

INTRODUCTION AND PROCEDURAL HISTORY

Ada A. Gunther (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 29, 1997.

The Commission investigated the charge and found probable cause that Universal Polymer & Rubber, Inc. (Respondent) engaged in unlawful discrimination in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on October 1, 1998.

The Complaint alleged that Respondent treated Complainant differently in regards to its attendance policy and discharged her because of her race.

Respondent filed an Answer to the Complaint on November 2, 1998. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices.

A public hearing was held on July 1, 1999 at the Geauga County Courthouse in Chardon, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 197 pages, evidence admitted into evidence during the hearing, and post-hearing briefs filed by the Commission on September 10, 1999 and Respondent on November 2, 1999.

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 29, 1997.

2. The Commission determined on August 14, 1998 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

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

4. Respondent is a corporation and an employer doing business in Ohio. Respondent manufactures rubber and plastic products at its three plants in Middlefield.¹

¹ Middlefield is located in the southeast part of Geauga County.

5. Complainant is a black person.

6. Complainant began working for Respondent in early January 1996. Complainant started as a temporary employee through an employment agency. She worked full-time as a press operator under Elaine Hynst's supervision.

7. In late January or early February 1996, Hynst recommended that Respondent hire Complainant as a press operator.² Ray Dyling, the plant manager, adopted this recommendation. Respondent hired Complainant on February 5, 1996.

8. Over the next year, Complainant received several verbal and written warnings for absenteeism. (R.Ex. A) Complainant and two other employees were placed on final notice for engaging in disturbances that were not work-related. *Id.* Complainant also received a warning for placing her hands in a press while "it was opening up." (*Id.*, Tr. 161)

² Press operators work in the molded rubber area located in Plant 1.

9. On Friday, April 18, 1997, Complainant was involved in a minor car accident in Middlefield shortly after leaving work. The accident occurred while Complainant waited behind another vehicle to exit a gas station. The driver of the other vehicle backed up two to three feet into the front of Complainant's vehicle. The police report indicated that the damage to Complainant's car was "light"; her car was "functional"; and she drove it from the scene. (R.Ex. A) Complainant told the patrol officer that she was not injured. (*Id.*, Tr. 58)

10. Complainant drove to her home in Warren after the accident.³ Later that evening, Complainant went to the emergency room of Trumbull Memorial Hospital. Dr. Blaha examined Complainant at the Hospital. Dr. Blaha subsequently completed a return to work form that excused her from work "until tomorrow morning." (Comm.Ex. 1)

11. On Sunday evening, Complainant called Respondent and reported off work for the next day. Complainant told the third shift supervisor that she was "going to [the] doctor." (R.Ex. A) Complainant

³ Warren is approximately 25 to 30 miles from Middlefield.

visited Dr. Frank Veres on Monday. Dr. Veres examined Complainant and released her to return to work on Tuesday, April 22, 1997. (Comm.Ex. 2)

12. On Tuesday, Complainant called Respondent and reported off work for the rest of the week “due to [a] car accident.” (R.Ex. A) Once Hynst learned that Complainant had reported off for the entire week, she called Complainant at home and left a message on her answering machine.

13. Complainant called Hynst back later that day. Hynst informed Complainant that she needed to provide medical documentation for her extended absence. Complainant asked Hynst to give Willie Chatmon, a friend and co-worker, any medical forms that she needed to complete. Hynst agreed with this request. Hynst completed the top part of a “medical treatment request” form shortly after the conversation. (Comm.Ex. 4, Tr. 172, 174) Hynst then gave the form to Chatmon for delivery to Complainant.

14. On Thursday or Friday, Complainant went to the lunchroom of Plant 1 around lunchtime. When Hynst heard of Complainant’s arrival, she left the pressroom to talk with her. Hynst asked Complainant if she had

brought any medical documentation with her. Complainant replied that she did not have any documentation, but she was under a “doctor’s care.” (Tr. 95) Complainant told Hynst that she would provide medical documentation once she received it from her doctor.

15. The following week, Complainant did not report off work for April 28, 29, or 30. Robert Foust Jr., former Human Resources and Safety Administrator, mailed a discharge notice to Complainant on May 1, 1997. The notice indicated that Respondent discharged Complainant effective April 30, 1997 for her “failure to report absence for three (3) consecutive days.” (Comm.Ex. 5)

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 Complaint that Respondent treated Complainant differently in regards to its attendance policy and discharged her because of her race.

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 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).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89. 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 is normally required to first establish 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.⁴ *McDonnell Douglas, supra* at

⁴ 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.

802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

. . . “clearly set forth, through the introduction of admissible evidence,” reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.

St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

The presumption created by the establishment of a *prima facie* case “drops out of the picture” when the employer articulates a legitimate, nondiscriminatory reason for its actions. *Hicks, supra* at 511, 62 FEP Cases at 100.

7. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent’s articulation of a legitimate, nondiscriminatory reason for Complainant’s discharge removes any need to determine whether the Commission proved a *prima facie* case, and the “factual inquiry proceeds 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.

8. Respondent met its burden of production with Robert Faust's testimony and documentary evidence created by him. Faust testified that Respondent discharged Complainant because she violated its no call/no report policy. (Tr. 118) Faust's testimony was consistent with Complainant's discharge notice. This notice indicated that Respondent discharged Complainant for her "failure to report absence for three (3) consecutive days." (Comm.Ex. 5)

9. Respondent having met its burden of production, the Commission must prove that Respondent intentionally discriminated against Complainant because of her race. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for its actions was not its true reason, but was "a pretext for discrimination." *Id.*, at 515, 62 FEP Cases at 102, quoting *Burdine, supra* at 253, 25 FEP Cases at 115.

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

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

10. Thus, even if the Commission proves that Respondent’s articulated reason is false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

That the employer’s proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the . . . [Commission’s] proffered reason of race is correct. That remains a question for the factfinder to answer

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

11. Although it is not enough to simply disbelieve Respondent’s articulated reason 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.⁵

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

⁵ Even though rejection of 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.

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 attempted to show pretext in this case by alleging disparate treatment. Specifically, the Commission alleged in the Complaint that Respondent treated Jennifer Frederick, a white press operator, “more favorably than the Complainant with regard to attendance and [she] was not discharged.”

13. Proof of disparate treatment requires similarly situated comparatives. The Commission must show that the comparatives were “similarly situated *in all respects*”:

Thus to be deemed “similarly situated”, the individuals with whom . . . [Complainant] seeks to compare . . . her treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.

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

14. To be deemed similarly situated, “a precise equivalence in culpability” is not required; misconduct of “comparable seriousness” may suffice. *Harrison v. Metro. Gov’t. of Nashville and Davidson Cty.*, 73 FEP Cases 109, 115 (6th Cir. 1996) (quotations omitted). Likewise, 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.” *Hollins v. Atlantic Co., Inc.*, 76 FEP Cases 553, 557 (N.D. Ohio 1997), quoting *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

15. Respondent argues that the Commission failed to prove that Complainant was treated differently than similarly situated white employees. This argument is well taken. The record is void of any evidence that white press operators violated Respondent’s no call/no show policy and were not discharged.

16. Similarly, there is no evidence that similarly situated white employees engaged in misconduct of comparable seriousness and were not discharged. In Frederick’s case, the evidence shows that Respondent discharged her in June 1997 for missing 18 days of work in a six-month

period. (R.Ex. F, Tr. 118) Assuming Frederick engaged in misconduct of comparable seriousness, Respondent discharged both Frederick and Complainant. Thus, they received the same treatment.

17. Complainant also testified that Arlene Christlieb, a white co-worker, failed to report off work for a “couple days” after taking three days of bereavement leave, and Respondent did not discharge her. (Tr. 28) The Commission, however, was unable to substantiate this allegation or rebut Respondent’s evidence to the contrary. Respondent provided a supervisor’s attendance log for Christlieb. (R.Ex. H) This log indicated that Christlieb only missed three days of work when her father died. Without evidence that a similarly situated comparative was treated more favorably than Complainant, the Commission cannot prove pretext through disparate treatment.

CONCLUSION

18. After a careful review of the entire record, there is insufficient evidence to conclude that Complainant was the victim of intentional race discrimination. The Commission's case was based primarily on hearsay rather than reliable, probative, and substantial evidence. The Commission not only failed to present any evidence that Respondent subjected Complainant to disparate treatment, but it also failed to prove that Respondent's legitimate, nondiscriminatory reason for her discharge was a pretext for intentional race discrimination.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8382.

TODD W. EVANS
HEARING EXAMINER

November 18, 1999