

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

MARLONDA GARRETT

Complainant

and

MED FIRST, M.D., INC.

Respondent

Complaint #8303

(DAY) 76060297 (13072) 072897

22A-97-9355

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

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INTRODUCTION AND PROCEDURAL HISTORY

Marlonda Garrett (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on July 28, 1997.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by Med First M.D., Inc. (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 June 5, 1998.

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

Respondent filed a timely answer to the Complaint, admitting certain procedural allegations but denying other procedural allegations for lack of

knowledge and denying that it engaged in any unlawful discriminatory practices.

A public hearing was held on December 9, 1998, at the Safety Building in Troy, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 98 pages of testimony and exhibits admitted into evidence at the hearing. The Commission waived its right to submit a post-hearing brief on January 19, 1999. Respondent did not file a brief.

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 28, 1997.

2. The Commission determined on April 2, 1998 that it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of R.C. § 4112.02(A).

3. Respondent was a corporation doing business in Ohio and an employer. Respondent ceased doing business at the end of June, 1998.

4. Complainant is a black person.

5. Complainant was employed by Respondent from March 10, 1997 to June 2, 1997, as a data entry clerk. Her primary duties consisted of inputting data into the computer regarding Respondent's clients. She was responsible for securing information from insurance adjusters and attorneys to verify new patient information. Complainant worked at the main office in Tipp City and collected information from offices in Troy and Dayton. Complainant assisted Edith Newell, who was employed as an auditor.

6. Complainant was hired by Vicky Knoderer, Caucasian. Knoderer was the Office Manager in Tipp City. When Knoderer hired Complainant she expected Complainant would be able to learn how to perform Newell's job duties when Newell was on vacation or absent for some other reason.

7. After Complainant had been employed by Respondent for two and a half to three weeks, Oscar Mitchell, a black person, became employed as Supervisor over the Billing Department. He became Complainant's immediate supervisor.

8. After she had been working with Complainant for a while, Newell concluded that Complainant's work was not satisfactory. She was not able to follow through to get the information she needed to get from the insurance companies, adjusters and attorneys. Newell had to remind her daily to perform this function on specific cases. Newell also concluded that Complainant was not able to learn how to do all the jobs that Newell had to do. She was not able to balance the fee slips with the charges on the trial postings.

9. A meeting was held in April 1997 regarding Complainant's job performance and her attitude. Oscar Mitchell, Complainant, Edith Newell, and Vicky Knoderer all attended the meeting. The purpose of the meeting was to talk about Complainant's job performance and attitude. Newell expressed her concerns that Complainant was not following through on her assignments. She perceived Complainant did not like the job, did not want to be there and did not want to do the job. (Tr. 65)

10. Complainant was concerned about Newell's attitude and expressed her dissatisfaction at the meeting. The meeting ended with the

understanding that their relationship would be strictly on a business level and conversations would be limited to job-related issues. After the meeting, Complainant stopped talking to Newell.

11. After the April meeting, Mitchell advised Knoderer that, in his opinion, Complainant was not going to be able to do the job, that she was not going to be able to fill in when Edith Newell was absent. He also told her that he thought Complainant was guilty of excessive absenteeism and tardiness.

12. Based on Complainant's performance and attendance after the April meeting, Oscar Mitchell decided to terminate Complainant's employment, effective June 2, 1997. The termination letter stated she was being terminated because of her "failure to meet the standards as outlined in her data entry insurance processors job description and inability to be at your appointed place of work, i.e. too many personal appointments and (sic) absenteeism."

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 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 her race.

¹ 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 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 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 reasons for discharging Complainant was her failure to

satisfactorily perform her job and attendance problems which included tardiness and excessive absenteeism.

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

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*

treatment was explained as follows in *Boyd v. U.S. Steel Corp.*, 20 FEP Cases 727 (W.D. Pa. 1979):

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." *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

finding of discrimination." *Hicks*, *supra* at 511, 62 FEP Cases at 100, n.4.

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

14. Based on the foregoing discussion, the Commission was unable to prove the legitimate non-discriminatory reasons articulated by Respondent were a pretext for unlawful discrimination. The Commission presented one witness in this case, Complainant. She disputed the allegation that her performance was unsatisfactory or that she had excessive absenteeism. She also stated that she believed she was replaced by a white person and that other persons working in similar jobs were also absent on occasion and were not discharged.

15. The Respondent presented testimony from Complainant's coworker, Edith Newell, and Vicky Knoderer, the Office Manager at the Tipp City Office. Respondent also offered into evidence of the affidavit of Oscar Mitchell who was unable to be present at the hearing. The affidavit was admitted without objection. Thus, it can be given the same weight as live testimony.

16. Probably the least interested witness in this case was Newell. Although she was still working for Respondent, her employment was going to terminate in the near future. She was helping wind up the affairs of the corporation. I found her testimony to be more credible than Complainant's testimony. Newell's testimony was also corroborated by Oscar Mitchell's affidavit and the testimony of Vicky Knoderer. Knoderer testified about conversations she had with Mitchell where Mitchell raised the same concerns about Complainant's performance that were raised by Newell.

17. The Commission was also unable to prove that Complainant was treated differently than similarly situated non-minorities. One of the persons that Complainant mentioned in her testimony was employed by a temporary agency and Complainant's testimony about her attendance was vague. Although Complainant believed there was another employee doing a job similar to hers who was also absent on occasion, there was insufficient evidence to conclude that this Caucasian employee was similarly situated to Complainant. The attendance records of other employees were not offered into evidence.

18. On the other hand, Respondent offered Complainant's attendance records. These records were authored by Oscar Mitchell and they indicated those days where Complainant was absent or tardy. The Commission did not contest the accuracy or authenticity of these records. Complainant agreed that if the records were accurate, which she disputed, she would not have a good attendance record. Absent some evidence that the records were fabricated, they are more credible than Complainant's recollection.⁴

19. Since the Commission was unable to prove that the Respondent's reasons for discharging Complainant were a pretext for discrimination, the Complaint must be dismissed.

⁴ Complainant did not dispute that she was late on many occasions. However, she stated that she was not more than fifteen minutes late. Although Respondent had a fifteen minute grace period for starting times, there was no evidence that Mitchell did not take that into consideration when he noted that the Complainant was late.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8303.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

August 23, 1999