

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

VAUGHN D. GEORGE

Complainant

and

Complaint #8633

(COL) 71091298 (26096) 100198
22A-99-3003

**STATE OF OHIO,
DEPARTMENT OF REHAB & CORRECTION,
ORIENT CORRECTIONAL INSTITUTION**

Respondent

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

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INTRODUCTION AND PROCEDURAL HISTORY

Vaughn D. George (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 1, 1998.

The Commission investigated the charge and found probable cause that State of Ohio, Department of Rehabilitation and Correction, Orient Correctional Institution (Respondent) engaged in unlawful discrimination in violation of Revised Code § (R.C.) 4112.02(A) and (I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on September 16, 1999. The Complaint alleged that Complainant was disciplined more harshly than coworkers because of his race and in retaliation for filing a previous charge of discrimination against Respondent.

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 March 30, 2000 at the Orient Correctional Institution.

The record consists of the previously described pleadings; the transcript consisting of 203 pages of testimony; exhibits admitted into evidence at the hearing; the deposition transcript of Harry Kevin Williamson, consisting of 32 pages; and the post-hearing briefs filed by the Commission on May 19, 2000 and by Respondent on May 22, 2000.

FINDINGS OF FACT

The following findings are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed; each

witness's strength of memory; frankness or the lack of frankness; and the bias, prejudice, and interest of each witness. Finally, the Hearing Examiner considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on October 1, 1998.

2. The Commission determined on August 19, 1999 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A) and (I).

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

4. Respondent is an agency of the State of Ohio and an employer.

5. Complainant is a black person. Complainant is employed by Respondent as a corrections officer. On February 12, 1998, Complainant filed a charge of discrimination against Respondent.

6. On August 30, 1998, Complainant noticed that one of the cars parked in the Respondent's parking lot had a license plate holder which depicted a Confederate flag. Complainant was upset about this and reported it to Captain Danny Morris, Caucasian. The next day Complainant was involved in an incident with a coworker, Shane Sprague, who had driven the vehicle with the Confederate flag to work. They exchanged words. Later that day Sprague called Complainant and asked him if this was something they were going to have to pursue after work. (Tr. 146) Complainant reported the conversation to Captain Morris who convened an informal meeting to resolve the incident.¹ The meeting was attended by Complainant, Sprague, Captain Lopez, Captain Frye, and Correctional Officer Williamson, who represented the Union. Captain Lopez, Captain Frye, and Williamson were present as observers. (Dep. 17)

¹ The purpose of an informal meeting is to resolve matters without paperwork.

7. During the meeting, both Complainant's comments to Sprague and Sprague's comments to Complainant was discussed. Captain Morris asked both of them if there were going to be any further problems between them. Both said there would not be any problems. (Dep.Ex. 5)

8. On September 11, 1998, Complainant was assigned to provide security in a construction area in the Four-E dormitory. Complainant was responsible for maintaining security and ensuring that unauthorized inmates did not enter the area. At approximately 9:20 a.m., Complainant was observed by James Riffle, maintenance supervisor, playing cards with an inmate who was not authorized to be in the area. (Tr. 155, Resp.Ex. U) He reported the incident to his supervisor and, subsequently, prepared an incident report.

9. Riffle's observations were reported to Captain Lopez. Lopez and Officer Mallow immediately went to the area. Captain Lopez observed Complainant facing the inmate and dealing cards on the table between them. (Tr. 170-71, Resp.Ex. W) Officer Mallow, who was directly behind Complainant, did not see him holding cards. She saw the inmate holding

cards. Subsequently, she reported that it “appeared” Complainant was playing cards. (Resp.Ex. X) Captain Lopez relieved Complainant from duty in the construction area.

10. Shortly thereafter, Complainant returned to the construction area and confronted Riffle. He walked toward him and said, “How ya doin’?” Riffle backed away from him. Complainant began looking over his shoulder and repeated the phrase “How ya doin’?” several times in a raised voice. Complainant asked Riffle why he was backing up and Riffle asked Complainant why he was getting in his face. Riffle asked Complainant what he wanted and Complainant replied, “I want to talk.” Riffle told Complainant he had to go outside to talk to another correctional officer. Complainant replied, “Yeah, and that’s where I’ll get you, too.” Riffle immediately went to Captain Lopez’s office and wrote another incident report. (Tr. 157, Resp.Ex. Y) In the report he stated Complainant had threatened him with physical harm.²

² Complainant had a different version of the conversation. He testified that he said, “Well, I’ll get you outside then.” (Tr. 93) He also testified that he said, “I’ll tell you what – I’ll get you later on then.” (Tr. 36)

11. Complainant was charged with violating three of Respondent's

Rules of Conduct:

#8 Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment;

#11 Inattention to duty; and

#18 Threatening, intimidating or coercing another employee or a member of the general public

(Resp.Ex. FF)

12. Pursuant to the Collective Bargaining Agreement, Complainant was given the opportunity to participate in a pre-disciplinary hearing. The pre-disciplinary hearing was held on November 9, 1998. Complainant was present and represented by his union representative. The Hearing Officer found that Complainant violated the three disciplinary rules in that he was playing cards with an inmate, the inmate was not authorized to be in the area, and Complainant intimidated another employee by making threatening statements. (Resp.Ex. HH) Complainant was suspended for ten days.

Subsequently, as part of the grievance process, the suspension was reduced to eight days.³

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.⁴

³ The suspension was reduced to eight days because it was determined that Complainant did not violate Rule #8. (Tr. 41)

⁴ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleged in the Complaint that Complainant was suspended because of his race and in retaliation for filing a previous charge of discrimination.

2. These allegations, 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; and
- (I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

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(I) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

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 retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

RACE DISCRIMINATION ALLEGATION

5. Normally, the Commission is required to first 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 an rebuttable presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981).

6. If the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate,

nondiscriminatory reason” for the employment action.⁵ *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 the employment action. *Hicks, supra* at 511, 62 FEP Cases at 100.

⁵ 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 defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for . . . [suspending Complainant]; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.

EEOC v. Flasher Co., 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

7. 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 to 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 its burden of production through testimony and documentary evidence. Complainant was suspended for eight days because he was observed playing cards with an inmate and because he threatened a coworker.

9. Respondent having met its 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 suspending Complainant 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 reason is 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

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 race discrimination.

11. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for suspending Complainant. The Commission may directly challenge the credibility of Respondent's articulated reason by showing that the reason had no basis *in fact* or it was *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the factfinder to infer intentional discrimination from the rejection of the reason without additional evidence of unlawful discrimination.

The 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 the *prima facie* case, suffice to show intentional discrimination . . . [n]o additional proof is required.⁶

Hicks, supra at 511, 62 FEP Cases at 100.

12. In its brief the Commission challenged the credibility of the determination that Complainant was playing cards with an inmate. Complainant testified he was not playing cards with the inmate. The inmate

⁶ Even though rejection of a respondent's articulated reason is "enough at law to sustain finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* 511, 62 FEP Cases at 100, n.4.

(who did not testify at the hearing) claimed he and Complainant were not playing cards. Captain Lopez, who witnessed the incident, stated that Complainant was playing cards with the inmate. Officer Mallow, who accompanied Captain Lopez, stated she was not able to see whether Complainant was holding any cards. However, James Riffle, the maintenance supervisor, testified credibly that he observed Complainant and the inmate playing cards. (Tr. 155) The Commission did not challenge Riffle's credibility. He was a disinterested witness and had no reason to fabricate his testimony. This evidence supports Respondent's version of the card playing incident.

13. The appointing authority also chose to believe Riffle's and Lopez's version of the events instead of Complainant's version. Even if Lopez and Riffle were mistaken about what they saw, their mistaken belief does not equate to intentional race discrimination. See *Fleur v. Westbridge Consultants*, 71 FEP Cases 485, 489 (D.C. E.Texas 1994) ("discriminatory intent is not shown by the fact that the employer terminated the employee because of a mistaken belief about the employee"); *Finch v. Hercules, Inc.*, 74

FEP Cases 1571 (D.C. Del. 1994) (the “mistake” must not have been so unreasonable as to be pretextual).

The law is clear that, even if a Title VII claimant did not in fact commit the violation with which he is charged, an employer successfully rebuts any prima facie case of disparate treatment by showing that it honestly believed the employee committed the violation.

Jones v. Gerwins, 50 FEP Cases 163, 169 (11th Cir. 1989).

14. Based on foregoing discussion, the facts surrounding the card playing incident lack the “suspicion of mendacity” that is mentioned in the *Hicks* case. *Hicks, supra* at 511, 62 FEP Cases at 100.

15. The Commission also challenged Respondent’s decision to formally discipline Complainant for threatening James Riffle instead of handling the matter informally, as was done with the incident involving the Confederate flag. The Commission attempts to compare the two incidents to show pretext. The incidents are not comparable. Complainant and Sprague were not similarly situated:

. . . [T]o be deemed “similarly situated”, the individuals with whom . . . [Complainant] seeks to compare . . . her treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.

Mitchell v. Toledo Hospital, 59 FEP Cases 76, 81 (6th Cir. 1992) (citations omitted).

16. The incidents are not comparable because each incident was dealt with by a different supervisor. Captain Morris made all of the decisions surrounding the Confederate flag incident. Captain Lopez made all of the decisions about how the card playing and threat incidents were to be handled. See *Jones, supra* at 168 (“Courts have held that disciplinary measures undertaken by different supervisors may not be comparable for Title VII analysis”).

17. Furthermore, the difference in the way the two incidents were handled was probably based on the circumstances surrounding each incident. Under the circumstances, Morris’ approach was reasonable. Likewise, Lopez was not in a position to deal with Complainant’s multiple rule infractions in an informal manner. They were too serious to be dealt with informally.

18. Since the Commission could not prove that Complainant's race was a motivating factor in the decision to discipline him, the race discrimination allegation in the Complaint cannot be sustained.

RETALIATION CLAIM

19. The Complaint also alleged that Complainant was disciplined in retaliation for filing a charge of discrimination. In order to sustain its burden of proof, the Commission must prove a *prima facie* case. A *prima facie* case may be established by proving that:

- (1) Complainant engaged in an activity protected by R.C. Chapter 4112;
- (2) The alleged retaliator knew about the protected activity;
- (3) Thereafter, Respondent subjected Complainant to an adverse employment action; and
- (4) There was a causal connection between the protected activity and the adverse employment action.

Hollins v. Atlantic Co., Inc., 80 FEP Cases 835 (6th Cir. 1999), *affirming in part and reversing in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

20. The Commission proved the first element and the third element, but there was no proof to support the second element or the fourth element. The alleged retaliator in this case is Captain Lopez. The Commission's argument that Warden Lazaroff knew about Complainant's 1998 charge does not prove that Captain Lopez knew about it.

21. The Commission was also unable to establish a causal connection between the protected activity and the adverse employment action. In its brief, the Commission offered no arguments that related to the fourth element of the *prima facie* case. (Comm.Br. 14) An examination of the record reveals that there was no evidence that could be offered.

22. Since the Commission was unable to prove that Respondent suspended Complainant for eight days because Complainant filed a previous charge of discrimination, the retaliation allegation in the Complaint cannot be sustained.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8633.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

September 12, 2000