

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

TIMOTHY E. KEELS

Complainant

and

**STATE OF OHIO,
DEPARTMENT OF PUBLIC SAFETY**

Respondent

Complaint #8111

(CIN) 75040896 (25906) 100896
22A-97-1513

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

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INTRODUCTION AND PROCEDURAL HISTORY

Timothy E. Keels (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 8, 1996.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by the State of Ohio, Department of Public Safety (Respondent) in violation of Revised Code Section (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 18, 1997.

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

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

A public hearing was held on July 23, 1998 at the Commission's regional office in Cincinnati, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 309 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on January 25, 1999 and by Respondent on April 15, 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 October 8, 1996.

2. The Commission determined on September 18, 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 state agency doing business in Ohio and an employer.

5. Complainant is a black person.

6. Complainant was employed by Respondent from 1988 until April 8, 1996 as an Ohio State Highway Patrol trooper. (The Division of Highway Patrol is one of the five divisions that make up the Department of Public Safety.)

7. Complainant was discharged, effective April 8, 1996, for violating Ohio State Patrol (OSP) Regulation 4501:(2)-6-02(I)(1), which provides that conduct unbecoming an officer includes “. . . conduct that may bring discredit to the Division.” Conduct unbecoming an officer also includes “committing any crime, offense or violation of the laws of the United States, the State of Ohio or any municipality.” (I)(2).

8. Complainant violated this work rule on April 1, 1996. Complainant was observed by the loss prevention manager of the Micro Center Computer

Store in Cincinnati, Ohio removing five software packages valued at \$374.79 from their respective shelves, opening the plastic wrappers and removing the compact discs. He placed them inside his coat, walked to a cash register, and paid for a book. He left the store where he was confronted by the loss prevention manager.

9. Complainant was detained and the police were called. Pursuant to Micro Center's policy to prosecute all shoplifters, Complainant was charged with theft, a violation of R.C. § 2913.02, a fourth degree felony.

10. Pursuant to R.C. § 124.388 and the Union Contract, Complainant was placed on administrative leave with pay after Respondent became aware of Complainant's arrest.

11. Respondent conducted a thorough investigation of the matter which included interviewing all persons who were involved, including Complainant. The investigating officer prepared an investigative report. The report was reviewed by officers in the chain of command. Ultimately, the Director of Public Safety issued a report recommending that Complainant be

removed from his position. Major John Demaree, Caucasian, made the decision to remove Complainant for conduct unbecoming an officer, effective April 8, 1996.

12. Subsequent to his removal, Complainant entered a diversion program for first-time, non-violent felons. He fulfilled the requirements of the program which included making restitution for any loss. Subsequently, the charges were dismissed.

13. Pursuant to the Union Contract, Complainant filed a grievance claiming that his discharge was not for just cause. The grievance proceeded to arbitration. The arbitrator reinstated Complainant, modifying the discharge to a sixty day suspension without pay. The arbitrator relied on the unrebutted testimony of Complainant's psychiatrist. He testified that Complainant's behavior on April 1, 1996 was triggered by job-related stress and separation from his wife and children.

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.¹

1. The Commission alleged in its Complaint that Respondent discharged Complainant because of his race.

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

¹ 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, . . . 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 R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm.* (1991), 61 Ohio St.3d 607. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the Commission normally must prove a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases

965 (1973). The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 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.² *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.

² 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.

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.

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 Complainant’s discharge 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 discharging Complainant was his violation of OSP 4501:(2)-6-02(I)(1), (conduct unbecoming an officer).

9. Respondent having met its burden of production, the Commission must show by a preponderance of the evidence that Respondent's articulated reason for discharging Complainant was not the true reason but was 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 to 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.³

Id., at 511, 62 FEP Cases at 100 (emphasis added).

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. The Commission can also attack Respondent's reasons by proving that Complainant was treated differently than similarly situated Caucasian employees. This is known as disparate treatment. 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):

³ 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 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.

13. 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).

14. There was no dispute about the event that occurred on April 1, 1996 that led to Complainant's discharge. Therefore, the Commission is not arguing that Respondent's legitimate, nondiscriminatory reason was untrue. The Commission is arguing that Complainant was treated more harshly than a similarly situated Caucasian trooper.

15. Specifically, the Commission argues that another trooper (Smith) had an overall work record that was worse than Complainant's work record. Smith received various forms of discipline for conduct unbecoming an officer, but was never discharged. Smith was never accused of shoplifting. His disciplinary infractions could not be compared to Complainant for purposes of disparate treatment.

16. Complainant was discharged because he stole merchandise valued at \$374.79 from Micro Center. Smith never engaged in any criminal behavior that was as serious as Complainant's. He was accused of domestic violence by his wife, but she later withdrew the charges. Respondent investigated the matter and concluded there was insufficient evidence to support her allegations. Therefore, Respondent could not discipline Smith

because they had no evidence to justify disciplining him. The evidence that Complainant committed shoplifting was clear and unambiguous. Therefore, Complainant and Smith were not similarly situated.

17. The appropriate comparison for purposes of disparate treatment would be to compare Complainant with other officers who committed theft. Respondent made this comparison. The evidence showed that Respondent consistently discharged employees who committed theft. Five employees were discharged for theft; four of them were Caucasian.

18. The Commission also argues that the individual who was the commanding officer of Complainant's district was racially biased. The evidence to support this argument consisted of Complainant's testimony about statements he had heard regarding the opinions of other employees that the commanding officer was a racist. Of course, the opinions of others about the racial biases or the lack of bias of a supervisor are not probative evidence in a race discrimination case. If they were, each party in a case could line up witnesses who could give their opinions (pro or con). The Commission's decisions must be based on objective evidence, not subjective impressions.

19. Furthermore, the commanding officer did not investigate the matter and did not make a recommendation regarding the level of discipline.

20. The Commission also offered hearsay evidence about an incident where a racially derogatory term was uttered by one of Complainant's coworkers. He used the term in a joke. Although the incident was reported to the commanding officer, he did not discipline the coworker. Even if the incident occurred, it does not support the conclusion that Complainant was discharged because of his race.

21. There was no evidence that the commanding officer embellished the investigator's findings that Complainant committed theft to make them look worse than they actually were. The evidence about what happened on April 1, 1996 was not disputed by Complainant. There was no evidence that the commanding officer ignored reports of misconduct that was committed by Caucasians that there were brought to his attention and only pursued reports that were brought to his attention that involved minorities.⁴

⁴ The *Dayton Power & Light Company* case (33 Ohio St. 3d 73 (1987)) cited by the Commission in its brief is distinguishable. In that case there was evidence that the supervisors routinely ignored horseplay when it was committed by white employees but

22. The Commission also argued that there were mitigating circumstances that Respondent should have taken into consideration in determining the level of discipline. However, there was no evidence that Respondent took similar mitigating circumstances into consideration when they terminated Caucasian employees who engaged in theft. There was no evidence that Caucasian employees committed theft and were not terminated because of mitigating circumstances.

23. In conclusion, this is not a case of racial discrimination. It is a case that was appropriately considered in the context of the Collective Bargaining Agreement by an arbitrator. The arbitrator sympathized with Complainant after hearing testimony from Complainant's psychiatrist about Complainant's mental state on April 1, 1996. The psychiatrist's testimony was not challenged by Respondent. The arbitrator was also impressed with Complainant's efforts to deal with his personal problems after he was terminated. This led the arbitrator to modify the discharge to a sixty day suspension. The arbitrator's decision to impose a lesser penalty was appropriate under the circumstances. However, his decision does not convert

chose to report similar conduct that was committed by plaintiff, a black person, which ultimately led to his discharge. His supervisors also admitted that they harbored racial bias.

this case into one of racial discrimination. Therefore, the Complaint must be dismissed.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8111.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

July 19, 1999