charge of discrimination. (Comm.Exs. E, F, and G) Respondent objected to the admission of these exhibits because they lacked proper authentication. The Hearing Examiner allowed the exhibits into evidence despite legitimate concerns about authentication because the Investigator testified that she received the documents from Respondent during the investigation, and they were part of the investigatory file. The Hearing Examiner considered these exhibits in weighing the evidence, but did not place much weight on them given their lack of authentication. In any event, these exhibits did not properly frame the factual issues, i.e. why Respondent placed Complainant on call and never called her for work, with “sufficient clarity” to provide the Commission with “a full and fair opportunity to demonstrate pretext.” *Burdine*, *supra* at 255-56, 25 FEP Cases at 116.

Hearing Examiner's belief of the Commission's evidence, entitles Complainant to relief as a matter of law.

Establishment of a prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the . . . [employee] because no issue of fact remains in the case.

*Burdine, supra* at 254, 25 FEP Cases at 116 (footnote omitted).

### **RETALIATION / COMPLAINT #8346**

31. The Commission also alleged in Complaint #8346 that Respondent refused to return Complainant to work in retaliation for filing a previous charge of discrimination. 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:

- (l) For any person to discriminate in any manner against another person because that person . . . has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

32. The Commission may establish a *prima facie* case of unlawful retaliation by proving that:

- (1) Complainant engaged in an activity protected by R.C. Chapter 4112;
- (2) Respondent subjected Complainant to an adverse employment action; and
- (3) There was a causal connection between the protected activity and the adverse employment action.

*Cooper v. City of North Olmsted*, 41 FEP Cases 425 (6<sup>th</sup> Cir. 1986).

33. The Commission established the first two elements of a *prima facie* case of retaliation. Complainant engaged in protected activity by filing a charge of discrimination with the Commission. As previously discussed, Respondent subjected Complainant to an adverse employment action by placing her on call on March 12, 1997 and refusing to call her for work after that date. These actions collectively were tantamount to a discharge.

34. Respondent argues that the Commission failed to establish a causal connection between its refusal to call Complainant for work and her filing of a previous charge of discrimination. This argument is well taken.

35. The Commission attempted to establish the necessary causal connection with testimony from the Commission Investigator about a statement that Mr. Raike made during informal efforts of conciliation.<sup>10</sup> Respondent objected to this testimony at the hearing. The Hearing Examiner sustained the objection because R.C. 4112.05(B)(5) and the Commission's regulations prohibit statements made during informal efforts of conciliation to be used as evidence in a subsequent hearing. Since the Commission was unable to prove a *prima facie* case of unlawful retaliation, this allegation in Complaint #8346 must be dismissed.

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<sup>10</sup> The Commission Investigator, Loretta Riddle, testified that she called Mr. Raike and asked him to reinstate Complainant "as part of the possible settlement." (Tr. 72) Riddle further testified that she made the call in an attempt to settle the case:

Q: Ms. Riddle[,] was the purpose of your call to Mr. Raike also to get information?

A: I'd have to think about that for a minute. Really, to be honest with you the purpose was to try to get Ms. Roper back . . . to work and trying to settle the case was what it started out to be.

(Tr. 76)

## RELIEF

36. When the Commission makes a finding of unlawful discrimination, the victims of such discrimination are entitled to relief. R.C. 4112.05(G)(1). Title VII standards apply in determining the appropriate relief under the statute. *Ingram, supra* at 93. Like Title VII, one of the purposes of R.C. Chapter 4112 is to make “persons whole for injuries suffered through past discrimination.” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 10 FEP Cases 1181, 1187 (1975). The attainment of this objective requires that:

. . . persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

*Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763, 12 FEP Cases 549, 555 (1976) (footnotes omitted).

37. In providing a “make whole” remedy, there is a strong presumption in favor of awarding back pay:

[G]iven a finding of unlawful discrimination, backpay should be only for reasons, which applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered for past discrimination

*Albemarle Paper Co., supra* at 421, 10 FEP Cases at 1189.

This presumption “can seldom be overcome.” *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 719, 17 FEP Cases 395, 403 (1978). There must be “exceptional circumstances” to deny an award of back pay. *Rasimas v. Michigan Dept. of Mental Health*, 32 FEP Cases 688, 696 (6<sup>th</sup> Cir. 1983).

38. The difficulty in calculating back pay does not constitute an exceptional circumstance. The Commission should award back pay “even where the precise amount of the award cannot be determined.” *Id.*, at 698. The calculation of back pay does not require “unrealistic exactitude”, only a reasonable calculation is required. *Salinas v. Roadway Express, Inc.*, 35 FEP Cases 533, 536 (5<sup>th</sup> Cir. 1984). The Commission should resolve any ambiguity in the amount of back pay against Respondent. *Rasimas, supra* at 698; *Ingram, supra* at 94.

39. To be eligible for back pay, victims must attempt to mitigate their damages by seeking substantially equivalent employment. *Rasimus, supra* at 694. A substantially equivalent position affords the victim “virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status.” *Id.*, at 695. Victims forfeit their right to

back pay if they refuse to accept a substantially equivalent position or fail to make reasonable and good faith efforts to maintain such a job once accepted. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 29 FEP Cases 121 (1982); *Brady v. Thurston Motor Lines*, 36 FEP Cases 1805 (4<sup>th</sup> Cir. 1985).

40. The discriminating employer has the burden of proving that the victim failed to mitigate damages. To meet this burden, the discriminating employer must establish that: (1) there were substantially equivalent positions available, and (2) the victim failed to use reasonable diligence in seeking such positions. *Rasimus, supra* at 695.

41. The victim's duty to use reasonable diligence is not burdensome. Victims are not required to be successful or go to "heroic lengths" to mitigate damages, only reasonable steps are required. *Ford v. Nicks*, 48 FEP Cases 1657, 1664 (6<sup>th</sup> Cir. 1989). The reasonableness of the victim's effort to find substantially equivalent employment should be evaluated in light of the victim's individual characteristics, such as educational background and work experience, and the job market. *Rasimus, supra* at 695.

42. Besides proving lack of mitigation, the discriminating employer also has the burden of proving that the victim had interim earnings. The victim's interim earnings are deducted from the back pay award. R.C. 4112.05(G)(1).

43. During the hearing, the Commission presented evidence of Complainant's efforts to find other employment after several months passed and Respondent had not called her to work. Complainant testified that she registered with two temporary employment agencies and "the unemployment office in Mansfield" during the summer of 1997. (Tr. 29) Complainant testified that she sought a job as an accountant or bookkeeper. Complainant testified that she eventually found a job as a part-time bookkeeper with the local Chamber of Commerce in Ashland, Ohio.

44. Respondent did not present any evidence showing that Complainant failed to mitigate her damages. Absent such evidence, Respondent failed to meet its burden of proving that Complainant's

mitigation efforts were insufficient. Therefore, Complainant is entitled to back pay, less her interim earnings.<sup>11</sup>

45. Complainant testified about her interim earnings with the local Chamber of Commerce. Complainant testified that she was hired on March 16, 1998. Complainant testified that she averaged 32 hours per week for the first six months and then worked approximately 25 hours per week. Complainant testified that her starting pay was \$7.00 per hour. Complainant testified that she received fifty cent (50¢) raises in April, May, and June 1998. Complainant testified that she earned \$9.50 per hour after receiving a dollar raise in December 1998. The Hearing Examiner credited Complainant's testimony about the number of hours that she worked for her current employer and her rate of pay.

46. The Hearing Examiner also credited Complainant's testimony that Mr. Raike agreed to reduce her work hours to approximately 30 per week in the summer of 1997. (Tr. 22) Complainant sought to work part-

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<sup>11</sup> Complainant is also entitled to prejudgment interest at the maximum rate allowable by law. *Ingram, supra* at 93. Such interest is usually calculated from the time of the unlawful discriminatory act or March 12, 1997 in this case. *Id.*

time to avoid her social security benefits being offset because she earned over a certain amount in a year.

47. In addition to back pay, Complainant is also “presumptively entitled to reinstatement.” *Ford*, 48 FEP Cases at 1666. However, reinstatement is inappropriate here because of Mrs. Raike’s hostility toward Complainant and the close working relationship between Respondent’s employees. See *Shore v. Federal Express Corp.*, 39 FEP Cases 809, 812 (6<sup>th</sup> Cir. 1985) (reinstatement was inappropriate because of the employer’s hostility toward employee). Since reinstatement is inappropriate and an award of back pay does not fully redress Complainant’s economic loss, the Hearing Examiner recommends that Respondent pay her front pay.

48. Front pay is compensation for the “post-judgment effects of past discrimination”. *Shore*, 39 FEP Cases at 811. Front pay is designed to make victims of discrimination whole for a reasonable future period required for them to re-establish their rightful place in the job market. See *Reeder-Baker v. Lincoln Natl. Corp.*, 42 FEP Cases 1567 (N.D. Ind. 1986) (court ordered front pay for two years, taking into account money plaintiff would earn at her new but lower-paying job). An award of front pay should

be limited to the amount required to place Complainant in the position she would have occupied absent unlawful discrimination. *Shore*, 39 FEP Cases at 812.

## **RECOMMENDATIONS**

For all of the foregoing reasons, it is recommended in Complaints #8093 and #8346 that:

1. The Commission issue a Dismissal Order in Complaint #8093 and dismiss the retaliation allegation in Complaint #8346;
2. The Commission order Respondent in Complaint #8346 to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
3. The Commission order Respondent to submit to the Commission within 10 days of the Commission's Final Order a certified check payable to Complainant for the amount that Complainant would have earned had she been employed full-time with Respondent from March 12, 1997

through September 21, 1997 and part-time (30 hours per week) from September 22, 1997 to the date of the Commission's Final Order, including any raises that she would have received, less her interim earnings, plus interest at the maximum rate allowable by law;<sup>12</sup> and

4. The Commission order Respondent to submit to the Commission within 10 days of the Commission's Final Order a certified check payable to Complainant for \$55,094 in front pay.<sup>13</sup>

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TODD W. EVANS  
HEARING EXAMINER

November 4, 1999

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<sup>12</sup> Any ambiguity in the amount that Complainant would have earned during these periods should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent. The Hearing Examiner resolved the ambiguity of when Complainant would have began working part-time for Respondent by using the last day of summer in 1997.

<sup>13</sup> The front pay award is based on the difference between \$23,368.80 (\$14.98 times 30 times 52), which represents Complainant's part-time yearly salary with Respondent and \$12,350 (\$9.50 times 25 times 52) which represents Complainant's yearly salary at the time of the hearing. The annual difference of \$11,018.80 was multiplied by five, for a total of \$55,094. In light of Complainant's last salary increase by her current employer, a five-year time period is a reasonable estimate of the time she needs to return to her part-time yearly salary with Respondent.