

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**KAIZAAD N. KOTWAL**

Complainant

and

**COLUMBUS STATE  
COMMUNITY COLLEGE**

Respondent

Complaint #8226

(COL) 71092196 (24378) 032197  
22A-97-3555

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

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## INTRODUCTION AND PROCEDURAL HISTORY

Kaizaad N. Kotwal (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 21, 1997.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by Columbus State Community College (Respondent) 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 March 12, 1998.

The Complaint alleges that Complainant was denied hire because of his national origin.

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 November 6, 1998 at the Commission's Central Office in Columbus, Ohio.

The record consists of the previously described pleadings, the transcript consisting of 265 pages of testimony, exhibits admitted into evidence at the hearing, and written stipulations. The Commission filed a post-hearing brief on February 23, 1999. Respondent filed a post-hearing brief on March 17, 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 March 21, 1997.

2. The Commission determined on February 19, 1998 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 community college doing business in Ohio and an employer.

5. Complainant was born in India. He came to the United States (U.S.) from India as a student. He is permitted to remain in the U.S. under an

“F-1” visa as long as he remains a student. Currently he is pursuing a doctoral degree at the Ohio State University (OSU). He can be employed while he is pursuing his studies, but only by OSU.

6. In order to be employed BY Respondent, Complainant would have to obtain a different visa, a professional “H-1B” work visa for specialty occupations. The hiring employer applies for the H-1B visa on behalf of the employee.

7. In order to meet the criteria of eligibility for an H-1B visa, the prospective employer must obtain a prevailing wage determination from the Ohio Bureau of Employment Services (OBES) and file an appropriately prepared Labor Condition Application (LCA) approved by the Department of Labor. After obtaining the approved LCA, the employer must file a petition with the Immigration and Naturalization Service and change of status to an H-1B category with the appropriate documentation. The employer may be liable for the reasonable cost of return transportation if the employed alien is terminated from employment before the authorized period. The maximum period of time that a person can hold an H-1B visa is six years. After that, they must obtain permanent residency status (a green card) in order to remain

in the U.S. The criteria for obtaining a green card is different than the criteria for obtaining an H-1B visa.

8. It is possible for a person holding an F-1 visa to accept a position outside of the university where they are studying for a one-year period as “optional practical training”. Once the year is used up, it can never be renewed.

9. In the summer of 1996, Respondent was hiring two full-time faculty members for the Communications Skills Department. The hiring process was coordinated by and controlled by the Human Resources Department (HRD). HRD had designated one of the two positions as a position that had to be filled by a minority candidate. Complainant learned about the open positions and met with Christine Holter, Employment Coordinator, on August 14, 1996. Previously, he had filled out an application and provided the HRD with his *curriculum vitae* and a letter. During the interview, Complainant’s immigration status was discussed. Complainant told Holter that he had a student visa. He told her If he was hired, it could be changed to a professional H-1B visa. Holter told him she was not familiar with H-1B status or the requirements and she would have to look into the matter.

10. In the meantime, Complainant was interviewed by the Search Committee. The Search Committee determined that he was their first choice for the position. Dr. Ardinger, the Department Chair, advised HDR that the remaining interviews with the Dean and Provost could be arranged.

11. Dr. Ardinger, who did not have the authority to hire Complainant, led Complainant to believe that he would receive the position and that the remaining interviews were merely formalities. He and Complainant proceeded to work out a teaching schedule for Complainant.

12. After her interview with Complainant, Holter consulted with the College's Director of Human Resources, Dr. Zitlow, about Complainant's immigration status. Dr. Zitlow was not familiar with the process for converting an F-1 visa to an H-1B visa and had to look up the requirements in a manual. After doing so, he decided not to forward Complainant's application to the Dean or the Provost because he did not want to go through the process of applying for the H-1B visa. He was concerned about having to pay the prevailing wage determined by OBES, having to post the prevailing wage, and

having the potential responsibility of returning the employee to his country of origin if his employment was terminated.

13. This decision concerning Complainant was communicated to Dr. Ardinger who informed Complainant around September 21, 1996. Dr. Ardinger told Complainant that Dean Hockenberry, Human Resources, and the President of the University, Valerina Moeller, had made the decision. Subsequently, Dr. Ardinger offered Complainant a part-time adjunct position which he accepted.

14. After he accepted the position, Complainant continued to attempt to persuade Respondent to pursue the H-1B visa. Ultimately, Complainant attempted to schedule a meeting with President Moeller to discuss the problem. She did not meet with him. Instead, Dr. Ardinger met with her. Dr. Ardinger told Complainant that President Moeller said she would not consider any candidate who did not possess a green card.

15. Complainant continued his part-time employment with Respondent. He used his one year of optional practical training.

## 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.<sup>1</sup>

1. The Commission alleged in the Complaint that Complainant was denied hire because of his national origin.

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

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<sup>1</sup> 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 . . . national origin, . . . 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 Civ. 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.<sup>2</sup> *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.

7. In order to satisfy the first prong of the *prima facie* case, Complainant

must be a member of a protected class. While it is true that Complainant was born in India, the Commission's Complaint actually alleges discrimination on the basis of citizenship and/or alienage. The Commission is not alleging, and the facts do not support an allegation, that Complainant was discriminated against because of his national origin, i.e. that he was not hired because he was of Indian descent.

8. The seminal case on this issue was decided by the United States Supreme Court in 1973 and has remained the law ever since. As the Court explained:

Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin – for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry. Aliens are protected from illegal discrimination under the Act [Title VII], but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.

*Espinoza v. Farah Manufacturing Co.*, 6 FEP Cases 933, 936-37 (1973).

9. Other federal courts that have considered the matter have concluded likewise.

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<sup>2</sup> 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.

. . . [N]ational origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage . . . .

*Chacko v. Texas A & M Univ.*, 77 FEP Cases 1795, 1800 (S.D. Texas) (1997) (citations and quotations omitted).

10. It is not disputed in this case that Complainant was not hired by Respondent because Respondent did not want to go through the bureaucratic morass (my characterization) that was created by the federal government in order for an applicant to change their visa status from a student visa to an H-1B visa. Since Complainant could not work for Respondent with an F-1 student visa, he could not be employed. Although the Commission argues this is national origin discrimination, it is actually discrimination based on citizenship and/or alienage, which is not unlawful under Title VII.

11. The same result follows even if we accept the arguments from the Commission that somehow the decision not to hire Complainant was based on fears that American-born applicants might complain if the position was given to someone who was a “foreigner”.

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*Burdine*, *supra* at 254, 25 FEP Cases at 116.

12. The *Chacko* case provides strong precedent for this conclusion. Chacko, a citizen of Canada, did not have an H-1B visa and was offered a position at the University. During the process of obtaining the H-1B visa, an anonymous complaint surfaced complaining about the selection process and complaining that there was never an opportunity for the position to be offered to an American citizen. Based on the complaint, Respondent rescinded their offer to Chacko, reopened the selection process, and ultimately offered the position to a U.S. citizen. During the second selection process, there were alleged statements by members of the staff that Chacko should not be hired and that it was un-American to hire a foreigner. The Fifth Circuit dismissed Chacko's Title VII claim, finding that in reality she was complaining about citizenship discrimination which is not covered by Title VII.

13. Assuming for purposes of argument that the Commission was able to prove a *prima facie* case, Respondent met its burden of production of articulating a legitimate, nondiscriminatory reasons for the decision not to hire Complainant for a full-time, tenure track position. Those reasons were articulated by the person who made the decision, Dr. Zitlow, Human Resources Director. The reasons were simply that Dr. Zitlow did not want to apply for an H-1B visa because of all the responsibilities and requirements

that were involved in that process. Therefore, Complainant could not be offered the position because he did not have the appropriate visa.

14. Respondent having met its burden of production, the Commission must show by a preponderance of the evidence that Respondent's articulated reasons for discharging Complainant 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.

15. 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.

16. 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.<sup>3</sup>

*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.

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<sup>3</sup> 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.

17. In addition to examining the truthfulness of Respondent's legitimate, nondiscriminatory reasons, evidence regarding statements or remarks that were made that could be evidence of discriminatory animus toward Complainant because of his Indian national origin are also admissible. Although they may be evidence of discriminatory intent under some circumstances, remarks that are vague and ambiguous do not have any probative value.

It is well established in the Sixth Circuit that isolated and ambiguous comments are too abstract, in addition to being irrelevant and prejudicial, to support a finding of . . . discrimination.

*Grant v. Harcourt Brace*, 77 FEP Cases 1068, 1076 (DC SOhio 1998) (citations and quotations within a quotation omitted).

*See also, Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP Cases 954, 974 (1989) (stray remarks, statements by nondecisionmakers, and statements by decisionmakers unrelated to the decisional process are insufficient to conclude that employer relied on impermissible factor in reaching decision) (O'Connor, J., concurring).

18. The Commission does not challenge the truthfulness of the legitimate, nondiscriminatory reasons offered by Respondent. Instead, the Commission argues that Complainant was not hired because someone was

concerned that there would be a protest if Complainant was hired because he was a “foreigner”. However, the evidence showed that even if this was true, Dr. Zitlow, the decision-maker, was not concerned.

19. This concern was never specifically attributed to Dr. Zitlow. The issue arose during a conversation Complainant had with Dr. Ardinger where Complainant allegedly asked Dr. Ardinger, “Somebody up there is concerned that an American would protest a foreigner getting a full-time, tenure track position?” Dr. Ardinger responded, “Yes.” (Tr. 65-66)

20. However, even if this statement was made, it is too vague and ambiguous to be considered direct evidence of discrimination. Direct evidence

is “[e]vidence which, if believed, proves the fact in issue without inference or presumption.” *Black’s Law Dictionary*, Sixth Ed. p. 460.

Strictly speaking, the only “direct evidence” that a decision was made “because of” an impermissible factor would be an admission by the decisionmaker such as “I fired him because he was too old.” Even a highly probative statement like “you’re fired, old man” still requires the factfinder to draw the inference that the plaintiff’s age had a causal relationship to the decision.

*Tyler v. Bethlehem Steel Corp.*, 59 FEP Cases 875, 882 (2d Cir. 1992).

21. In order for circumstantial evidence to suffice, the evidence must be “tied directly to the alleged discriminatory animus.” *Ostrowski v. Atlantic Mutual Ins. Co.*, FEP Cases 1139 (2d Cir. 1992). In other words, recent conduct or statements by persons involved in the decisional process that directly reflect the alleged discriminatory animus and have some relationship to that process may permit the factfinder to conclude that such animus was, more likely than not, a motivating factor in the decision.

22. The statement by Dr. Ardinger, even if it was made as it was characterized by Complainant, was not direct evidence of discriminatory animus because it was not attributed to a decision-maker. In fact, further in the conversation, Dr. Ardinger indicated that the “somebody up there” was not the Dean or the President. (Comm.Ex. 4, pp. 7-8) Dr. Ardinger indicated the concern *might* have come from HRD, but the evidence showed Dr. Zitlow was only concerned about the red tape that was involved in the H-1B process, not the potential that someone might complain about the position being awarded to a noncitizen. Even if that was one of his concerns, it would not be evidence of national origin discrimination. See *Chacko, supra*.

23. Therefore, even if it was true that “someone up there” was concerned that there might be a protest if the position was awarded to a noncitizen, there concern does not constitute direct evidence of national origin discrimination.

24. The Commission also argued that Holter, who was a member of the HRD, told Complainant that although one of the positions had been targeted for a minority, it was not a position for a minority like him or a “foreign minority”. However, these statements, if they were made, must be put in context. Holter was explaining to Complainant that even if his visa problem could be resolved, he did not qualify as a minority as it was defined by the Equal Employment Opportunity Commission (EEOC) and Respondent’s affirmative action plan. For affirmative action purposes, minorities must be U.S. citizens. Therefore, even if she used the term “not a minority like you”, she was not referring to Complainant’s national origin. She was referring to his status as an alien or noncitizen. In any event, Holter was not the decision-maker.

25. The Commission also argued that a remark that was allegedly made by President Moeller that Complainant was not hired because he

did not have a green card was evidence of discriminatory animus. However, President Moeller did not make the decision not to hire Complainant. Complainant's appeal to her was made after-the-fact. President Moeller is of Indian ancestry. Therefore, it is highly unlikely that she would have some animus against Complainant because of his Indian national origin. Furthermore, this statement, if it was made, indicates a preference for aliens who have permanent residence in the U.S., i.e. aliens who possess green cards. It is not evidence of discriminatory animus based on national origin.

### **DISPARATE IMPACT**

26. The Commission also argues that Respondent's decision to not pursue an H-1B visa for Complainant had a disparate impact on a class of persons who are aliens, but do not have permanent resident status in the U.S. Again, this appears to be an allegation that such a policy would have a disparate impact because of the person's status as a noncitizen or their status as an alien, not because of their national origin. It does not necessarily follow that the policy has a disparate impact on persons because of their national origin. There are many persons who were not born in the U.S. who have U.S. citizenship. There are also many persons who were not born in the U.S. who

are not U.S. citizens, but who have green cards, or some other visa which entitles them to live and work in the U.S.

27. The United States Supreme Court specifically considered and rejected the same conclusionary argument the Commission is making in this case. In *Espinoza, supra*, the EEOC promulgated a regulation which stated that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin. The Court disagreed, stating that under the circumstances of the case it was considering, the EEOC's premise was not borne out. *Espinoza, supra* at 936.

28. Likewise, that premise was not borne out in this case. The Commission offered no statistics to support the conclusion that a policy that restricted employment to persons who were permanent, registered aliens of the U.S. would have a disparate impact on persons because of their national origin. In fact, Respondent offered the only statistical evidence in this case. Respondent offered evidence that 8% of the faculty members at Columbus State were foreign born. Thus, if anything, the evidence is contrary to the Commission's assertion. Therefore, even if Columbus State had a policy of only employing faculty members who were not U.S. citizens if they had green

cards, the policy would not inhibit the employment of persons who were born outside of the U.S.

29. Since the Commission was unable to prove that Complainant was discriminated against by Respondent because of his national origin or that Respondent's hiring practices had a disparate impact on applicants who were not born in the U.S., the Complaint must be dismissed.

### **RECOMMENDATION**

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8226.

FRANKLIN A. MARTENS  
CHIEF HEARING EXAMINER

October 14, 1999