

## INTRODUCTION AND PROCEDURAL HISTORY

Randy Davis (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on May 5, 1998.

The Commission investigated the charge and found probable cause that Starfire Express 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 January 7, 1999. The Complaint alleged that Respondent discharged Complainant because of his race.

On May 27, 1999, the Commission moved to join Amin Khiralla as a respondent.<sup>1</sup> The Hearing Examiner granted this motion, which was unopposed, on June 15, 1999.

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<sup>1</sup> Khiralla filed a request for reconsideration and otherwise participated in the investigation of Complainant's discrimination charge. Khiralla manages two gas stations in Ohio under the trade name, Starfire Express. Complainant's charge stems from his employment at one of these gas stations.

The Commission filed an Amended Complaint on June 24, 1999. The Amended Complaint named Amin Khiralla d/b/a Starfire Express (Respondent) as the sole respondent.

Respondent filed an Answer to the Amended Complaint on August 10, 1999. Respondent admitted certain procedural allegations, but denied that he engaged in any unlawful discriminatory practices.

A public hearing was held on September 15, 1999 at the Ocasek Government Building in Akron, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 119 pages, and post-hearing briefs filed by the Commission on December 9, 1999 and Respondent on February 8, 2000.

## **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 May 5, 1998.

2. The Commission determined on October 1, 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. Complainant is a black person.

5. In early 1998, Respondent became the general manager of the Starfire Express on South Main Street in Akron. When Respondent assumed control, he continued the employment of the station manager already there.<sup>2</sup> Respondent visited the gas station approximately twice per week.

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<sup>2</sup> The record does not contain the station manager's surname. The record does indicate that his first name is "Scott", and he is a white person.

7. Complainant also visited the gas station in early 1998 and talked to the station manager regularly. Complainant asked the station manager for employment during one of their discussions. The station manager hired Complainant as a clerk in April 1998.

8. Complainant began his employment on a Monday. He worked 6:00 a.m. to 2:00 p.m. during his first two days. The station manager trained Complainant the first day and part of the second day. Complainant worked 2:00 p.m. to 11:00 p.m. by himself on Wednesday.

9. On Thursday, the station manager called Complainant at home around 8:00 a.m. The station manager told Complainant that there was a “problem”; he asked Complainant to come to the gas station. (Tr. 6, 58) The station manager also called Respondent and asked him to come there.

10. Complainant arrived at the gas station before Respondent. The station manager told Complainant that the nightly totals did not add up. Complainant denied stealing money from the gas station. Complainant became “frustrated” and raised his voice to the station

manager. (Tr. 59, 113, 114) The station manager advised Complainant that Respondent was coming to the station to handle the problem.

11. When Respondent arrived, Complainant was waiting outside the front door of the gas station. Complainant followed Respondent inside. Complainant asked the station manager about the problem. The station manager indicated the records kept by Complainant did not match the electronic printout of gas and other items sold for the previous night. Complainant told Respondent that he did not steal money from the gas station. At some point, Complainant and the station manager exchanged words with each other as their conversation became heated. (Tr. 78, 80)

12. Respondent attempted to quell the situation. He closed the gas station. He also asked Complainant and the station manager to stand on each side of him while he counted the money from the previous night.

13. Respondent opened several envelopes that Complainant had stuffed with money once the cash register reached a certain level. As instructed, Complainant recorded the amount of money in the envelopes prior to placing them in a safe. One envelope contained more money than

Complainant recorded. This caused a \$40 discrepancy in Complainant's nightly totals. Overall, Respondent found \$3.00 missing.

14. Once Respondent completed counting the money, the station manager suggested that Respondent pay Complainant while both were there. Respondent reminded the station manager that payday was on Friday. The station manager told Respondent that he did not want Complainant to work there anymore. Complainant asked Respondent to do "something." (Tr. 112) Respondent told Complainant that he could not do anything.

15. Respondent then paid Complainant in cash for the three days that he worked. Respondent also paid the station manager \$20 that Complainant owed him.<sup>3</sup>

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<sup>3</sup> At some point, the station manager informed Respondent that Complainant owed him \$20. Complainant acknowledged the debt. Respondent gave the Station Manager \$20 in Complainant's presence to defuse any further conflict.

## **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 his race.

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 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).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. 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 is normally required to first establish 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 the employment action.<sup>4</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.

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<sup>4</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 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 this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent’s articulation of legitimate, nondiscriminatory reasons 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.

8. Respondent met his burden of production with his testimony about the reasons for Complainant’s discharge. Khiralla testified that the station manager discharged Complainant because he received complaints from

females about him, and Complainant's reaction to the station manager, i.e. raising his voice and otherwise arguing with him, when confronted about nightly totals that indicated a cash shortage. (Tr. 113, 114) Khiralla further testified he did not intervene in this decision because he entrusted the station manager with the gas station's daily operations including hiring and firing decisions.

9. Respondent having met his burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of his race. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for Complainant's discharge were not the true reasons, but were "a pretext for discrimination." *Id.*, 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.

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 a question for the factfinder to answer . . . .<sup>5</sup>

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

Ultimately, the factfinder must be convinced that Complainant was the victim of unlawful discrimination.

11. The record in this case is void of any evidence that Respondent subjected Complainant to disparate treatment in approving his discharge. Likewise, the record lacks sufficient evidence to infer that Respondent's articulated reasons for Complainant's discharge were a pretext for race discrimination.

12. Complainant, who was the Commission's only witness, testified that his discharge was unwarranted because he did not steal money

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<sup>5</sup> Even though rejection of Respondent's articulated reasons 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.

from the gas station. Even if true, this opinion does not establish that Respondent's articulated reasons for Complainant's discharge had no basis in fact since neither involved theft. Respondent testified that being \$3.00 short was a common occurrence and not "terribly important." (Tr. 78, 108)

13. The Commission was also unable to provide any evidence that either the station manager or Respondent harbored discriminatory animus toward Complainant or black persons in general. The only evidence on this issue suggests otherwise. When asked whether the station manager or Respondent ever made racially derogatory comments toward him, Complainant testified emphatically:

No. No, they wasn't—it wasn't even all like that. It wasn't even all like that. It had nothing—No, No, No. It wasn't what he was calling me . . . or all that there . . . .

(Tr. 19-20)

14. Respondent argues that the allegation of race discrimination defies "common sense" in this case because the station manager knew Complainant's race when he hired and fired him. (R.Br. 2) The same actor 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.*, 61 F.3d 461, 463 (6<sup>th</sup> Cir. 1995). One federal court provided the following rationale for this inference:

From the standpoint of the putative discriminator, it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.

*Proud v. Stone*, 945 F.2d 796, 797 (4<sup>th</sup> Cir. 1991) (citation, brackets, and quotation marks omitted).

15. To apply the same actor inference, a short period of time between hiring and firing is not essential when the employee’s class does not change. *Buhrmaster, supra* at 464. However, the closer these events occur in proximity, the stronger the inference becomes.

[I]n cases where the hirer and firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor in the adverse action taken by the employer.

*Proud, supra* at 797.

16. The facts in this case provide a classic example where the same actor inference applies. The station manager hired Complainant and fired him within a four-day span. The brief period between these employment

actions creates a strong inference that race discrimination was not a determinative factor in Complainant's discharge. See *Grady v. Affiliated Central, Inc.*, 130 F.3d 553 (2d Cir. 1997) (the fact that the same person who hired plaintiff discharged her only nine days later strongly suggested that age discrimination was unlikely). The Commission did not present any evidence to rebut this inference.

### **RECOMMENDATION**

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8452.

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TODD W. EVANS  
HEARING EXAMINER

February 22, 2000