

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**KATHRYN OGLETREE**

Complainant

and

**OHIO WESLEYAN UNIVERSITY**

Respondent

Complaint #8074

(COL) 71030696 (23749) 082696  
22A-96-3886

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

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## INTRODUCTION AND PROCEDURAL HISTORY

Kathryn Ogletree (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on August 26, 1996.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by Ohio Wesleyan University (Respondent) (University) in violation of Revised Code (R.C.) § 4112.02(A).

The Commission's efforts to eliminate the alleged unlawful discriminatory practices by conciliation were unsuccessful.<sup>1</sup> A complaint was issued on August 21, 1997.

The Complaint alleged that Complainant was denied a promotion because of her race.

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<sup>1</sup> Respondent contested the allegation that the Commission attempted conciliation in this case. My recommendation makes it unnecessary to consider their arguments, although I believe the documentation supports the conclusion that the Commission attempted to eliminate the alleged unlawful discriminatory practices by conciliation and that attempt was unsuccessful.

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 8-9, 1999 at the Commission's Central Office in Columbus, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 450 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on May 10, 1999 and by Respondent on May 28, 1999.

## **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 August 26, 1996.

2. The Commission determined on April 3, 1997 that it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of R.C. 4112.02(A).

3. The Commission attempted to eliminate the alleged unlawful discriminatory practices by conciliation. The Commission issued its complaint after conciliation failed.

4. Respondent is an undergraduate liberal arts college located in Delaware, Ohio. Respondent is an employer. Respondent's student population is approximately 1,850; 5% are African-American.

5. Complainant is African-American.

6. Complainant has been employed by Respondent since 1988 as the Director of Minority Student Affairs. Her primary job duty is to provide services and support to minority students. (Comm.Ex. 10) She has a B.S. degree in psychology (1971), a M.S. degree in guidance and counseling (1972), and a Ph.D in counseling psychology (1976). She has experience as a psychologist. She has also taught at the university level.

7. In July 1994, Thomas Courtice, (Caucasian), became the President of Ohio Wesleyan. When he took over, the University had a \$4,500,000 deficit in its annual operating budget. It was his task to eliminate that deficit. In order to do so, a decision was made to reduce personnel costs by \$2,000,000. This necessitated eliminating various positions within the faculty and the administration.

8. Two of the positions that were eliminated were the positions of Dean and Associate Dean of the Division of Student Services (DSS). Both these positions were held by white males. They were terminated, effective July 1, 1996.

9. DSS was reorganized into two divisions, Student Life and Counseling Services. Two new positions were created to oversee these new divisions, Chair of Student Life and Chair of Counseling Services. President Courtice made the decision about who would fill the vacant positions. The positions were not posted; there was no formal selection process.

10. President Courtice believed that he had the authority to make the appointments in this manner, although it was contrary to the University's Affirmative Action Plan (AAP) which required all permanent positions to be filled through a formal selection process.

11. President Courtice believed that he had an understanding with the Affirmative Action Council (Council). The Council monitored the AAP. President Courtice believed he could make these appointments without going

through the formal selection process pursuant to this understanding. Prior to these appointments, President Courtice had appointed administrators to other positions where they would assume additional duties.

12. President Courtice decided to appoint Dr. David S. Cozzens, (Caucasian), as Chair of the Division of Student Life (DSL). Dr. Cozzens was the Director of University Counseling Services (UCS), a subdivision of the DSS. He decided to appoint Dr. Janet M. Rogers, (Caucasian), as Chair of the Division of Counseling Services (DCS). Dr. Rogers was a counselor in UCS. The appointments were effective July 1, 1996.

13. Prior to making the announcement, President Courtice met with Dr. Rogers and Dr. Cozzens to advise them that he was going to appoint them to the new positions and to discuss the new organizational structure.

14. Dr. Cozzens had a B.S. degree in psychology (1973), a Masters degree in counseling (1978), and a Ph.D in counseling psychology (1990). He had been employed by Ohio Wesleyan since 1992 as the Director of

University Counseling Services. He had previous experience teaching at the university level and practicing psychology.

15. When Complainant learned about the appointments, she was shocked. Complainant's position was equal to Dr. Cozzens' position. The Office of Minority Affairs was also a subdivision of DSS. Complainant and Dr. Cozzens both reported to the Dean and Associate Dean of Student Services. Complainant wanted to be considered for the position that was awarded to Dr. Cozzens. She complained to the affirmative action officer. When Complainant did not get a response, she contacted President Courtice directly by filing a grievance, stating that she felt personally discriminated against. She complained that the Affirmative Action Plan was not followed. She asked President Courtice to rescind the appointments.

16. President Courtice was surprised when he received Complainant's grievance. He believed that he was in compliance with the Affirmative Action Plan and that he had an understanding with the Council regarding how the positions were to be filled during the reorganization process. This was the first time anyone had ever complained about the process.

17. President Courtice met with Complainant on two occasions to try to explain to her the basis for his decision to award the position to Dr. Cozzens and his reasoning for making the appointments without using the formal selection process. Complainant continued to insist that the appointments should be rescinded.

18. On May 4, 1996, the Council passed a resolution recommending that the AAP be followed in filling the two new positions. President Courtice agreed to rescind the appointments and fill the positions using a formal internal selection process. Job descriptions were written for the two positions, a search plan was developed, a search committee was appointed, the positions were posted, and applications were submitted and received. Two persons applied for the position of Chair of Student Services, Complainant and Dr. Cozzens. Dr. Rogers was the only applicant for the other position.

19. A Search Committee was selected by the Affirmative Action Officer and the Provost. It was chaired by Provost William C. Louthan (Caucasian). The members were Lynda K. Hall, (Caucasian), Associate Professor of

Psychology, Stewart W. Peckham, (Caucasian), Director of Career Services, (a subdivision of the new Division of Counseling Services, formerly a subdivision of the Division of Student Life), and Beverly J. Rose, (African-American), the Affirmative Action Office's representative. Rose was appointed by the Affirmative Action Officer. The Provost made the other appointments.

20. The Search Committee interviewed each of the applicants. President Courtice also interviewed each applicant for approximately one hour.<sup>2</sup> Both applicants also met with a number of University groups. Written comments from the faculty and students about the candidates were solicited and forwarded to the Search Committee.

21. After the interviews were completed, the Search Committee met and discussed the strengths and weaknesses of each candidate. They reviewed all of the documentation that was available. They made a unanimous recommendation that Dr. Cozzens be appointed to the position of

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<sup>2</sup> He wrote a memo to the Search Committee summarizing the interviews. He recommended Dr. Cozzens for the position. His letter was considered by the Search Committee, but was not a motivating factor in their decision. (Tr. 411, 440)

Chair of Counseling Services. They documented their recommendation with ten

reasons supporting their decision. They concluded that both candidates had similar educational backgrounds. They believed that Dr. Cozzens was “a substantially stronger candidate” because:

- (1) He has a far greater familiarity with the following areas of responsibility in student life: residential life, judicial affairs, public safety, student activities, new student orientation, and retention related work;
- (2) He has substantially greater capacity to articulate and communicate student life issues to various constituencies; students, parents, the public, and the press;
- (3) He has far superior and demonstrated skills with management, organization, leadership, and staff management (indeed, there is concern, based on input from staff, that Kathy Ogletree has a tendency to schedule meetings without all members being made aware, to cancel meetings without notifications, or to be late to meetings, and to be late in responding to phone mail and memos);
- (4) He has a better track record of collaborative work with faculty;
- (5) He has a better appreciation for the complexities/demands of the position;
- (6) He has a far more detailed, accurate, realistic working knowledge of the current state of student affairs on campus,, is better with the “nuts and bolts” of the job, has more talent for handling all aspects of the job, a more acute awareness of the broad array of responsibilities of the job;

- (7) He gave far superior answers to questions regarding retention and for dealing with the challenges presented to the system by an extraordinarily large incoming freshman class;
- (8) He is perceived to have a far greater capacity to serve the needs of all students;
- (9) He has demonstrated more involvement in professional associations and activities, and would be better able to facilitate the professional development of members of the staff; [and]
- (10) He articulated a more holistic approach to student development and also demonstrated experience in a greater breadth of student programs.

(Comm.Ex. 19)

22. President Courtice accepted their recommendation and appointed Dr. Cozzens to the position.

## 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.<sup>3</sup>

1. The Commission alleged in the Complaint that Complainant was denied a promotion because of her race.

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

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<sup>3</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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(E) and (G).

4. Federal case law applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm.* (1991), 61 Ohio St.3d 607. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). *Id.*

5. Under Title VII case law and under Ohio law, discrimination can be proven by direct and circumstantial evidence. Direct evidence is “[e]vidence which, if believed, proves the fact in issue without inference or presumption.”

*Black's Law Dictionary*, Sixth Ed. p. 460.

Strictly speaking, the only "direct evidence" that a decision was made "because of" an impermissible factor would be an admission by the decisionmaker such as "I fired him because he was too old." Even a highly probative statement like "you're fired, old man" still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision.

*Tyler v. Bethlehem Steel Corp.*, 59 FEP Cases 875, 882 (2d Cir. 1992).

6. In this case there was no direct evidence as it is defined above. There was no evidence of remarks that were made about Complainant from which one could conclude without inference that anyone involved in the selection process had a discriminatory animus toward Complainant or African-Americans in general.

7. Normally, when there is no direct evidence of discrimination, the Commission must prove a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. The establishment of a *prima facie* case creates a rebuttable

presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981).

8. An employee may establish a *prima facie* case of intentional discrimination using the “*McDonnell Douglas*” formula. Under *McDonnell Douglas*, the Commission bears the initial burden to prove a *prima facie* case of discrimination by proving that:

- (1) The employee was a member of a protected class;
- (2) She was qualified for the position; and
- (3) She was treated differently than “similarly situated” employees that were not members of that class.

*Mitchell v. Toledo Hospital*, 59 FEP Cases 76, 80 (6<sup>th</sup> Cir. 1992).

9. The Ohio Supreme Court has held that a *prima facie* case can also be proven by what the Court characterized as “direct evidence”, which is circumstantial in nature. As the Court explained it:

It means that a plaintiff may establish a *prima facie* case of . . . [race] discrimination by directly presenting evidence, of any nature, to show that the employer more likely than not was motivated by discriminatory intent.

*Mauzy v. Kelly Services, Inc.*, 664 N.E. 2d 1272, 1279 (Ohio 1996).

10. Thus, the Commission can prove a *prima facie* case of discrimination if there is sufficient circumstantial evidence to support an inference of discrimination. However, the ultimate burden still rests with the Commission to show that Complainant was not selected for the position of Chair of Student Life because of her race. *Mauzy, supra* at 1280, Syllabus 5.

11. The Commission argues that there is sufficient circumstantial evidence to infer discrimination in this case without resorting to the *McDonnell Douglas* formula. I disagree. The Commission is merely criticizing the process that was followed. These criticisms, even if they were valid, do not support an inference that the process was, as the Commission puts it, “bogus”.

12. This would have taken a conspiracy of immense proportions. I am not prepared to make such a giant, inferential leap. There is no evidence to show that the President, the Search Committee, the Affirmative Action Officer, the student body president, and others conspired to rig the selection process so that it would automatically result in the selection of Dr. Cozzens.

13. Nor was there any circumstantial evidence from which one could infer that the decision-makers, the Search Committee, were biased against Complainant. For instance, there was no evidence that Complainant was more qualified than Dr. Cozzens. A strong argument could be made that Complainant was less qualified. She had much narrower job duties than Dr. Cozzens. At best, they were equally qualified. Of course, Respondent is free to choose one applicant over another when they are equally qualified.<sup>4</sup>

14. The Search Committee found Dr. Cozzens to be the most qualified applicant. The two members of the Selection Committee who testified at the hearing were very credible. They addressed the Commission's criticisms of the process. They explained how the search was conducted. They explained those aspects of the search that were not covered by the search plan. For example, they explained the basis for their decision not to check references (which was not required by the search plan). They explained why comments were solicited from students. It was deemed appropriate to get as much input as possible from students about the candidates and to give

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<sup>4</sup> In its brief, the Commission did not make any arguments regarding the candidates' comparative qualifications, thus conceding this point.

students the opportunity to interact with the candidates because the DSL was set up to serve students.

15. This was also credible testimony that the Search Committee did not consider any of Dr. Cozzens' accomplishments after his initial appointment was rescinded. (There was also no evidence that he did anything during that period of time that would give him an advantage in the selection process, although he was paid a stipend to be a "safety valve" for students if that was necessary.)

16. The Commission also criticized President Courtice's initial decision not to engage in a formal selection process as required by the AAP. Apparently the Commission believes this is evidence supports an inference that President Courtice decided not to engage in a formal selection process because he did not want to consider Complainant for the position due to her race. The failure to comply with an AAP could indicate an intent to discriminate against the person who was denied the plan's benefits. However, a violation of an AAP is not, *per se*, a violation of Title VII. The Commission has no jurisdiction to prosecute an employer for violating its AAP. *Cf. Smith v.*

*Board of Public Utilities*, 38 F.Supp 2d 1272, 1286-87 (D. Kan. 1999) (citations omitted) (“Absent a showing of discrimination, Title VII recognizes no cause of action for failing to implement or utilize an affirmative action program”). In any event, ultimately, the AAP was not violated.

17. The evidence showed that President Courtice’s initial decision not to follow the AAP was motivated by the circumstances, an economic crisis which necessitated a rapid reorganization which would result in a substantial savings in personnel costs. He believed that his methodology was approved by the Affirmative Action Council. The evidence indicates the Council had given him some flexibility in how he approached the reorganization, although apparently not as much flexibility as he thought they had given him. Thus, while there may have been a misunderstanding about President Courtice’s authority, his actions were not motivated by any discriminatory animus.

18. Since there was insufficient “direct evidence” to prove a *prima facie* case of discrimination, the *McDonnell Douglas* paradigm is appropriate.

The caliber of evidence as “direct” does, indeed eschew reliance on the *McDonnell Douglas* paradigm, not because it is the sole alternative method by which to create an inference of discrimination, but because it rises to the level of actually proving discrimination.

*Mauzy, supra* at 1279.

19. Under the *McDonnell Douglas* paradigm, it is appropriate to take an analytical shortcut and go directly to an examination of Respondent’s legitimate, nondiscriminatory reasons for appointing Dr. Cozzens Chair of Student Services.<sup>5</sup>

20. The Search Committee gave ten reasons for selecting Dr. Cozzens over Complainant. The Commission must show by a preponderance of the evidence that these ten reasons were not the Search Committee’s true

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<sup>5</sup> Respondent’s articulation of legitimate, nondiscriminatory reasons for failing to promote Complainant 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 Svc. Bd. of Governors v. Aikens*, 460 U.S. 711, 31 FEP Cases 609 (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.

reasons, but were a pretext for discrimination. *Hicks, supra* at 511, 62 FEP Cases at 100.

[A] reason cannot be proved to be a “pretext for discrimination” unless it is shown *both* that the reason is false, *and* that discrimination is the real reason.

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

21. The Commission was unable to meet its burden of proof. The ten reasons given by the Search Committee for preferring Dr. Cozzens over Complainant were not challenged by the Commission. The ten reasons appear to be accurate, logical business reasons.

22. Since the Commission was unable to prove that Respondent’s legitimate, nondiscriminatory reasons were a cover-up for pretext or discrimination, and there was insufficient direct evidence to infer that race was a motivating factor in the decision, the Complaint must be dismissed.

## **RECOMMENDATION**

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8074.

FRANKLIN A. MARTENS  
CHIEF HEARING EXAMINER

November 24, 1999