

## **INTRODUCTION AND PROCEDURAL HISTORY**

Janice S. Johnson (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on June 23, 1997.

The Commission investigated the charge and found probable cause that Steelcraft, Inc. (Respondent) engaged in unlawful discrimination in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on June 5, 1998.

The Complaint alleged that Respondent discharged Complainant because of her age.

Respondent filed an Answer to the Complaint on July 8, 1998. Respondent denied that it engaged in any unlawful discriminatory practices.

A public hearing was held on January 20, 1999 at the Trumbull County Courthouse in Warren, Ohio. Near the end of the day, the Commission's counsel indicated that she intended to call William Alford, the Commission Investigator, as one of her rebuttal witnesses. Respondent's counsel objected to Alford testifying on rebuttal and argued that he should have been called as a witness in the Commission's case-in-chief. Respondent's counsel also indicated that he might become a witness if Alford testified about a statement that Wendell Swegan, Respondent's president and owner, allegedly made during a conference call.

The Hearing Examiner concluded that Alford's testimony about the alleged statement, regardless of whether it should have been offered on direct examination, was relevant to the ultimate issue in this case, i.e. whether Complainant's age was a determinative factor in her discharge.<sup>1</sup> Therefore, the Hearing Examiner overruled Respondent's objection to his testimony. The Hearing Examiner granted Respondent's counsel sufficient time to determine whether his participation as a witness was necessary.

---

<sup>1</sup> The Commission's counsel represented that Alford would testify that Swegan told him that the younger generation was better with computers or words to that effect. Swegan earlier testified that he discharged Complainant based on his conclusion that she was unable and unwilling to operate a computer.

On February 8, 1999, Respondent filed a motion to take Alford's deposition. Respondent's counsel argued that he would be in a better position to determine whether he ought to be a witness following this deposition. The Commission filed an answer memorandum on February 16, 1999. The Hearing Examiner granted the Motion for Deposition on February 23, 1999.

In early May 1999, Respondent's counsel indicated during a status conference that he would not be a witness in this case. The hearing reconvened on May 25, 1999 at the same location.

The record consists of the previously described pleadings; a transcript of the hearing divided into two volumes consisting of 200 and 89 pages, respectively; exhibits admitted into evidence during the hearing; and post-hearing briefs filed by the Commission on June 30, 1999 and by Respondent on August 3, 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 a sworn charge affidavit with the Commission on June 23, 1997.

2. The Commission determined on May 14, 1998 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a corporation and an employer doing business in Ohio.<sup>2</sup> Respondent operates a machining and fabricating business in Warren. R. Wendell Swegan is Respondent's president and owner.

5. Complainant was born on August 17, 1934.

6. Complainant worked for the American Automobile Association (AAA) as a license supervisor in the early 1980s. During her employment, Complainant received computer training from State of Ohio, Bureau of

---

<sup>2</sup> Respondent had at least four employees in April 1997. Respondent's work force fluctuates depending on the volume of work. Respondent had 22 employees in January 1999.

Motor Vehicles (BMV). In addition to her supervisory duties, Complainant performed data entry for AAA and accessed BMV's database by computer.

7. In the late 1980s, Complainant began working for Glunt Machine & Fabricating Company (Glunt). Complainant initially worked for Glunt as a receptionist. Complainant later performed data entry and cost accounting when the company purchased computers. Glunt trained Complainant to perform these functions on a computer.

8. While working at Glunt, Complainant became acquainted with Swegan who worked for the company as a salesperson. Swegan observed Complainant perform computer functions and other duties for Glunt. (Tr. Vol. I, pp. 34, 118)

9. In May 1991, Swegan purchased a machine and fabricating company called Cetina Specialties.<sup>3</sup> Swegan contacted Complainant in December 1992 and offered her a job with his new company. Complainant

---

<sup>3</sup> Swegan changed the company's name from Cetina Specialties to Cetina Specialties, Inc. after he purchased it. Swegan changed the company's name to Steelcraft, Inc. in March 1993.

accepted his offer and began working for the company in early January 1993.

10. Complainant was the only office employee when she began her employment with Respondent. Consequently, she performed all of the office functions. These functions included preparing payroll, tracking shop and quote folders, balancing “the checkbook”, making bank deposits, running errands, as well as other office duties such as filing, typing, answering telephones, and purchasing office supplies. (Tr. Vol. I, pp. 16, 78, 109-10) Complainant also prepared accounts receivable, accounts payable, and customer invoices.

11. Complainant performed all of her accounting duties “manually” because Respondent did not have a computer. (Tr. Vol. I, p. 16) Complainant submitted payroll and other financial reports to Respondent’s accountant, Rosemarie Keating. Keating reviewed these reports for accuracy and corrected any errors.

12. Respondent purchased a used computer in 1995. Respondent arranged for Shelby Green, a co-owner’s wife, to train Complainant on

using the computer for payroll. Complainant continued to do payroll manually while she and Green tried to use the computer for several pay periods. Unfortunately, the computer program, which was not “commercially acquired”, was difficult to use and inadequate for doing Respondent’s payroll. (Tr. Vol. I, pp. 92, 98, 115) Respondent eventually moved the computer from an upstairs office to the shop for machine programming.<sup>4</sup>

13. Respondent moved its place of business in early July 1996. Respondent did not have a computer at the new office. Complainant continued to perform her payroll and accounting functions manually.

14. In mid-February 1997, Swegan hired Terry Anderson as plant manager. Anderson recommended that Respondent purchase a computer to perform payroll, accounting, and other financial operations. Swegan and Anderson decided within “two or three weeks” of the latter’s hire that the company could only afford one office worker, and Complainant would

---

<sup>4</sup> Complainant’s office was located downstairs at the reception area. Swegan intended to move the computer downstairs, but it never became operational for payroll purposes.

be unable to operate the computer that Respondent planned to acquire.  
(Tr. Vol. II, pp. 6-9)

15. In late March 1997, Complainant and Swegan engaged in a conversation about her future employment. Swegan told Complainant that he believed that she was incapable of operating a computer, and the company needed “to move in that direction.” (Tr. Vol. I, p. 126) Complainant disagreed with Swegan’s statement about her computer skills. Complainant reminded Swegan that she worked with computers for Glunt and AAA.

16. On April 15, 1997, Swegan called Complainant into his office and informed her that it was “not working out.” (Tr. Vol. I, p. 34) Swegan advised Complainant that her replacement, Rachelle Swarm, was starting the next day. Swegan asked Complainant if she would stay for a couple of days to train Swarm. Complainant refused. Swarm was “in her late 20s” at the time. (Tr. Vol. I, p. 130)

## **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.

1. The Commission alleged in the Complaint that Respondent discharged Complainant because of her age.

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

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the . . . 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.”

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).

4. 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 under Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA).

5. Under ADEA and Title VII case law, the Commission is normally 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, 253, 25 FEP Cases 113, 115 (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 254, 25 FEP Cases at 116, n.8.

6. 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 at 969, n.13. In this case, the Commission may establish a *prima facie* case of age discrimination by proving that:

- (1) Complainant was at least 40 years of age;
- (2) Complainant was qualified for her position;
- (3) Respondent subjected Complainant to an adverse employment action; and
- (4) Respondent replaced Complainant with a substantially younger person.

*O'Connor, supra* at 489; *Barnett v. Dept. of Veterans Affairs*, 77 FEP Cases 1218 (6<sup>th</sup> Cir. 1998).

7. It is undisputed that Complainant, who was 62 years of age in April 1997, was a member of the protected age class. Respondent also does not dispute that Complainant's discharge on April 15, 1997 constituted an adverse employment action.

8. Given the nature of Respondent's articulated reason for Complainant's discharge, i.e. Complainant was unable to operate and unwilling to learn computers, the issue of whether Complainant was qualified for her position appears to be in dispute. For purposes of proving a *prima facie* case, the Commission is only required to prove that Complainant met Respondent's objective qualifications for the position in question. *Sempier v. Johnson & Higgins*, 66 FEP Cases 1214 (3<sup>rd</sup> Cir. 1995). This requirement, which was never intended to be burdensome, purports with a primary function of a *prima facie* case—the elimination of the “most common nondiscriminatory reasons” for employment actions. *Burdine*, *supra* at 253, 25 FEP Cases at 116.

9. The evidence in this case suggests that Respondent never established any objective job qualifications (or a job title) for Complainant's

position even when hiring her replacement.<sup>5</sup> In other words, the record is void of any evidence that Respondent required Complainant or her replacement, Rachelle Swarm, to possess any minimum qualifications, educational or otherwise, for hire or to maintain their employment. Respondent's lack of objective qualifications for Complainant and her replacement leads to the inevitable conclusion that Complainant, who performed various functions for Respondent for over four years, was objectively qualified for her position.

10. In its brief, Respondent does not challenge that Complainant was objectively qualified for her position. In fact, Respondent concedes that Complainant's "aptitude, skill, or qualifications to operate a computer could not be objectively measured" because the company did not have a

---

<sup>5</sup> The Hearing Examiner reached this conclusion based on Swegan's and Anderson's testimony. Neither was able to articulate any minimum qualifications for Complainant's position despite being questioned on the issue. For the most part, their testimony was inconsistent and suggested that there was, in fact, no minimum qualifications for the position. For example, Swegan initially testified that Respondent sought "formal schooling" in accounting and computers when asked about minimum qualifications. (Tr. Vol. I, pp. 182-83) Swegan later testified that work experience was probably more important than education. Anderson testified that he and Swegan did not discuss "the fact that someone had to have a certain amount of schooling." (Tr. Vol. II, p. 33) Anderson testified that they only talked about a certain amount of work experience being necessary.

computer, and Complainant “never used a computer in her job.”<sup>6</sup>  
(R.Br. 8) Respondent also concedes that Swegan’s conclusions about Complainant’s computer skills were “necessarily” subjective to some extent. (R.Br. 9)

11. When subjective evaluations play a role in employment decisions, employees are not required to show that they possessed certain subjective qualifications as part of proving a *prima facie* case. Such issues are properly resolved in the pretext stage of the *McDonnell Douglas* framework.

Thus, to deny the plaintiff an opportunity to move beyond the initial stage of establishing a *prima facie* case because he has failed to introduce evidence showing he possesses certain subjective qualities would improperly prevent the court from examining the criteria to determine whether their use was mere pretext.

*Sempier, supra* at 1217-18.

12. Respondent argues that the Commission never presented any evidence that Complainant “was replaced by a younger employee not

---

<sup>6</sup> It is incorrect that Complainant never used a computer on her job. Complainant and Shelly Green, a co-owner’s wife, did attempt to use a computer for payroll purposes in 1995. Swegan acknowledged at the hearing that the computer program that Respondent provided to them was “totally” inadequate for doing its payroll. (Tr. Vol. I, p. 115)

belonging in the protected class.” (R.Br. 6) This argument misstates the fourth element of a *prima facie* case of age discrimination when an employee has been discharged. In *O’Connor*, the Supreme Court ruled that “the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case.” *Id.*, at 489. The Supreme Court recognized that:

. . . the fact that a replacement is *substantially younger* than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.

*Id.*, (emphasis added).

13. The evidence shows that Respondent replaced Complainant with a substantially younger person. Terry Anderson, Respondent’s plant manager, testified on cross-examination that Complainant’s replacement, Rachelle Swarm, was in her late 20s when she was hired. Anderson’s testimony on this issue was consistent with Swegan’s testimony. Swegan gave the following testimony on direct examination:

Q: How old was Rachelle?

A: I think somewhere in her late 20s because she had . . . school and had work experience here that would indicate that she had been probably working for ten years.

Q: So, . . . sitting here today you don't know how old she was, but certainly she was in your impression . . . in her late 20s?

A: Uh-huh.

(Tr. Vol. I, pp. 130-31)

Although neither Swegan nor Anderson verified Swarm's exact age when she replaced Complainant, their testimony that Swarm was in her late 20s at the time is sufficient to establish that she is substantially younger than Complainant.

14. 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.<sup>7</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 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.

---

<sup>7</sup> Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254, 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.

15. Respondent met its burden of production with Swegan’s and Anderson’s testimony. Anderson testified that he and Swegan made the decision to discharge Complainant. Both testified that Respondent discharged Complainant because they concluded that she was unable to operate a computer. (Tr. Vol. I, p. 126, Vol. II, p. 29) Swegan also testified that he believed that Complainant was unable and unwilling to learn computers.

16. Respondent having met its burden of production, the Commission must prove that Respondent discharged Complainant because of her age. The Commission must show by a preponderance of the evidence that Respondent’s articulated reasons for Complainant’s discharge were not its true reasons, but were “a pretext for discrimination.” *Hicks, supra* at 515, 62 FEP Cases at 102, *quoting Burdine, supra* at 253, 25 FEP Cases at 115.

[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.

17. 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 . . . [age] is correct. That remains a question for the factfinder to answer . . . .

*Id.*, at 524, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of age discrimination.

18. Since discrimination exists in various forms, the Commission is not required to prove that the decision-makers in this case harbored discriminatory animus toward Complainant personally because of her age or older persons generally. The Supreme Court recognized that age discrimination is rarely based on the sort of animus that often motivates other forms of discrimination. *Hazen Paper Co. v. Biggins*, 507 U.S. 604,

610 (1993). The passage of the ADEA was prompted by a “concern that older employees were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.” *Id.*, at 610.

19. Like its federal counterpart, R.C. Chapter 4112 requires that employers evaluate older employees on their individual merits, not group stereotypes. Thus, the prohibition of age discrimination (and other forms of discrimination) extends to employer acts based on conscious discriminatory animus and those rooted in stereotypical beliefs or other forms of less conscious bias.<sup>8</sup> *Thomas v. Eastman Kodak Co.*, 80 FEP Cases 537 (1<sup>st</sup> Cir. 1999). As in the context of sex stereotyping, an employer who acts on stereotypical beliefs about older persons has acted on the basis of age. *Cf. Hopkins v. Price Waterhouse*, 490 U.S. 228, 249, 49 FEP Cases 954, 963 (1989) (plurality opinion).

---

<sup>8</sup> Federal Courts of Appeals have consistently found that age discrimination may result from unconscious stereotypical beliefs about older persons. For example, the Eight Circuit ruled that:

Age discrimination is often subtle and may simply arise from an unconscious application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce.

*Brooks v. Woodline Motor Freight*, 47 FEP Cases 654, 656 (8<sup>th</sup> Cir. 1988) (citation and quotation marks omitted).

20. The evidence in this case shows that Respondent decided to purchase a computer to perform payroll, accounting, and other functions that Complainant performed manually in the past. Swegan and Anderson testified that they believed that Complainant would be unable to operate a computer and therefore, the company needed to replace her. Swegan further testified that he did not believe that Complainant was capable or willing to learn computers. Specifically, Swegan testified that, in his opinion, computer training for Complainant would not fall on “fertile ground.” (Tr. Vol. I, pp. 132, 167)

21. Subjective evaluations, although not *per se* unlawful, require close scrutiny because they can easily mask not only intentional age discrimination, but also employment decisions tainted by stereotypes based on age. This is particularly true here and in other cases where the employer’s articulated reason is a common stereotype of older persons, i.e. they are unable to operate or unwilling to learn computers. See *Purcell v. Seguin State Bank and Trust Co.*, 62 FEP Cases 1336 (5<sup>th</sup> Cir. 1993) (plaintiff’s evidence suggested that bank president believed him to be “incompetent on the computer and incapable of learning to use it, in large

part because of his age”). In such cases, the factfinder must peel back the layers of the subjective evaluation and examine each layer individually as well as collectively. The issue is not necessarily whether a stereotypical belief was at the core of the challenged decision, but only whether it was a determinative factor in the outcome. *Hazen Paper Co, supra* at 610.

22. Swegan and Anderson testified about their reasons for concluding that Complainant was incapable of operating a computer. Anderson testified Complainant had difficulty operating the phone system and the facsimile (fax) machine. Anderson testified specifically that Complainant pulled paper out of the fax machine prior to transmission. Anderson testified generally that Complainant’s “total mannerism was not that of a person that could do what I expected someone to do with the computer.” (Tr. Vol. II, p. 7) When questioned about the meaning of “total mannerism”, Anderson testified that Complainant did not perform her tasks “complete[ly] and accurately.” (Tr. Vol. II, p. 31) Anderson also testified that he once approached Complainant about a problem, and she exhibited an unwillingness to accept criticism.

23. Swegan testified extensively about Complainant's problems operating fax machines, and his belief that the part of a fax machine that stores numbers is similar to a "mini-computer." (Tr. Vol. I, p. 123) Swegan provided the following testimony on this issue:

- (1) Shortly after Complainant's hire in January 1993, Swegan asked Complainant to reprogram the speed dial on the company's fax machine after a power outage. When Complainant had not reprogrammed the fax machine after "a day or so later", Swegan showed Complainant the manual and programmed several numbers for her. Complainant eventually programmed the rest of the numbers;
- (2) Respondent had another power failure "a month or two later." Swegan noticed that Complainant had not reprogrammed the speed dial numbers and approached Complainant about it. Complainant told Swegan that she generally dialed the entire number anyway. Swegan instructed Complainant to use the speed dial and later had to approach Complainant again about the matter. Complainant eventually reprogrammed it;
- (3) Respondent purchased another fax machine when the company moved to its new place of business in July 1996. Shortly thereafter, Swegan asked Complainant to correct inaccurate spellings of company names that were already programmed for speed dial. Complainant did not correct this problem for several months. At the same time, the fax machine was not working properly, and the company had to hire outside help to repair it. The names of the misspelled companies were corrected during the repair; and

- (4) An employee who worked as an estimator informed Swegan in December 1996 that Complainant frequently pushed in the numbers instead of using speed dial. Complainant also pulled paper out of the fax machine before its cycle was completed causing transmission errors.

(Tr. Vol. I, pp. 119-23)

24. Swegan also testified that Complainant often made minor numerical mistakes in the payroll and other financial reports that she submitted to the Respondent's accountant, Rosemarie Keating. Swegan testified that Keating advised him that such errors would "definitely not" work with a computer. (Tr. Vol. I, p. 123) Lastly, Swegan testified that he was aware that Complainant had worked with computers at Glunt and AAA, but he believed that her computer experience with those companies was limited to data entry.

25. The evidence shows that the decision to replace Complainant with someone who could operate a computer was made "within two to three weeks" of Anderson's hire. (Tr. Vol. II, pp. 6-9) It is undisputed that Respondent did not have a computer during that period. Despite this fact, Anderson never asked Complainant if she knew how to operate a computer or questioned Swegan about her computer background. Unlike her

replacement, Anderson never inquired about Complainant's educational background and prior work experience. Although Complainant's work performance and response to criticism may have raised doubt in Anderson's mind about her ability to operate a computer, his lack of interest in Complainant's computer background suggests that he never seriously considered her in his plans to computerize the office.<sup>9</sup>

26. In Swegan's case, he had more of an opportunity to observe Complainant in a work setting including her use of a computer at Glunt. However, the evidence also suggests that he did not seriously consider Complainant either. While Swegan and Complainant apparently discussed her use of a computer at AAA, Swegan never inquired about the specific computer functions that she performed at Glunt. Further, Swegan admitted that he never questioned Complainant about her computer training, use of a computer at home, or other work experience with computers.

27. A close review of Complainant's alleged problems with fax machines reveals that she eventually learned how to program the speed

---

<sup>9</sup> In reaching this conclusion, the Hearing Examiner also considered that the inability to answer phones, operate a fax machine, and take criticism does not necessarily translate into an inability to operate computers.

dial on Respondent's first fax machine. Swegan also admitted that Respondent had mechanical problems with the second fax machine at the time he wanted Complainant to correct company names for the speed dial. Yet Swegan was unwilling to give Complainant the benefit of the doubt that these problems prevented her from correcting the names. Since the ability to program a fax machine does not necessarily translate into an ability to operate a computer, it is difficult to believe that any difficulties Complainant had programming fax machines was a motivating factor in her discharge.

28. It is also difficult to believe that Swegan disqualified Complainant from consideration for making minor errors on reports that she submitted to Keating. These errors apparently were not significant enough to bring to Complainant's attention at the time. Although Keating testified that Complainant did submit reports with errors, Keating indicated that it was "easy to make mistakes" in light of the volume of numbers that needed to be recorded and calculated. (Tr. Vol. I, p. 94) More importantly, Keating never testified that she advised Swegan that Complainant would be unable to perform her accounting functions on a computer because of the type of errors she made. Swegan again was not willing to give Complainant the

benefit of the doubt despite the probability that a computer would make her accounting duties easier.

29. More troubling is Swegan's testimony that he did not believe that Complainant was capable or willing to learn computers. In his words, he considered computer training for her, but concluded that such training would not fall on "fertile ground." (Tr. Vol. I, pp. 132, 167) This testimony sharply contrasts with his other testimony that Complainant was the type of employee who "always worked harder and faster" and did whatever needed to be done. (Tr. Vol. I, p. 167) Swegan conceded that Complainant was a "very" dedicated employee who ran company errands on her own time and lent the company money. (Tr. Vol. I, pp. 111, 128) Complainant's actions throughout her employment were not those of an employee who would refuse to learn computers at the risk of losing her job.

30. Other evidence casts doubt on Swegan's credibility. On December 16, 1997, the Commission received an affidavit from Jimmy Green who was Respondent's former plant manager and a stockholder of

the company at the time.<sup>10</sup> (Comm.Ex. 10) Green stated in the affidavit, *inter alia*, that Swegan told him in 1995 that he “wanted a younger woman to do Ms. Johnson’s job because younger women dress nicer and are better at learning new computer skills.” *Id.*, (internal quotations removed).

31. The Commission Investigator, William Alford, testified that he participated in a conference call with Swegan and his counsel, Michael Mirando on March 2, 1998. Alford testified that he asked Swegan during the call whether he made the statement that “the younger generation or younger people were just better with computers” or words to that effect. (Tr. Vol. II, pp. 42-43, 66) Alford testified that Swegan told him that he might have made such a statement.

32. Swegan reversed his course at hearing. Swegan testified that he did not recall making the statement to Alford or even participating in that conference. Swegan also denied that he believed that younger persons in

---

<sup>10</sup> Respondent objected to the admission of Commission Exhibit 10 into evidence. The Commission argued that the affidavit was not being offered to prove the truth of the statements in the affidavit. Instead, the affidavit was offered to establish that (1) the Commission received the affidavit after the December 9, 1997 telephone conference and (2) certain parts of the affidavit conform to the questions that the Commission Investigator asked Swegan during the March 2, 1998 call. The Hearing Examiner admitted Commission Exhibit 10 into evidence for those limited purposes.

general were more computer literate than older persons. Swegan testified on surrebuttal that he only participated in the December 9, 1997 call.

33. The Commission argues that since Alford submitted the case on March 3, 1998, “his recollection must have been of the March 2, 1998 call, not a call placed in December of 1997.” (Comm.Br. 13) This argument is well taken. The case activity log for this case indicates that Alford submitted the case to management on March 3, 1998. (Commission Ex. 7) Alford testified that he asked Swegan about statements in Green’s affidavit shortly before he submitted the case to supervision and ended his involvement in the investigation.

34. Other evidence supports the conclusion that the call, in fact, occurred on March 2, 1998. The case activity log indicates that Alford spoke with Respondent on that day. Alford’s notes for that day, which were kept contemporaneously, demonstrate that he asked questions about allegations in Green’s affidavit. The Commission did not receive Green’s affidavit until December 16, 1997. This explains why Alford’s notes of the December 9, 1997 call do not contain any reference to statements made in Green’s affidavit. (R.Ex. A)

35. Respondent argues that the March 2, 1998 notes are ambiguous and could be interpreted to indicate that only its counsel, Mr. Mirando, participated in the call. For example, Alford testified that the reference “R” in one line of his notes referred to Swegan and the same letter in the next line referred to Mr. Mirando. Respondent also points out that Alford did not label the call as a conference call as he did on December 9, 1997, and he was unable to recall who initiated the call.

36. Although Alford’s notes were ambiguous to some extent and contained minor flaws, Alford testified that he had an independent recollection of Swegan stating on March 2, 1998 that he might have said “the younger generation or younger people were just better with computers” or words to that effect.<sup>11</sup> (Tr. Vol. II, pp. 42-43, 66) The Hearing Examiner credited Alford’s testimony on the issue. Alford had reason to remember this conversation from other conference calls with respondents because Green’s affidavit was a motivating factor in his probable cause recommendation, which he informed Swegan about on that day. (Comm.Ex. 8)

---

<sup>11</sup> Alford transposed “2/3/98” as the date of the call instead of March 2, 1998. (Comm.Ex. 8) Alford testified that this was a typographical error.

37. Respondent argues that even if Swegan made the statement to Alford, it was not an admission; Swegan only said he “might have” made the statement. (R.Br. 12) While it is true that Swegan’s statement was neither an admission nor direct evidence of age discrimination, it may be considered as circumstantial evidence bearing on the issue of pretext. Swegan’s testimony that he did not recall making the statement to Alford and only participated in the December 9, 1997 call creates a suspicion of mendacity.

38. The Hearing Examiner also doubts Swegan’s testimony that he did not believe that younger persons in general were more computer literate than older persons.<sup>12</sup> According to Alford’s March 2, 1998 notes, Swegan denied making that statement that he sought “someone who is

---

<sup>12</sup> Like most stereotypes, the belief that younger persons are better with computers than older persons has some grain of truth and perhaps is a commonly held belief. The problem with stereotypes is that they all lack universal application. In other words, although stereotypes may apply generally to a particular group, such as older persons, they are not true for all those in the group. Older persons who did not grow up with computers may become computer literate by taking computer courses or educating themselves.

In a sense, every technological advancement appears to favor the young, but only if one presupposes that older workers are more resistant to change and are adverse to learning new methods . . . this is the very type of ageist stereotype that the ADEA was enacted to address.

*Hartsel v. Keys*, 72 FEP Cases 951, 956 (6<sup>th</sup> Cir. 1996).

younger and dresses nicer” because he did not believe that Complainant “dressed poorly.” (Comm.Ex. 8) On the issue of younger persons being better with computers, Swegan told Alford that he “might have” made that statement. It is reasonable to conclude that Swegan gave that response because he, at least at that time, believed it to be true.

39. Respondent argues that the same actor inference should apply in this case. This inference allows the factfinder to infer “a lack of discrimination from the fact that the same individual both hired and fired the employee.” *Buhrmaster v. Overnite Transp. Co.*, 68 FEP Cases 766 (6<sup>th</sup> Cir. 1995). The rationale for this inference is simple:

An individual who is willing to hire and promote a person of a certain class is unlikely to fire them simply because they are a member of that class.

*Id.*, at 768.

40. The rationale for the same actor inference does not apply to this case. In *Buhrmaster*, the court recognized that circumstances might change between the hiring and firing of an employee that defeats this inference. For example, the hirer might develop an animus toward the discharged employee’s class over time.

41. In this case, there is no evidence that Swegan, who himself is in the protected age class, harbored discriminatory animus toward older persons when he discharged Complainant. Instead, the evidence suggests that Swegan acted on the stereotypical belief that Complainant was unable or unwilling to learn computers at the age of 62. Although Complainant was 58 years of age when Swegan hired her, Respondent did not have any computers at that time.

42. After a careful review of the entire record, Hearing Examiner disbelieves the underlying reasons that Respondent articulated for Complainant's discharge and concludes that, more likely than not, they were a pretext or a cover-up for age 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>13</sup>

*Id.*, at 511, 62 FEP Cases at 100.

The Hearing Examiner is convinced that neither Swegan nor Anderson seriously considered Complainant's ability to operate a computer or the option of providing her computer training because of her age or more

---

<sup>13</sup> Even though rejection of Respondent's articulated reason 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.

specifically stereotypical beliefs that older persons are unable to operate or unwilling to learn computers. Respondent's reliance on such stereotypical beliefs in Complainant's discharge constitutes age discrimination and entitles her to relief as a matter of law.

## **RELIEF**

43. When the Commission makes a finding of unlawful discrimination, R. C. 4112.05(G)(1) entitles victims of such discrimination to relief. 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).

44. 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).

45. 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.

46. 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).

47. 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.

48. 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.

49. 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).

50. In this case, the Commission presented evidence of Complainant's efforts to find other employment. Complainant testified that she has placed applications with several companies and temporary employment agencies, but her job search has been unsuccessful. Complainant testified that she was forced to collect "early social security" once her unemployment benefits expired. (Tr. Vol. I, 7-8) Complainant testified that she continued to look for employment while collecting these benefits. The Hearing Examiner credited Complainant's testimony on this issue.

51. During the hearing, 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>14</sup>

52. 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 the small size of Respondent's company and the close working relationship that Complainant's position requires with Swegan and Anderson.<sup>15</sup> *Hutchison v. Amateur Elec. Supply*, 66 FEP Cases 1275 (7<sup>th</sup> Cir. 1994). 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.

---

<sup>14</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 April 15, 1997 in this case. *Id.*

<sup>15</sup> Complainant testified that although she would return to the job, it would be "very difficult under the circumstances." (Tr. Vol. I, p. 84)

53. 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 the unlawful discrimination. *Shore*, 39 FEP Cases at 812.

## **RECOMMENDATIONS**

For all of the foregoing reasons, it is recommended in Complaint #8305 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

2. 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 April 15, 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>16</sup> and

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 one year of front pay or \$20,280.<sup>17</sup>

---

TODD W. EVANS  
HEARING EXAMINER

December 17, 1999

---

<sup>16</sup> Any ambiguity in the amount that Complainant would have earned or raises she would have received during this period should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings, if she had any, should be resolved against Respondent.

<sup>17</sup> The front pay award is based on Complainant's ending salary with Respondent. The evidence shows that Complainant worked full-time and earned \$9.75 per hour at the time of her discharge.