

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**CHERYL RUCKEL**

Complainant

and

Complaint #8365

(COL) 71061397 (24857) 090597  
22A-97-4049

**STATE OF OHIO,  
DEPARTMENT OF TRANSPORTATION**

Respondent

**HEARING EXAMINER'S FINDINGS OF FACT,**

**CONCLUSIONS OF LAW, AND RECOMMENDATION**

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**HEARING EXAMINER'S REPORT BY:**

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## INTRODUCTION AND PROCEDURAL HISTORY

Cheryl Ruckel (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on September 5, 1997.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by the State of Ohio, Department of Transportation (Respondent) (ODOT) 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. A complaint was issued on August 14, 1998.

The Complaint alleged that Complainant was demoted because of her sex.

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 April 22-23, 1999 at the Commission's central office in Columbus, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 681 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on July 6, 1999 and by Respondent on July 26, 1999. The Commission filed a reply brief on August 6, 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 September 5, 1997.

2. The Commission determined on June 26, 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 state agency and an employer.

5. Complainant is a female.

6. Complainant has been employed by Respondent since 1992. Up until 1995, Complainant was Bureau Chief of Systems Maintenance Programming (SMP). SMP was part of the Division of Information Technology (DoIT). Complainant's immediate supervisor was David Fuhrman, Deputy Director of DoIT.

7. DoIT was reorganized in 1995. The bureaus were renamed offices and bureau chiefs were renamed office administrators. Four offices were reduced to three offices. The three offices were the Office of Computer Facilities Services, the Office of Application Services, and the Office of Customer Services. Complainant became the administrator of the Office of Computer Facilities Services. William Puckett became the administrator of the Office of Application Services. Richard Rector became the administrator of the Office of Customer Services. They all continued to report to Fuhrman.

8. In July 1995, William Davis, Assistant Director of Business Management, became Fuhrman's immediate supervisor. Complainant and Davis did not get along. She perceived him as being sexist. She also did not like it when he used vulgar language in her presence.

9. Davis learned that Complainant was upset with him when she accidentally sent a memo to him that was intended for her immediate supervisor, Fuhrman. Davis thought the "Bill" in the memo was William Puckett. This conclusion was based on his knowledge that Puckett and Complainant were feuding over which computer program should be purchased for ODOT. Complainant wanted to install a program called D.C.E., while Puckett wanted to install a program called F.O.R.T.E. After Davis learned that Complainant was referring to him, he viewed it as a positive step by Complainant to try to resolve issues and problems.

10. The feuding between Complainant and Puckett continued. In the latter part of April 1997, Davis and Fuhrman decided to stop moving forward with D.C.E. Their decision was based on the continuing controversy

between Complainant and Puckett and complaints they were receiving from the district offices.

11. In May 1997, a conference was held at Deer Creek State Park to assess ODOT's progress in meeting "Vision 2000", a plan to prepare ODOT for the twenty-first century. During the conference, it was obvious the district offices were not satisfied with DoIT. Jerry Wray, ODOT's Director, approached Davis and told him "something has to be done. If DoIT can't do it, we'll just have to get it done outside." (Tr. 440)

12. Based on the conversation with Wray, Davis decided to reorganize DoIT. He did not want Complainant to remain in her position. Furhman was put in charge of the reorganization.

13. Fuhrman held a meeting off-site with the two managers who worked under Complainant, Nani Morrison and Mike Carroll. Neither of them supported the decision to remove Complainant from a top management position. Both were very loyal to Complainant. Subsequently, Complainant's

position was offered to Nani Morrison who flatly rejected it and ultimately resigned to protest the reorganization.

14. Ultimately, Davis decided to merge the Office of Customer Services with the Office of Computer Facilities Services and the Office of Application Services, reducing the number of offices from three to two. Richard Rector, administrator in the Office of Customer Services, was reassigned as the administrator of the Office of Computer Facility Services.

15. Complainant was reassigned to the position that was previously occupied by Nani Morrison, Manager of Systems Services. Her pay range and classification remained the same, but she supervised fewer employees.

16. Davis appointed John Lavkulich as Administrator of the reorganized Office of Application Services. Lavkulich was the Data Systems manager for ODOT's district office in New Philadelphia.

17. Puckett was reassigned to the position of Manager of Data Services in the reorganized Office of Application Services. His pay range and classification did not change.

## **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.<sup>1</sup>

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<sup>1</sup> 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 demoted because of her sex.

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

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the . . . sex, . . . 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.<sup>2</sup> *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

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<sup>2</sup> 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.

. . . “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 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 demotion 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. The decision-maker, the Assistant Director for Business Management, testified that Complainant and her male counterpart, William Puckett, were not viewed as being able to work together as a team. There was a lack of trust, teamwork and cooperation between the Office of Computer Facilities Services and the Office of Application Services and the district offices. (Tr. 501-03) That was the basis for Davis' decision that they could not remain in leadership positions.

9. Respondent having met its burden of production, the Commission must show by a preponderance of the evidence that Respondent's articulated reason for demoting 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 . . . [sex] is correct. That remains for 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.<sup>3</sup>

*Id.*, at 511, 62 FEP Cases at 100.

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.

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<sup>3</sup> 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.

12. The Commission could also prove that Complainant was demoted because of her sex 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 (5<sup>th</sup> Cir. 1993).

13. If there is no direct evidence, evidence of sexist remarks that the decision-maker made might be probative of bias toward females in general. Under some circumstances, such remarks could be evidence of pretext. However,

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 (1<sup>st</sup> Cir. 1998) (citations and quotations within a quotation omitted).

14. Remarks that are vague do not have any probative value.

It is well established in the Sixth Circuit that isolated and ambiguous comments are too abstract, in addition to being irrelevant and prejudicial, to support a finding of . . . discrimination.

*Grant v. Harcourt Brace*, 77 FEP Cases 1068, 1076 (DC SOhio 1998) (citations and quotations within a quotation omitted).

*See also, Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP Cases 954, 974 (1989) (stray remarks, statements by nondecisionmakers, and statements by decisionmakers unrelated to the decisional process are insufficient to conclude that employer relied on impermissible factor in reaching decision) (O'Connor, J., concurring).

15. Based on the foregoing discussion, the Commission was unable to prove that Complainant's demotion was a pretext for sex discrimination. There was a conflict between Complainant and Puckett regarding Respondent's choice of computer systems. Although the conflict was supposedly resolved by Davis' decision not to proceed with the project, the damage was already done. The evidence showed that the district offices were complaining about the controversy and it affected the way they perceived DoIT.

16. The problem became a concern of the Director Wray, who observed the tension and negative interaction at the Deer Creek meeting. He approached Davis and told him that something had to be done. This is what prompted Davis to do what many state agencies do when they have

personnel problems, they engineer a reorganization and remove individuals who are perceived as causing the problems from their current management positions. In this case, Davis had control over Complainant and Puckett. He did not have any control over the district offices.

17. The Commission's attempts to characterize the decision as one that had sexist connotations is not supported by the evidence. Davis may have made crude and vulgar comments which were in poor taste on a few occasions. However, the comments he made do not support the inference that sex was a motivating factor in the decision to demote Complainant.

18. The Commission also argues that the decision to demote Complainant was not a valid business decision.<sup>4</sup> In essence, the Commission argues Complainant did not deserve to be demoted. Of course, that is a matter of opinion. Some of Complainant's subordinates obviously thought highly of her. However, Complainant's performance as a manager and her relationship with her subordinates was not the issue. There was no dispute

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<sup>4</sup> In general, neither the Hearing Examiner nor the Commission is in a position to second-guess an employer's business judgment, "except to the extent that those judgments involve intentional discrimination." *Krumwiede v. Mercer Co. Ambulance Service*, 74 FEP Cases 188, 191 (8<sup>th</sup> Cir. 1997) (citations omitted).

that Complainant was a good supervisor and that her technical knowledge was sound.

19. The problem was her interaction with the district offices and the dispute with Puckett. There were also problems interacting with other units at ODOT. Thus, Complainant's subordinates' opinions about how Complainant did her job are not relevant.

With respect to the opinion testimony, we have repeatedly explained that “[i]t is the perception of the decision maker which is relevant,’ not the self assessment of . . . [Complainant].” Accordingly, . . . [Complainant’s] “perception of [her]self . . . is not relevant.” Similarly, that . . . [Complainant’s] co-workers “may have thought that [she] did a good job, or that [she] did not ‘deserve’ [to be discharged] is close to irrelevant.”

*Dejarnette v. Corning, Inc.*, 75 FEP Cases 1088, 1092 (4<sup>th</sup> Cir. 1998) (footnote and citations omitted).

It is well settled, however, that . . . [Complainant’s] own opinions about her work performance or qualifications do not sufficiently cast doubt on the legitimacy of her employer’s proffered reasons for its employment actions.

*Ost v. West Suburban Travelers Limousine*, 71 FEP Cases 304, 309 (7<sup>th</sup> Cir. 1996) (citations omitted).

20. In conclusion, after listening to the witnesses who testified in this matter for Respondent and the Commission and reviewing the exhibits that were admitted into evidence, I am convinced that it was more likely than not that Complainant's sex was not a motivating factor in the decision to demote her. Instead, it is more likely that she was demoted because of her communication problems and her inability to resolve a controversy with a co-manager, who also lost his position.<sup>5</sup>

### **RECOMMENDATION**

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8365.

FRANKLIN A. MARTENS  
CHIEF HEARING EXAMINER

January 13, 2000

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<sup>5</sup> Complainant's problems with communication, i.e. lack of tact and diplomacy, were documented in the two evaluations that preceded her demotion and one that was completed after she was demoted. (R.Exs. K, L, M)