

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

ROBERT HILL

Complainant

and

BUCKEYE TERMINEX CO., INC.

Respondent

Complaint #8202

(COL) 71011097 (24222) 020797
22A-97-3398

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

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INTRODUCTION AND PROCEDURAL HISTORY

Robert Hill (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on February 7, 1997.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by Buckeye Terminex Co., Inc. (Respondent) in violation of Revised Code (R.C.) § 4112.02(A) and (I).

The Commission's efforts to eliminate the alleged unlawful discriminatory practices by conciliation were unsuccessful. A complaint was issued on January 29, 1998.

The Complaint alleged that Respondent discharged Complainant because of his race and in retaliation for his complaints of racial discrimination.¹

¹ Although the Complaint alleged that Complainant was discharged in retaliation for engaging in protected activity, there was no evidence presented regarding this allegation at the hearing and no arguments were made in the Commission's post-hearing brief regarding this allegation. Therefore, it is not necessary to consider this allegation.

Respondent filed a timely Answer to the complaint, denying that it engaged in any unlawful discriminatory practices. Respondent also filed a Motion to Dismiss on August 24, 1998.²

A public hearing was held on September 8-9, 1998 at the Commission's Central Office Conference Room in Columbus, Ohio. Respondent filed a Motion to Submit Additional Evidence on October 16, 1998.

The record consists of the previously described pleadings; the transcript consisting of 458 pages of testimony; written stipulations and exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on December 23, 1998 and by Respondent on January 14, 1999. The Commission filed a reply brief on January 25, 1999.

² Respondent's Motion to Dismiss was denied by the Hearing Examiner. Respondent's Motion to Submit Additional Evidence is also denied.

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 February 7, 1997.

2. The Commission determined on January 8, 1998 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 a corporation doing business in Ohio and an employer.

5. Complainant is a black person.

6. Complainant was employed by Respondent on two occasions. One the first occasion he was employed from May 1996 to July 1996. He was employed in the Pest Department and supervised by Pete Kelly, Caucasian. Kelly had been the manager of that department for six or seven years. During his first stint of employment, a dispute arose regarding the amount of compensation Complainant was entitled to. Complainant became very

agitated and argumentative. His behavior was characterized by Kelly as violent. His behavior frightened some of the office workers at Respondent's facility. Kelly decided to discharge Complainant because of his behavior.

7. Kelly's supervisor, John Breen, Caucasian, was not present at the time and did not play a role in the decision to terminate Complainant's employment.

8. Complainant re-applied for employment in November 1996. He was remorseful about his behavior during his previous employment. Breen left the decision regarding rehire up to Kelly who decided to give Complainant another chance. Complainant's second stint of employment lasted approximately six weeks. He was discharged on January 10, 1997.

9. During his second stint of employment, Complainant was assigned to the "Metro route". This assignment was supposed to be temporary because it was the only open position that was available when he applied for re-employment. Subsequently, Complainant was offered a full-time

residential position by Kelly, similar to the position he previously held. He refused it because it required more work.

10. The Metro route serviced the 3000 dwelling units owned by the Columbus Metropolitan Housing Authority (Authority). Respondent had a contract with the Authority to provide pest control services. The services primarily consisted of periodically visiting each unit and applying various chemicals to each of the rooms in the unit in order to control the primary pest, roaches. Usually, two service technicians worked as a team to service the housing projects. They were able to service between 150 and 200 units each day. The time it took to service each unit depended upon the problems. Vacant units took almost no time. The units that were not vacant could also be serviced rapidly if there were no problems. The problem units might take up to a half hour. Units that did not have problems could be serviced in five to ten minutes or less.

11. The service technicians on the Metro route were paid a fixed salary, \$310 per week. They were supposed to work from 8:30 a.m. to 4:30 p.m. five days a week. They were not permitted to service the units on the

weekends. If they finished their daily assignments before 4:30 p.m., they were supposed to report back to the office for additional assignments.

12. Metro service technicians were also eligible for assignments for other types of services Respondent performed, such as clean outs, a service provided residential or commercial customers. Kelly assigned Metro technicians additional work if they wanted it during the summer and fall seasons when the insects were more active and Respondent had more business than they could handle. There were also additional assignments available during the winter months. Complainant did not usually volunteer for additional assignments because he did not want to work the additional hours.

13. Shortly after Complainant began working his second stint of employment with Respondent, Respondent began receiving complaints about his work. The complaints included complaints that Complainant was not keeping appointments or was not properly servicing the units. In addition to complaints about service provided by Complainant, other problems were brought to Breen's and/or Kelly's attention regarding Complainant's behavior.

14. Bill Zupovich, a manager, had a conversation with Larry Scott who worked with Complainant on the Metro route.³ Because Complainant appeared to be using an excessive amount of chemicals, Zupovich asked Scott if Complainant was selling chemicals on the side to Metro residents. Scott told him about an occasion where he and Complainant were working together and Complainant told Scott he was going to sell some chemicals to someone in the “projects” as the Authority was referred to by the Metro technicians. He told him that Complainant left and came back with the chemicals so he concluded that the sale was never consummated. Ron Mullins, another manager, told Breen that there was a possibility Complainant was selling chemicals.

15. Complainant’s behavior during his second stint of employment led Breen to conclude that Complainant might be using drugs. Breen observed that Complainant’s behavior was erratic to the extent that he believed that Complainant was abusing drugs. He concluded that the drug of abuse was marijuana. When Complainant was confronted about the matter, he stated that he smoked marijuana with Kelly. Complainant said he would be willing to

³ They worked together, but serviced different units.

take a drug test. When Respondent agreed, Complainant retracted his statement and said that what he did on his own time was his own business. Since Complainant had accused Kelly of smoking marijuana, Kelly volunteered to take a drug test and passed the test.

16. Breen was also concerned about Complainant's unauthorized use of company trucks. On one occasion, Kelly followed Complainant and found that Complainant was using the company truck to go to the bank to cash his check. Although other employees had been allowed to use company trucks on occasion for personal reasons, they were not allowed to use one unless they had asked for and received permission. Complainant had not asked for permission to use the truck on that occasion.

17. Breen also believed that Complainant had taken a truck home for the weekend without permission on another occasion. The employee who was supposed to be using the truck to perform services on a Saturday, called and reported that the truck was not there. Respondent charged Complainant \$200 for the lost profits that resulted from being unable to use the truck Saturday morning. Breen also believed Complainant used a company truck the day before he was fired to go to the unemployment office.

18. Toward the end of his employment with Respondent, Kelly told Breen he was unable to supervise Complainant. Instead of firing Complainant, Breen decided to put Complainant directly under his supervision to see if he could turn the situation around. He had contact with Complainant on a daily basis. In January 1997, Breen gave Complainant three days off so Complainant could decide if he wanted to continue working for Respondent.

19. The day Complainant returned to work, Breen received a complaint from Worley Terrace that Complainant was supposed to be working there and was not there. He subsequently learned that instead of working, Complainant had taken the company truck and gone to the unemployment office. Breen decided to terminate Complainant's employment after this incident.

20. After Complainant's employment was terminated, he was replaced by Richard Holmes. Holmes was given the same beeper number that Complainant had. He received calls from persons who thought that he was Complainant and told him they wanted to buy chemicals. When he told them he could not sell them chemicals, they told him they had gotten them before

from Complainant. Holmes also saw aerosol cans used by Respondent inside some of the units he was servicing. When he asked the tenants where they got the cans, they told him they got them from someone who worked for the company.

21. After Complainant was terminated, Respondent learned that while Complainant was working for them, his driver's license had been under suspension and that he had misrepresented that he had a driver's license when he was re-employed by Respondent.⁴

22. If Respondent had known that Complainant did not have a valid driver's license in January 1997, Respondent could not have hired Complainant for a residential or commercial route because residential and commercial service technicians work alone and are required to drive a company truck.

⁴ Complainant signed a vehicle responsibility agreement where he represented that he had a valid driver's license. He also made that same representation on Respondent's employment application.

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 herein, it is not credited.⁵

1. The Commission alleged in its Complaint that Respondent discharged Complainant because of his race.

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:

⁵ Any Finding of Fact may be deemed a Conclusion of Law and any Conclusion of Law may be deemed a Finding of Fact.

- (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) and 4112.06(E).

4. Federal case law applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. of Akron v. Ohio Civil 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).

5. Under Title VII case law, the Commission normally 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).

6. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for its actions.⁶ *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.

⁶ Although the burden of production shifts to Respondent once a *prima facie* case is established, 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. However, 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 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 (emphasis added).

8. Respondent met its burden of production. Respondent articulated numerous legitimate, nondiscriminatory reasons for discharging Complainant.

9. Respondent having met its burden of production, the Commission must show by a preponderance of the evidence that Respondent's articulated reason for discharging Complainant was not the true reason but was 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.

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 to the factfinder to answer . . .

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

In other words,

nothing in law permit[s] . . . substitut[ion] for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Id., at 514-515, 62 FEP Cases at 102.

11. Although it is not enough to simply disbelieve Respondent's articulated reasons to infer intentional discrimination,

[t]he factfinder's disbelief of the reasons put forward by the defendant (*particularly if disbelief is accompanied by a suspicion of mendacity*) may, together with the elements of a *prima facie* case, suffice to show intentional discrimination.⁷

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

Ultimately, the factfinder must be convinced that Complainant was "the victim of intentional discrimination." *Id.*, at 508, 62 FEP Cases at 99, *quoting Burdine, supra* at 256, 25 FEP Cases at 116.

12. The Commission can also attack Respondent's reasons by proving that Complainant was treated differently than similarly situated Caucasian employees. This is known as disparate treatment. The essence of discrimination, of course, is disparate treatment. Thus, the ultimate decision to be made in a discrimination case where the Complainant alleges disparate treatment was explained as follows in *Boyd v. U.S. Steel Corp.*, 20 FEP Cases 727 (W.D. Pa. 1979):

The ultimate decision to be made . . . is whether it is reasonable to infer from all the evidence that the challenged action was based

⁷ Even though rejection of Respondent's articulated reasons under these circumstances 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.

in whole or in part on race. The focus must be on the similarity between the situations of different employees -- whether the situations are comparable for purposes of applying the doctrine of *McDonald* and *McDonald Douglas*. The more distinct the situations of the two employees of different races [protected classes] who are treated differently, the less compelling is the inference that race played a role in the disparate treatment.

Id., at 730.

13. The Commission must prove that the "comparables" are similarly situated in all relevant respects:

A "similarly situated non-minority employee" is one who has "dealt with the same supervisor, [has] been subject to the same standards and [has] engaged in the same conduct without such differentiating or mitigating circumstances [as] would distinguish their conduct or the employer's treatment of them for it." [*Mitchell v. Toledo Hospital*, 59 FEP Cases 76 (6th Cir. 1992)] A "precise equivalence in culpability" . . . is not required; misconduct of "comparable seriousness" is sufficient. [*Harrison v. Metro Gov't. of Nashville and Davidson County*, 73 FEP Cases 109 (6th Cir. 1996)] Similarly situated employees "need not hold the exact same jobs; however, their duties, responsibilities and applicable standards of conduct must be sufficiently similar in all relevant aspects so as to render them comparable." *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

Hollins v. Atlantic Company, 76 FEP Cases 553, 557 (N.D. Ohio 1997).

14. The Commission could also prove that Complainant was discharged because of his race using direct evidence. Direct evidence of discrimination is “evidence which, if believed, proves the fact without inference.” *Brown v. East Miss. Elec. Power Assn.*, 61 FEP Cases 1104 (5th Cir. 1993).

15. If there is no direct evidence, evidence of racial remarks can be offered into evidence and be considered as proof that Respondent’s legitimate, nondiscriminatory reasons were a pretext for discrimination.

. . . [P]roof of incidents of racial epithets . . . may also help . . . support an allegation that a specific employment action, such as a discharge, . . . was taken with discriminatory intent, or that the employer’s proffered nondiscriminatory reason for the action was pretext.

Cassells v. University Hospital, 62 FEP Cases 963, 966 (D.C. Cir. 1992) (citations omitted).

However, the impact and relevance of alleged racial remarks must be examined in light of the facts and circumstances of each case. *Id.*

16. Although such remarks are admissible into evidence,

their probativeness is circumscribed if they were made in a situation temporally remote from the date of the employment decision or if they were not related to the employment decision . . . Stray remarks by . . . decisionmakers unrelated to the decision process are rarely given great weight

McMillan v. Mass. SPCA, 77 FEP Cases 589, 596 (1st Cir. 1998) (citations and quotations within a quotation omitted).

17. Based on the foregoing discussion, the Commission was unable to sustain its burden of proof that Complainant's race was a motivating factor in the decision to discharge him on January 10, 1997. The evidence showed that Respondent had a good faith belief to support the underlying basis for Complainant's discharge. Breen, the decision-maker, had sufficient information from Complainant's immediate supervisor and information he received from other employees to support his decision that Complainant's employment should be terminated. He also testified about complaints he had personally received about Complainant's work.

18. Complainant was discharged for a variety of reasons. There was some evidence to support each of the reasons. For instance, there was evidence regarding Complainant's misuse of a company vehicle. (See

Findings of Fact 16, 17) There was evidence that could lead a reasonable person to believe that Complainant was attempting to sell pesticide on the side. (*See Finding of Fact 14)* There was evidence that there were occasions when Complainant was supposed to be working at the Columbus Metropolitan Housing Authority projects and he was not there. (*See Findings of Fact 13, 19)* There were complaints about Complainant's work performance when he was working at Columbus Metropolitan Housing Authority. (*See Finding of Fact 13)* There was also evidence that Complainant did not have car and that he could not get to work unless another employee picked him up and brought him to work.

19. The Commission's arguments regarding Respondent's legitimate, nondiscriminatory reasons appear to be that there was insufficient evidence that Complainant was engaging in some of the activities that Respondent ultimately relied on to justify his discharge. However, Respondent is not required to adhere to any evidentiary standard when reaching its decision. Respondent is not a government agency. There was no collective bargaining agreement. In essence, the Commission is challenging Respondent's business judgment by arguing Respondent did not have enough reliable

information to conclude that Complainant was engaging in the activities that formed the basis of his discharge. However, this is insufficient to sustain the Commission's burden of proof that the reasons were false.

[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.

Combs v. Meadowcraft, Inc., 73 FEP Cases 232, 249 (11th Cir. 1997).

The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with.

Hartsel v. Keys, 72 FEP Cases 951, 955 (6th Cir. 1996).

20. However,

. . . [a]lthough it is true that a factfinder should refrain from probing an employer's business judgment, a decision . . . based upon unlawful considerations does not become legitimate because it can be characterized as a business judgment.

EEOC v. Yenkin Majestic Paint Corp., 73 FEP Cases 1317, 1320 (6th Cir. 1997) (citation omitted.)

The distinction lies between a poor business decision and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer's "business decision" was so lacking in merit as to call into question its genuineness.

Hartsel, supra at 955.

In this case, Respondent's reasons were not so lacking in merit as to call into question their genuineness.

21. The Commission also argued that there were Caucasian technicians who did some of the same things Complainant was accused of doing and they were not discharged. For instance, the Commission argued that there was a technician who used a company vehicle for personal reasons. However, the only testimony regarding this allegation came from Complainant. Respondent testified that an employee could take a truck home if they were going to go directly to a job the next day. If they had permission, they could use a truck to go back and forth from their home to work. They could never use a truck for personal reasons without permission. There was no evidence that the Caucasian employee did not have permission to use the truck or that he was using the truck to conduct personal business.

22. In its brief, the Commission also argued there was direct evidence of discrimination because of alleged racial remarks that were made by Complainant's supervisor and another supervisor, both of whom provided information to Breen that he considered when he decided to terminate Complainant's employment. However, these remarks cannot be classified as direct evidence.

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).

23. Based on the foregoing discussion, the remarks attributed to Kelly and another supervisor were not direct evidence. These remarks included the allegation that Complainant's supervisor used the term "nigger" when referring to black persons on occasion and called black technicians who serviced the Authority "home boys". The evidence was insufficient to support the allegation. Complainant testified that Kelly used the term "black man"

when speaking to him about black persons. (Tr. 364) Complainant's testimony about a racial remark made by another management employee was contradicted by his deposition testimony. In his deposition, he testified that the reference was made to a "black guy". At the hearing he testified that this black employee was referred to as a "tall nigger".

24. In any event, there was no evidence that the key decision-maker, John Breen, made any racial remarks or racial slurs. Also the remarks, if they were made, were made by non-decision-makers and were not related to the decisional process. They would be considered stray remarks. Such remarks do not permit the fact finder to conclude that racial animus was more likely than not a motivating factor in the discharge decision. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 49 FEP Cases 954, 974 (1989) (plurality opinion) (stray remarks, statements by non-decision-makers, and statements by decision-makers unrelated to the decisional process are insufficient to conclude that employer relied on impermissible factor in reaching decision) (O'Connor, J., concurring).

25. In conclusion, this is not a wrongful discharge case where the burden of proof is upon Respondent to justify the legitimate, nondiscriminatory reasons they gave in their termination letter by a preponderance of the evidence. The burden of proof is upon the Commission to prove by a preponderance of evidence that Complainant's race was a motivating factor in the decision to discharge him. The Commission was unable to satisfy its burden of proof. Therefore, the Complaint must be dismissed.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8202.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

September 14, 1999