

INTRODUCTION AND PROCEDURAL HISTORY

Tracie L. Burchett (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 13, 1998.

The Commission investigated the charge and found probable cause that East Liverpool Dodge Chrysler Plymouth Jeep (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on July 1, 1999.

The Complaint alleged that Respondent discharged Complainant in retaliation for filing a previous charge of unlawful discrimination against the car dealership.

The Commission filed a Motion to Amend Complaint on September 15, 1999. The Commission moved to amend the Complaint to name

Motors Holding Co. d/b/a East Liverpool Dodge Chrysler Plymouth Jeep and Basil Mangano (Respondents) as the proper respondents in this case. The Hearing Examiner granted this motion, which was unopposed, on October 26, 1999.

Respondents filed an Answer to the Amended Complaint on December 1, 1999. Respondents admitted certain procedural allegations, but denied that they engaged in any unlawful retaliatory practices. Respondents also pled affirmative defenses.

A public hearing was held on February 24, 2000 at the Juvenile Justice Center in Lisbon, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 155 pages, exhibits admitted into evidence during the hearing, and post-hearing briefs filed by the Commission on March 24, 2000 and by Respondents on April 21, 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 October 13, 1998.

2. The Commission determined on May 20, 1999 that it was probable that Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(I).

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

4. In August 1998, Respondent Motors Holding Co. owned and operated a car dealership doing business in Ohio as East Liverpool Dodge Chrysler Plymouth Jeep. Respondent Basil Mangano, the company president, oversaw the daily operations of the car dealership. Respondents were employers at that time.

5. Respondents hired Complainant in November 1995 as a salesperson. Complainant sold cars for Respondents until she became the finance manager in the fall of 1997. While working as finance manager, Complainant became pregnant in the latter part of 1997. Complainant informed Mangano of her pregnancy.

6. Mangano eliminated the finance manager position in January 1998. Mangano hired Rick Palmer as sales manager. Palmer supervised salespersons and arranged financing for car buyers. Complainant returned to a salesperson position under Palmer's supervision.

7. In early March 1998, Complainant filed a charge of pregnancy discrimination against the car dealership. Mangano became aware of the charge shortly after it was filed. Mangano hired counsel to defend the car dealership against the charge.¹

8. On April 27, 1998, Complainant provided Irene Bender, Respondents' office manager, written notice about her maternity leave. (Comm.Ex. 3) Complainant indicated that she would be on maternity from May 16, 1998 to August 8, 1998. Complainant further indicated that she would return to work on Monday, August 10, 1998.

9. Complainant visited her obstetrician, Dr. Edward Woo, on May 12, 1998. Complainant provided Bender a physician's statement from Dr. Woo

¹ The federal Equal Employment Opportunity Commission (EEOC) investigated the charge. The EEOC dismissed the charge on July 28, 1998.

later that day. (Comm.Ex. 1, p. 9, Tr. 147) The statement placed Complainant under Dr. Woo's care from May 16, 1998 to August 8, 1998. The statement indicated that Complainant was capable of returning to work "after being released by [her] physician." *Id.*

10. Complainant went on unpaid maternity leave on May 16, 1998. She gave birth on July 11, 1998.

11. In early to mid-August 1998, Complainant made two social visits to Respondents' place of business with her newborn baby. Complainant informed Bender during at least one of these visits that she intended to return to work once her physician released her to do so.² Mangano was present in the office during one of these visits; Bender informed him about the other visit. (Tr. 139)

12. Complainant visited Dr. Woo for her six-week postpartum checkup during the week of August 24, 1998. Following this checkup, Dr.

² Complainant gave birth one week after her July 4, 1998 due date. (Comm.Ex. 1, p. 1) This delay pushed Complainant's six-week postpartum checkup back one week to August 17, 1998. Complainant attempted to schedule an appointment with Dr. Woo for that week, but she had to wait until he returned from vacation.

Woo provided Complainant with a physician's statement that released her to work on August 31, 1998. (Comm.Ex. 1, p. 10)

13. Complainant reported to work on August 31, 1998 at her prior starting time of 10:00 a.m. Upon arrival, Complainant went to Bender's office. Complainant gave Bender the physician's statement that released her to work. Bender placed the physician's statement in Complainant's personnel file. Bender assisted Complainant in obtaining a time card. Bender also helped Complainant get buyer's orders and work supplies.

14. As Complainant walked through the office, she briefly exchanged greetings with Shawn Broadbent.³ Complainant went to the office that she used as a salesperson prior to her maternity leave.

15. Complainant found "a big mess" when she walked into the office. (Tr. 148) The desk had Styrofoam cups, cigarette butts, cigarette ashes, and stacks of papers on it. Complainant stacked the papers, which she

³ Broadbent worked as a salesperson prior to Complainant's maternity leave. In early July 1998, Broadbent became the sales manager. When Complainant returned to work, she was unaware of Broadbent's promotion.

recognized as containing Mangano's handwriting, on the corner of the desk to clean its surface. Complainant threw away the coffee cups and cigarette butts.

16. Meanwhile, Broadbent called Mangano at the bank. Broadbent informed Mangano that Complainant had returned to work. (Tr. 82) Mangano indicated that he would be over right away.

17. Mangano walked into the office at approximately 10:30 to 10:45 a.m. and started screaming at Complainant who was on the telephone. Mangano advised Complainant that he received a bill from his attorney. Mangano told Complainant that he no longer needed her and ordered her to leave the premises. Complainant made a copy of her timecard and left as instructed.

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 Amended Complaint that Respondents discharged Complainant in retaliation for filing a previous charge of unlawful discrimination against the car dealership.

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:

- (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. (Emphasis added.)

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).

5. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973) for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful

retaliation by a preponderance of the evidence. The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, 116, (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 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 969, n.13. In this case, the Commission may establish a *prima facie* case of unlawful retaliation by proving that:

- (1) Complainant engaged in an activity protected by R.C. Chapter 4112;⁴

⁴ The retaliation provision under R.C. 4112.02(I) contains an opposition clause and a participation clause. Since courts have analyzed these clauses differently, it is important to focus on the nature of the alleged protected activity.

The distinction between employee activities protected by the participation clause and those protected by the opposition clause is important because federal courts have generally granted less protection for opposition than participation.

Aldridge v. Tougaloo College, 64 FEP Cases 708, 711 (S.D. Miss. 1994), *citing Brown v. Williamson Tobacco Co.*, 50 FEP Cases 365 (6th Cir. 1989).

Courts usually grant absolute protection for participation activities such as filing a charge of unlawful discrimination. *Proulx v. CitiBank*, 44 FEP Cases 371 (S.D.N.Y. 1987).

- (2) The alleged retaliator knew about the protected activity;
- (3) Thereafter, Respondents 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), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

7. The Commission established the first two elements of a *prima facie* case of unlawful retaliation. It is undisputed that Complainant engaged in protected activity by filing a charge of unlawful discrimination. Likewise, Respondents do not dispute that Mangano knew about the charge shortly after its filing.

8. Respondents apparently challenge that Complainant was subjected to an adverse employment action. Mangano testified that he never told Complainant that she was discharged on August 31, 1998, and he never intended such a result.

9. Regardless of Mangano's intentions, both Complainant and Mangano testified that he ordered her to leave the premises on August 31,

1998. In fact, Mangano testified that he told Complainant “to get the hell out of here.” (Tr. 90) Respondents did not present any evidence that Mangano asked Complainant to return after August 31, 1998 or took any other subsequent action placing her on notice that she remained employed. Although Complainant was never formally discharged, Mangano’s actions toward her on August 31, 1998 had the same effect.⁵

10. The Commission also established the fourth element of a *prima facie* case. Complainant testified that Mangano told her during his tirade that he received a bill from his attorney. This testimony, which the Hearing Examiner credited, provides the necessary causal connection between Complainant’s filing of a discrimination charge and her subsequent discharge for purposes of proving a *prima facie* case. Mangano was unable to rebut Complainant’s testimony on this issue.

11. The Commission having established a *prima facie* case, the burden of production shifted to Respondents to “articulate some legitimate, nondiscriminatory reason” for the employment action. *McDonnell Douglas*,

⁵ The Ohio Bureau of Employment Services (OBES) determined that Complainant was discharged from her employment at the car dealership. (Comm.Ex. 5) Although the Commission is not bound by the factual determinations of other state agencies, such determinations may be considered in finding facts in this case.

supra at 802, 5 FEP Cases at 969. To meet this burden of production,

Respondents 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 of unlawful retaliation 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.

12. Respondents met their burden of production with Mangano’s testimony. Mangano testified that he went “ballistic” on August 31, 1998 because Complainant had removed his papers from the desk and placed them on the floor next to the wastepaper basket. (Tr. 69, 99) Mangano further testified that he became “livid” that day because some of his papers were in the wastepaper basket as well. (Tr. 85, 99)

13. Respondents having met their burden of production, the Commission must prove that they retaliated against Complainant because

she filed a charge of unlawful discrimination. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondents' articulated reasons for Complainant's discharge were not their true reasons, but were a "pretext for . . . [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, quoting *Burdine*, 450 U.S. at 253, 25 FEP Cases at 115.

[A] reason cannot be proved to be a "pretext for . . . [unlawful retaliation]" unless it is shown *both* that the reason was false, *and* that . . . [unlawful retaliation] was the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

14. Thus, even if the Commission proves that Respondents' 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 . . . [unlawful retaliation] is correct. That remains 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 unlawful retaliation.

15. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondents' articulated reasons for Complainant's discharge. The Commission may directly challenge the credibility of Respondents' articulated reasons by showing that the reasons had no basis *in fact* or they were *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 a violation of R.C. 4112.02(I) from the rejection of the reasons without additional evidence of unlawful retaliation.

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 . . . [unlawful retaliation] . . . [n]o additional proof is required.⁶

Hicks, supra at 511, 62 FEP Cases at 100 (emphasis added).

16. The Commission may indirectly challenge the credibility of Respondents' reasons by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reasons are a pretext or coverup for unlawful retaliation. *Manzer, supra* at

⁶ Even though rejection of a 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.

1084. This type of showing, which tends to prove that the reasons did not *actually* motivate the employment decision, requires the Commission produce additional evidence of unlawful retaliation besides evidence that is part of the *prima facie* case. *Id.*

17. In this case, the Commission presented credible evidence that challenged the factual accuracy of Respondent's articulated reasons for Complainant's discharge. Contrary to Mangano's testimony, Complainant testified that she only moved his papers to the corner of the desk to clean it; she denied placing them on the floor or in the wastepaper basket. The Hearing Examiner resolved this factual dispute in Complainant's favor.

18. In making this credibility determination, the Hearing Examiner considered Broadbent's testimony that he saw Complainant in the office "cleaning out some things" and "throwing some stuff away." (Tr. 111, 112) This testimony does not necessarily support Mangano's testimony that he saw some of his documents in the wastepaper basket. Broadbent never testified that he saw Complainant throwing *documents* away on that day. Complainant acknowledged that she threw away Styrofoam cups and cigarette butts so she could work at the desk.

19. Respondents argue that Complainant attempted to provoke Mangano “by her actions on August 31, 1998.” (R.Br. 13) This theory lacks support in the record. Respondents have not offered any explanation why Complainant would want to provoke Mangano or discard documents belonging to him. Complainant simply returned to the office she used prior to her maternity leave. While Complainant testified that she saw Mangano’s handwriting on the documents, it is more plausible that she stacked them on the corner of the desk so she could work on it.

20. Respondents also contend that they had other legitimate reasons to discharge Complainant such as poor work performance and her failure to notify them of her exact return to work date.⁷ Respondents argue that the Commission “cannot prevail if it appears from the evidence that the

⁷ Although obstetricians are able to estimate “due dates” for pregnant females with some accuracy, it is not an exact science. It is also common knowledge that most obstetricians do not release mothers to work until their six-week postpartum checkup. In this case, Complainant’s return to work was delayed because her child arrived one week late, and she had to wait one week for her six-week checkup because her physician was on vacation. In light of these facts, Complainant was not in a position to give Respondents an exact return to work date. Complainant’s physician statement, which she provided to Bender on May 12, 1998, placed Respondents on notice that she would return to work “after being released by [her] physician.” (Comm.Ex. 1, p. 9, Tr. 147) Complainant also told Bender during at least one of her social visits to the office in early to mid-August 1998 that she intended to return to work upon release from her physician.

employer would have made the same decision regardless of Complainant's participation in protected activity." (R.Br. 14) Respondents make this argument despite Mangano's testimony that he never intended to discharge Complainant. Respondents cannot maintain both positions. Respondents provided no evidence that the car dealership would have discharged Complainant on August 31, 1998 regardless of any unlawful retaliatory behavior.

21. After a careful review of the entire record, the Hearing Examiner disbelieves the underlying reasons that Respondents articulated for Complainant's discharge and concludes that, more likely than not, they were a pretext or a cover-up for unlawful retaliation. As a victim of unlawful retaliation, Complainant is entitled to relief as a matter of law.

RELIEF

22. When the Commission makes a finding of unlawful discrimination, the victims of such discrimination are entitled to relief. R.C. 4112.05(G)(1). Title VII standards apply in determining the appropriate relief under the statute. *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89.

23. 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).

24. 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 (6th Cir. 1983).

25. 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”; a reasonable calculation will suffice. *Salinas v. Roadway Express, Inc.*, 35 FEP Cases 533, 536 (5th Cir. 1984). The Commission should resolve any ambiguity in the amount of back pay against Respondents. *Rasimas, supra* at 698; *Ingram, supra* at 94.

26. 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 (4th Cir. 1985).

27. 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.

28. 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 (6th 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.

29. 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).

30. During the hearing, Respondents did not present any evidence that substantially equivalent positions to Complainant's salesperson job at the car dealership were available in East Liverpool or the surrounding area. Nor did Respondents provide sufficient evidence to conclude that Complainant failed to exercise reasonable diligence in seeking such positions. Absent such evidence, Respondents failed to meet their burden of proving that Complainant's mitigation efforts were insufficient. Therefore, Complainant is entitled to back pay, less her interim earnings.⁸

⁸ Complainant is also entitled to prejudgment interest. *Ingram, supra* at 93. Such interest is usually calculated from the time of the unlawful discriminatory act or August 31, 1998 in this case. *Id.*

31. The evidence shows that Respondents sold the car dealership to John Seretti at the end of September 1998. This sale, in itself, did not sever Respondents' pay back liability for their retaliatory actions.

The sale of corporate assets to a successor corporation does not necessarily limit the predecessor corporation's liability for back pay subsequent to the sale. Indeed, a Title VII plaintiff may be barred from seeking back-pay liability from a successor corporation if the predecessor corporation is fully able to provide relief. The employer's liability should be based on the extent to which its illegal action proximately caused plaintiff's damages.

Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1526 (11th Cir. 1991) (footnotes, quotation marks, and brackets omitted).

32. In *Weaver*, the court refused to sever the employer's back pay liability by the sale of its assets to a successor corporation because the evidence showed that but for his discharge, the plaintiff would have been hired by the successor corporation like other managers who held his position.

. . . Title VII should not put the prevailing claimant in a better position than similar employees who were not discriminated against, but conversely he should not be disadvantaged. Instead, he should be restored to or compensated for the employment opportunities that were available to other management personnel at Casa Gallardo.

Id., at 1527.

33. The Commission argues that if Respondents had not discharged Complainant on August 31, 1998, she would have been hired, like Respondents' other employees, by either John Seretti or Mangano's other business, Newell Central Services, Inc. This argument is well taken. Mangano testified that Seretti hired his remaining employees (except for Broadbent who Newell hired) after Seretti purchased the car dealership in late September 1998. (Tr. 58-59, 60)

34. As in *Weaver*, the evidence in this case supports the conclusion that had Complainant held her salesperson position with Respondents at the time of the sale to Seretti, she would have remained employed by Seretti in that position. Thus, Respondents are liable for Complainant's back pay prior and subsequent to the sale because their unlawful retaliatory behavior deprived Complainant an employment opportunity offered to her co-workers one month later. Respondents did not present any evidence of intervening circumstances that severed their back pay liability after the sale.⁹

⁹ Respondents request that the unemployment compensation that Complainant received be deducted from any back pay award. This request is denied because such benefits are not "interim earnings and should not be deducted from a back pay award made pursuant to R.C. 4112.05(G)." *Ingram, supra* at 95.

35. In addition to back pay, Complainant is also “presumptively entitled to reinstatement.” *Ford, supra* at 1666. However, reinstatement is inappropriate here because Respondents no longer own or operate the car dealership where Complainant worked.¹⁰ Since reinstatement is inappropriate and an award of back pay does not redress Complainant’s future economic loss caused by her unlawful discharge, the Hearing Examiner recommends that Respondents pay Complainant front pay.

36. Front pay is compensation for the “post-judgment effects of past discrimination.” *Shore v. Federal Express Corp.*, 39 FEP Cases 809, 811 (6th Cir. 1985). 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 unlawful discrimination, “neither more nor less.” *Suggs v. Servicemaster*

¹⁰ Neither Seretti nor the current owner, if different, was named as a respondent in this case. Therefore, the issue of successor liability is not before the Hearing Examiner.

Educ. Food Management, 72 F.3d 1228, 1234 (6th Cir. 1996) (quotation marks and citation omitted).

36. Generally, the following factors are relevant in awarding front pay:

[W]ork life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which a plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value.

Davoll v. Webb, 194 F.3d 1116, 1144 (10th Cir. 1999) (citation omitted).

Besides these factors, Complainant's future as a car salesperson may be considered. *Id.*, citing *Suggs, supra* at 1234. Overall, a front pay award should reflect the individualized circumstances of the employee and the employer involved. *Id.*, at 1144.

37. Given that Complainant's discharge occurred on August 31, 1998, the Hearing Examiner recommends that Respondents pay Complainant front pay for six months or \$9,000. This award provides

Complainant more than two years to become re-employed as a car salesperson or obtain a substantially equivalent position with reasonable efforts to find such a position.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint #9013 that:

1. The Commission order Respondents to cease and desist from all retaliatory practices in violation of R.C. Chapter 4112; and
2. The Commission order Respondents to submit to the Commission within 10 days of the Commission's Final Order a certified check payable to Complainant for the amount that she would have earned had she been employed by Respondents as a salesperson on August 31, 1998 and continued to be so employed up to the date of the Commission's Final

Order, less her interim earnings, plus interest at the maximum rate allowable by law.¹¹ This check should also include \$9,000 in front pay.

TODD W. EVANS
HEARING EXAMINER

May 4, 2000

¹¹ Any ambiguity in the amount that Complainant would have earned during this period should be resolved against Respondents. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondents.