

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

HAQIKAH GOMEZ

Complainant

and

THE MENDOZA COMPANY

Respondent

Complaint #8425

(CLE-COL) 71120297 (25198) 121197
22A-98-3247

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

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INTRODUCTION AND PROCEDURAL HISTORY

Haqikah Gomez (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on December 11, 1997.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by The Mendoza Company (Respondent) 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 October 29, 1998.

The Complaint alleges that Respondent refused to hire Complainant because of her sex (pregnancy).

Respondent filed an Answer and an Amended Answer to the Complaint. Respondent admitted certain procedural allegations but denied that it engaged in any unlawful discriminatory practices.

A public hearing was held on May 24, 1999 at the Commission's Central Office in Columbus, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 238 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on August 6, 1999 and by Respondent on August 27, 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 December 11, 1997.

2. The Commission determined on October 1, 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. Respondent operates a McDonald's Restaurant at 1020 Alum Creek Drive in Columbus, Ohio. There are approximately eleven other fast food restaurants within a one half mile radius of Respondent's place of

business. Since Respondent's turnover rate (and the turnover rate in this industry) is between 200% to 300%, Respondent and the other "fast food" restaurants are constantly seeking employees.

5. In December 1997, Respondent's manager, Fredda Thompson, was seeking "crew members". Crew members wait on customers and perform other routine tasks at the restaurant. Thompson had 25 years of experience as a manager in the fast food industry.

6. Complainant, who was 17 years old and six months pregnant, applied for a full-time crew member position in early December 1997. After she filled out her application, she was told to return for an interview. When she returned a few days later, Thompson asked her to fill out another application because the first one was lost. After she filled out her second application, she was interviewed by Thompson. Thompson asked her about her employment history and her references. They also discussed Complainant's work schedule. Complainant gave Thompson a document indicating that she was pregnant, but able to work. (Tr. 91) Thompson could

see that Complainant was pregnant. (Tr. 44) Thompson has hired pregnant females for crew member positions. (Tr. 29, 45)

7. After the interview Thompson scheduled Complainant for orientation several days later, instructing her to bring two pieces of identification with her for purposes of completing an I-9 form.¹ Thompson normally scheduled orientation sessions between 9:00 a.m. and 10:00 a.m. or after 2:00 p.m. She never scheduled orientation sessions between 11:00 a.m. and 2:00 p.m. (Tr. 35, 39) After the orientation, applicants watch a training video and work the hours they are scheduled to work that day. (Tr. 33)

8. Complainant returned to the restaurant on the day Thompson told her to return. When she entered the restaurant, one of the cashiers said, “We [sic] was waiting on you.” (Tr. 93, 97) Complainant proceeded to Thompson’s office area where orientations were conducted. Thompson did not hire Complainant.

¹ The Immigration Reform and Control Act of 1986 requires Respondent to hire only American citizens or aliens who are authorized to work in the United States. All employees hired after 1986 must verify their employment eligibility by completing a form, I-9. Proof of age is also required when hiring a minor.

9. Complainant's son, Jordan, was born on March 25, 1998. Complainant had childcare concerns and other family problems in 1998 and 1999 which prevented her from accepting employment. (Tr. 205-06) She started work as a cashier at a Long John Silver's Restaurant on March 11, 1999.

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.²

² 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 alleges in its Complaint that Complainant was not hired because of her sex (pregnancy).

2. This allegation, if proven, would constitute a violation of Revised Code § 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 term "because of sex" includes of or on the basis of pregnancy:

. . . the terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions.

R.C. § 4112.01(B).

4. The Commission has the burden of proof in cases brought under Chapter 4112 of the Revised Code. The Commission must prove a violation of R.C. § Section 4112.02(A) by a preponderance of reliable, probative and substantial evidence. R.C. § 4112.05(G) and § 4112.06(E).

5. A preponderance of evidence means:

. . . evidence which as a whole shows that the fact sought to be proved is more probable than not . . . [E]vidence which is more credible and convincing to the mind. That which best accords with reason and probability.

Black's Law Dictionary, Sixth Ed. (1990).

6. Title VII standards are to be used in evaluating alleged violations of Chapter 4112 of the Revised Code. Therefore, reliable, probative and substantial evidence means evidence sufficient to support a finding of discrimination under Title VII of the Civil Rights Act of 1964, U.S.C. Sec. 2000e *et. seq.*, *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm.* (1991), 61 Ohio St.3d 607.

7. The Commission is not required to prove that Complainant's sex was the sole reason for the employer's decision. The Commission must prove by a preponderance of reliable, probative, and substantial evidence that Complainant's sex was at least a "motivating factor" in the employment decision. *Price Waterhouse v. Hopkins*, 49 FEP Cases 954, 959 (1989).

8. The Commission can prove that Complainant's sex was a motivating factor by direct evidence or by circumstantial evidence. *Terbovitz v. Fiscal Court of Adair County*, 44 FEP Cases 841, 844 (6th Cir. 1987).

9. In this case, the Commission argues that there is sufficient circumstantial and direct evidence to sustain its burden of proof. Direct evidence is "evidence which, if believed, proves the fact without inference or presumption." *Brown v. East Mississippi Electric Power Assn.*, 61 FEP Cases 1104 (5th Cir. 1993), *citing Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP Cases 954 (1989).

10. The Commission's argument about direct evidence is based on Complainant's testimony. She testified that she arrived on time for orientation with the appropriate documents. She testified that after she sat down for the orientation and took off her coat, Thompson told her she could not be hired because she was pregnant and might hurt herself and sue them. (Tr. 95)

11. Thompson testified that she has never refused to hire anyone because they were pregnant. (Tr. 28) She testified that she has hired

females who were pregnant. (Tr. 29, 45) She testified that there was no reason why a pregnant woman could not work at the restaurant. (Tr. 31) Thompson testified that she could not specifically remember Complainant, but she did recall an applicant around the first week of December who was pregnant. She recalled this applicant was late for orientation and did not bring the proper identification. (Tr. 43)

12. Since Complainant's testimony conflicted with Thompson's testimony, the conflict in testimony must be resolved by the Hearing Examiner.

13. The Commission argues the conflict in testimony should be resolved in favor of Complainant because her version was corroborated by the assistant store manager. The Commission argues that his testimony that he overheard someone say something to the effect that "You're not hiring me because I'm pregnant" during the first week of December corroborates Complainant's testimony. I disagree. This was not independent corroboration; it was merely

his recollection of what he heard *Complainant* say when she was leaving the restaurant. It was *not* corroboration of what Thompson said to Complainant. Complainant may have thought Thompson was motivated not to hire her because she was pregnant. She may not have had a reason to think so.

14. Respondent argues that overall Complainant's testimony was not credible because it was not consistent with her deposition testimony. Complainant's testimony was inconsistent in many respects. However, some of these inconsistencies involved matters that were trivial and not material. A factual recitation will be somewhat different each time it is repeated over time. The inconsistencies in Complainant's testimony would reflect on her ability to accurately recall facts, not necessarily her veracity.

15. Complainant's testimony regarding her conversation with Thompson where she alleged Thompson told her she was not being hired because she was pregnant was consistent. Although it was consistent, it was not convincing. Nor was it logical or more probable than the reason Thompson gave for refusing to hire Complainant.

16. At the hearing, Complainant testified she was told to come in for orientation at 9:00 a.m. (Tr. 90) She testified she arrived at 8:55 a.m. (Tr. 93) She testified that when she arrived, the cashier stated, “We was [sic] waiting on you.” (Tr. 93) The cashier’s comment supports Thompson’s testimony that Complainant was late for the orientation. If Complainant arrived at 8:55 a.m., there would be no reason for the cashier to make that comment.

17. I also agree with Respondent’s argument that if Thompson was concerned about employing Complainant because she was in the late stages of pregnancy, Thompson could have rejected her for employment during the first interview. Her condition was obvious. If Thompson was going to commit an act of overt discrimination, there was no reason to wait until orientation to do so.

18. The Commission also attempted to prove that Complainant was not hired because of her sex through circumstantial evidence using the *McDonnell Douglas* formula. Under the *McDonnell Douglas* formula, the Commission

must prove a *prima facie* case of discrimination by a preponderance of the evidence.

19. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for its actions.³ *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.

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.

³ 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.

20. However, in this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent's articulation of legitimate, nondiscriminatory reasons for refusing to hire Complainant removes any need to determine whether the Commission proved a *prima facie* case, and the

“factual inquiry proceeds to 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 *Texas Dept. of Community Affairs v. Burdine*, 25 FEP Cases 113, 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 611 (emphasis added).

21. Respondent met its burden of production. Failure to appear for an orientation on time with the appropriate documentation is a legitimate business reason to refuse to hire someone.

22. Respondent having met its burden of production, the Commission must show by a preponderance of the evidence that Respondent’s articulated reasons for refusing to hire Complainant were not its true reasons but were a pretext for discrimination. *St. Mary’s Honor Center v. Hicks*, 62 FEP Cases 96, 100 (1993).

[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 102.

23. 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 to the factfinder to answer . . .

Id., 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 102.

24. 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.⁴

⁴ 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.

Id., at 100.

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

25. Based on the foregoing discussion, the Commission was unable to prove that Respondent’s reasons were a pretext for sex discrimination. The factual scenario offered by Thompson is more likely to have occurred than the factual scenario offered by the Commission. There is insufficient evidence to tip the scales in the other direction. Therefore, the Complaint must be dismissed.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8425.⁵

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

December 13, 1999

⁵ Although the issue of mitigation may be moot, it appears that Complainant did not actively seek employment after March 25, 1998 until early March 1999. Respondent proved Complainant could have secured a minimum wage job had she pursued one.