

INTRODUCTION AND PROCEDURAL HISTORY

Shann T. Chance (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 24, 1997.

The Commission investigated the charge and found probable cause that the Village of Malvern (Respondent) engaged in unlawful employment practices in violation of Revised Code Sections (R.C.) 4112.02(A) and (I).¹

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 Complainant was subjected to a hostile work environment because of her sex. The Complaint also alleged that Respondent placed Complainant on extended probation, suspended her, and ultimately discharged her in retaliation for opposing sex discrimination.

¹ The Complaint incorrectly identified Respondent as the “City of Malvern, Police Department.” Respondent denied that it was a city in its Answer. Respondent identified itself as the Village of Malvern, Police Department. The Hearing Examiner hereby amends the Complaint to reflect the proper Respondent — the Village of Malvern.

Respondent filed an Answer to the Complaint on October 9, 1998. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory or retaliatory practices.

A public hearing was held on August 30 through September 2, 1999. The first three days of hearing were held at the Carroll County Courthouse in Carrollton, Ohio. The last day was held at Canton City Council Chambers in Canton, Ohio.

The record consists of the previously described pleadings, a 677 page transcript of the hearing divided into two volumes, joint exhibits admitted into evidence during the hearing, an affidavit from Domenico Davide, a post-hearing brief filed by Respondent on April 5, 2000, and a reply brief filed by the Commission on April 17, 2000.

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 24, 1997.

2. The Commission determined on September 17, 1997 that it was probable that Respondent engaged in unlawful discrimination and retaliation in violation of R.C. 4112.02(A) and (I).

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 political subdivision of the State of Ohio and an employer. Respondent, which is located in Carroll County, has a population of approximately 1,200 to 1,300. Respondent is governed by a mayor and the Malvern Village Council (Council).

5. Council consists of six members. They meet regularly to conduct Respondent's business. The mayor presides over these meetings. (Ex. 45) The mayor also acts as the head of the Police Department. Kenny Yost is the Chief of Police.

6. Respondent employs part-time and full-time police officers. These officers are paid. Respondent also uses auxiliary officers who work

at least 16 hours per month without pay. Auxiliary officers and paid police officers, whether part-time or full-time, are required to complete a six-month probationary period.²

7. Complainant is a female. She completed the Carroll County Police Academy in late 1994. She passed the state test for Ohio peace officers in early 1995. She worked as a part-time "road officer" and dispatcher for Newcomerstown Police Department from September 1995 to March 1996. (Tr. 8)

8. In mid-July 1996, Complainant applied for hire at the Malvern Police Department. (Ex. 1) After an interview process, Complainant was sworn in as an auxiliary officer on July 31, 1996. In addition to Complainant, Shannon McCalla and Domenico Davide, both male, were also sworn in as auxiliary officers in July and August 1996, respectively. Complainant, McCalla, and Davide were placed on probation for six months.

² Chief Yost testified that there is only one six-month probationary period for paid police officers. (Tr. 476) Thus, a part-time police officer, who becomes full-time while on probation, does not begin another six-month probationary period upon the status change. Conversely, an auxiliary officer, who becomes part-time while on probation, would start another six-month probationary period.

9. Initially, Complainant was only allowed to ride with Chief Yost on patrol. Complainant received permission to ride with Lieutenant Dave McConnaughy after “a couple [of] weeks” and later with Sergeant Steve Adams. (Tr. 14) Meanwhile, McCalla and Davide were allowed to ride with part-time and full-time police officers. Respondent promoted them to part-time police officers within a few months while Complainant remained on auxiliary.

10. In November 1996, Complainant found a piece of paper in her work drawer with the number “69” typed on it numerous times and the word “Sixty Nine” typed once. (Ex. 9) Complainant complained to Chief Yost about the note. She informed Chief Yost that Respondent did not have a sexual harassment policy. Chief Yost became upset and told Complainant to read her “fucking manual” again. (Tr. 19) Complainant brought up the issue again within two weeks and received the same response from Chief Yost.

11. On Tuesday, January 14, 1997, Complainant worked a high school basketball game with McCalla and Sergeant Adams. During the game, a young boy approached Complainant and asked her to handcuff

him. When Complainant asked him why, the young boy told her that Sergeant Adams had sent him over because boys were supposed to be handcuffed by women.

12. McCalla approached Complainant after she spoke with the young boy. Complainant informed McCalla about the conversation. McCalla advised Complainant that he directed the boy to her and told him that he was Sergeant Adams. At some point, Complainant asked McCalla if he had a problem working with women. McCalla told Complainant that he once had difficulty with a female coworker who thought she was his boss; he called the woman a “cunt.” (Ex. 10)

13. On Sunday, January 19, 1997, Complainant called Sergeant Adams at the Police Department and asked him if he knew Chief Yost’s home telephone number. Complainant told Sergeant Adams that she wanted to talk to Chief Yost because she wanted to take time off. Adams refused to give Complainant Chief Yost’s telephone number, which was unlisted, but offered to tell him about her request. Complainant declined the offer and ended the conversation.

14. Complainant then called Corporal Obie Jenkins at home. Complainant asked Corporal Jenkins if he knew Chief Yost's home telephone number. Complainant told Corporal Jenkins that she needed to talk to Chief Yost about "her work schedule." (Ex. 10) Complainant informed Corporal Jenkins that she called Sergeant Adams, and he refused to give her Chief Yost's telephone number.

15. Complainant also informed Corporal Jenkins that she was upset by incidents that occurred at a recent basketball game, particularly the handcuffs incident with the young boy and McCalla's use of the word "cunt" to describe a female. Corporal Jenkins gave Complainant Chief Yost's telephone number.

16. Corporal Jenkins called Chief Yost and told him about giving Complainant his telephone number. Corporal Jenkins also called Sergeant Adams that afternoon. Corporal Jenkins informed Sergeant Adams about his conversation with Complainant including her version of events that occurred at the basketball game.

17. Complainant reported to work on January 20, 1997. Sergeant Adams called Complainant into his office and told her about his conversation with Corporal Jenkins. Sergeant Adams asked Complainant why she had not reported McCalla's behavior to him that night. Complainant replied that she did not want to "cause trouble." (Ex. 10) Sergeant Adams instructed Complainant to bring such concerns to him or Chief Yost in the future.

18. Sergeant Adams informed Chief Yost about the matter after he talked to Complainant. Chief Yost required all those involved, including Sergeant Adams, to submit a written statement about the events of that night.³ McCalla admitted in his written statement that he used the word "cunt" to describe a former female coworker and told the young boy that a "female officer" should handcuff him. *Id.* Upon review of the statements, Chief Yost verbally reprimanded McCalla for his use of the word "cunt."

³ Complainant wrote the following at the end of her statement:

I just want everyone here to realize that I am not just a female when I work with them[.] 'I am a police officer!!!!!!!'

(Ex. 10)

19. On January 28, 1997, Chief Yost gave Complainant written notice that her probationary period was being extended another six months. The notice indicated that this extension was necessary to “better monitor” Complainant’s work performance and to “make appropriate recommendations” about her future employment. (Ex. 11)

20. In late February 1997, Chief Yost completed a work performance evaluation for Complainant. (Ex. 8) Chief Yost rated Complainant in 14 categories from July 31, 1996 to February 26, 1997:

Work Performance Evaluation
Shann T. Chance

Category	Excellent	Good	Fair	Poor
Honesty	X			
Productivity		X		
Work Quality	X			
Work Consistency		X		
Skills	X			
Enthusiasm	X			
Attitude	X			
Cooperation	X			
Initiative			X	
Working Relations	X			
Attendance			X	
Punctuality	X			
Dependability		X		
Appearance	X			

Chief Yost made the following comments about Complainant in the evaluation:

[H]as the ability to become a very fine police officer with a little experience. She knows the law. And gets along with others very well.

21. On May 5, 1997, Respondent promoted Complainant to part-time police officer. Complainant started another six-month probationary period. Complainant worked afternoons Monday through Friday and day shifts on Saturday.

22. Beginning in May 1997, Chief Yost unsnapped Complainant's gun clip from her belt on several occasions. Complainant asked Chief Yost to stop and eventually told him to "keep his fucking hands to himself." (Tr. 31) Chief Yost stopped this behavior by the end of the month.

23. Chief Yost then began to pull Complainant's shirt out of her pants, either from behind or the side. This behavior occurred at the Police Department on at least two occasions. Chief Yost told Complainant that she needed to dress "properly" or "appropriately" after pulling out her shirt. (Tr. 32, 188) Complainant responded by telling Chief Yost "to keep his fucking hands to himself." (Tr. 31, 189) Chief Yost ceased this behavior by early July 1997.

24. Complainant often rode with Sergeant Adams on patrol in the summer of 1997. While on patrol, Complainant talked with Sergeant Adams about her sex life “quite a bit” and told him when she was “ragging” it.⁴ (Tr. 313, 342) Adams once told Complainant to stop adjusting her bulletproof vest because people would believe she was playing with her “tits.”⁵ (Tr. 37, 169) Sergeant Adams also stated to a number of men, as he and Complainant were leaving a factory, “Don’t be looking at her ass when she leaves.” (Tr. 37, 170) Complainant rode with Sergeant Adams until she became a full-time police officer on August 4, 1997.

25. Later that summer, Complainant’s father was involved in a car accident. Complainant received a telephone call at home informing her about the accident. Complainant “threw clothes on”, gathered her children, and drove to see her father. (Tr. 39) At some point, Complainant became aware that her father’s wallet was missing. Complainant, her father, and her nine-year old daughter, Pheleshia, then drove to the Police Department where Complainant called the state trooper who was at the accident scene

⁴ Complainant also participated in sexual discussions with other officers while on patrol. For example, when Officer Davide told Complainant that his girlfriend and most women “like it slow”, Complainant replied, “No some women like it hard.” (Tr. 45)

⁵ Sergeant Adams later told Complainant, after she received a new bulletproof vest, that she only wore it to make “her tits look bigger.” (Tr. 42)

to inquire about the wallet's whereabouts. While they were at the Police Department, Chief Yost shut off the lights and told Sergeant Adams, "Look Steve we don't need lights on, her headlights are on." (Tr. 38, 652, 659) Complainant was not wearing a bra at the time.

26. In August or early September 1997, Complainant met with Chief Yost and Respondent's Mayor, Dale Lewis, about several matters. One of the matters involved the legibility of Complainant's handwriting on motor vehicle citations; another dealt with her access to bars while on duty. In regards to the latter, Mayor Lewis told Complainant that she was not allowed to enter bars by herself while conducting police business. Complainant objected to this limitation. She advised Mayor Lewis that male officers were not similarly restricted. Mayor Lewis replied that it was not a "female thing." (Tr. 43, 47)

27. On September 8, 1997, Captain Adams called Complainant into his office to discuss her job status with the Police Department.⁶ Captain Adams informed Complainant that "she has not done anything to

⁶ Sergeant Adams was promoted to Captain when David McConaughy resigned. Captain McConaughy submitted his letter of resignation to Respondent on September 4, 1997. (Ex. 37) His resignation became effective on September 21, 1997.

jeopardize her job.” (Ex. 14) Captain Adams advised Complainant to ignore “town gossip” and only worry about herself, not other officers.⁷ *Id.* Captain Adams further advised Complainant that “she got better” when he and Chief Yost talked to her about how she conducted traffic stops. *Id.*

28. On September 10, 1997, Complainant met with Bog Dogan who worked for a local chapter of the NAACP. Complainant discussed incidents of perceived sex discrimination by the Police Department. Later that day, Complainant informed Captain McConnaughey about the meeting with Dogan.

29. On September 11, 1997, Complainant met with Chief Yost and Captain Adams near the beginning of her shift. Chief Yost informed Complainant that she missed a court appearance the previous day for a motorist whom she issued a speeding citation. Chief Yost also informed Complainant that she omitted pertinent information in a police report that

⁷ Captain Adams testified that Complainant told him about a conversation where she was warned to “watch it” because she was “going to be the next one fired.” (Tr. 408) Earlier Chief Yost and Sergeant Adams told Complainant about a rumor that she became full-time by sleeping with Chief Yost. These rumors bothered Complainant.

she prepared on July 20, 1997. Chief Yost discussed the possible repercussions from this omission.⁸

30. Chief Yost then advised Complainant that he was having difficulty scheduling her for 40 hours per week given her request to have Sunday off for bowling. Chief Yost also advised Complainant of his decision to place Randy Ecrement, male, on afternoons in her stead. Chief Yost offered to place Complainant on a rotating schedule and allow her to work midnights on Sunday.

31. Complainant became “very upset” at the meeting. (Ex. 15) She complained about being replaced by Ecrement who started as auxiliary officer on December 31, 1996. Complainant reminded Chief Yost that he accommodated male officers who bowled in leagues. Complainant told Chief Yost several times that “she was tired of getting fucked because she was a woman.” *Id.*

⁸ On July 20, 1997, Complainant investigated an incident where a white teenage boy alleged that three teenage boys assaulted him. Complainant did not include in the police report that the white teenage boy previously shot at one of the alleged assailants, who is black, with a “BB” gun two weeks before the incident. (Tr. 176) Chief Yost informed Complainant that an assistant prosecuting attorney advised him that the mother of the black teenage boy might contact the NAACP because the “BB” gun was not confiscated as in other cases.

32. On September 12, 1997, Complainant was involved in a motor vehicle accident while on duty. As Complainant pulled out to pursue a speeding motorist, a semi collided with the rear driver's side of the police cruiser. At impact, Complainant cut her elbow and hit her head on the windshield. Complainant was placed on a stretcher and taken to Columbia Mercy Medical Center via ambulance.

33. While at the hospital, Complainant refused to have an x-ray of her elbow. A nurse asked Complainant if she needed a drug test. Complainant replied, "No, I don't need one." (Ex. 18) Complainant was "verbally abusive" with hospital staff at times. *Id.*

34. Chief Yost returned to the Police Department after Complainant was taken to the hospital. While at the station, Chief Yost returned a telephone call from a nurse who was present when Complainant arrived at the emergency room. The nurse told Chief Yost that Complainant was "very rude" with hospital staff; she refused treatment; and she refused to take a drug test. (Ex. 16) The nurse also told Chief Yost that Complainant threaten to sue him and the Police Department.

35. Complainant returned to work approximately a week and a half after the accident. She worked two midnight shifts. On the third night, September 23, 1997, Chief Yost handed Complainant a suspension letter. The letter gave the following reasons for Complainant's suspension: "neglect of duty, inefficiency, insubordination, discourteous treatment of the public and for other reasonable and just causes." (Ex. 19) The letter indicated that Complainant "rebuffed" efforts to resolve her problems and demonstrated "no improvement in . . . [her] official duties or work attitude." *Id.* The letter further indicated that Chief Yost intended to recommend Complainant's discharge at the Council meeting scheduled for October 6, 1997.

36. Complainant asked Chief Yost at the time why she was suspended. He told Complainant that the letter was "detailed enough." (Tr. 60) He advised Complainant that she could resign now or be discharged later. Complainant refused to resign and left the premises.

37. On October 6, 1997, Chief Yost recommended to Council that Respondent discharge Complainant. Complainant appeared at the Council meeting. Complainant provided Council with documents, including her

work performance evaluation and letters of recommendation. She requested the opportunity to be heard. The Council president, Tom Dunn, tabled the matter until the next Council meeting. Council instructed Chief Yost, in the interim, to provide documentation supporting his recommendation at the upcoming Safety Committee meeting.

38. Chief Yost provided supporting documentation as requested. Council met again on October 20, 1997. Council gave Complainant (and her husband) the opportunity to speak at the meeting. Complainant discussed her duties and her general perceptions of police officers. (Tr. 184-85) Complainant told Council that she did not refuse a drug test following the September 12 accident. Council adopted Chief Yost's recommendation to discharge Complainant .

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 Complainant was subjected to a hostile work environment because of her sex. The Complaint also alleged that Respondent placed Complainant on extended probation, suspended her, and ultimately discharged her in retaliation for opposing sex discrimination.

2. These allegations, 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; and
- (I) For any person to discriminate in any manner against another person because that person has opposed any unlawful practice defined in this section

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) and (I) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination or retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

SEXUAL HARASSMENT

5. Sexual harassment is sex discrimination and prohibited by R.C. Chapter 4112. Ohio Adm.Code 4112-5-05(J)(1); *Cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment is sex discrimination under Title VII). There are two forms of sexual harassment: *quid pro quo* and hostile work environment. *Id.*, at 65. The latter form of sexual harassment, which the Commission alleges in this case, recognizes that employees have the “right to work in an environment free of discriminatory intimidation, ridicule, and insult.” *Id.*

6. Ohio Adm.Code 4112-5-05 defines sexual harassment based on a hostile work environment, in pertinent part:

- (J) Sexual harassment.
 - (1) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
 - (c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Whether the alleged conduct constitutes sexual harassment is determined on a case-by-case basis by examining the record as a whole and the totality of the circumstances. Ohio Adm.Code 4112-5-05(J)(2).

7. In order to create a hostile work environment, the conduct must be “sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), *quoting Meritor, supra* at 67. The conduct must be unwelcome. *Meritor, supra* at 68. The victim must perceive the work environment to be hostile or abusive, and the work environment must be one that a reasonable person would find hostile or abusive. *Harris, supra* at 21-22.

8. In examining the work environment from both subjective and objective viewpoints, the factfinder must examine “all the circumstances” including the employee’s psychological harm and other relevant factors such as:

. . . the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id., at 23.

This inquiry also requires “careful consideration of the social context” in which the particular behavior occurred since the “real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships.” *Oncale v. Sundowner Offshores Services, Inc.*, 118 S.Ct. 998 (1998).

9. Although the existence of corroborative evidence is often crucial in sexual harassment cases, there is no explicit corroboration requirement in either R.C. Chapter 4112 or Title VII. *See Durham Life Insurance Co. v. Evans*, 78 FEP Cases 1434, 1440 (3d Cir. 1999) (Title VII does not have a corroboration requirement in sexual harassment cases). Credibility determinations are the province of the factfinder. When there are two competing versions of disputed facts, the factfinder may credit either side’s version without corroboration from other witnesses.

10. In this case, the majority of Complainant’s sexual harassment allegations against Chief Yost and Sergeant Adams were uncorroborated by witness testimony. However, the Commission did provide a witness

who corroborated Complainant's testimony about the "headlights" comment. Complainant's teenage daughter, Pheleshia, testified that she saw Chief Yost shut off the lights while at the Police Department and make the comment to Sergeant Adams. The Hearing Examiner found her testimony, which withstood cross-examination, credible.

11. The Commission argues that if Chief Yost made the "headlights" comment in front of Complainant's daughter, "he is fully capable of the other conduct of which he is accused." (Comm.Br. 13) This argument has merit. More importantly, the Hearing Examiner believes that this evidence provides a glimpse of the sexual commentary that permeated throughout the ranks of the Police Department. It is reasonable to conclude that if Chief Yost participated in such conduct, he condoned it as well. Complainant and Captain Adams were not above the fray; the Hearing Examiner credited their testimony accusing each other of making sexual comments while on patrol.

12. The Hearing Examiner also credited Complainant's testimony about finding the "69" note in her work drawer in November 1996,⁹ the incidents involving Officer McCalla at the basketball game in January 1997, and Chief Yost's behavior toward her at the Police Department between May and early July 1997, i.e., he unsnapped Complainant's gun clip from her belt and pulled her shirt out of her pants. The first two incidents were isolated incidents that only occurred once. The latter incidents, which contained an element of physical invasion, occurred more than once.

13. Complainant testified in general that Chief Yost unsnapped her gun clip "for about a month." (Tr. 32) Although Complainant testified that she never saw Chief Yost unsnap a gun clip from a male officer's belt, she conceded that this behavior was "something he did to the male officers too." *Id.* Since Chief Yost engaged in such behavior toward both male and female officers, this behavior was not "because of sex" and cannot be considered in the hostile work environment analysis:

⁹ Respondent argues that Complainant's testimony on this issue is not credible because her charge of discrimination indicated that she found "suggestive notes on her desk" and Complainant told her counsel, according to his testimony, that she found the note on her desk. (Ex. 21, Tr. 667) The Hearing Examiner considered these inconsistencies in weighing Complainant's credibility on this issue, but found them insufficient to discredit her entire testimony about finding the note at the Police Department.

Title VII does not prohibit all verbal or physical harassment in the workplace; it is only directed at discrimination because of sex.

Oncale, supra at 80 (quotation marks and brackets removed).

In Title VII actions . . . it is important to distinguish between harassment and discriminatory harassment in order to ‘ensure that Title VII does not become a general civility code.’

Bowman v. Shawnee State University, 2000 WL 987841 (6th Cir. 2000), *quoting Faragher v. City of Boca Rotan*, 524 U.S. 775, 788 (1998).

14. Complainant testified more specifically that Chief Yost pulled her shirt out of her pants approximately 15 times from late May to early July 1997. Yet Complainant acknowledged that she recorded only two incidents of this behavior in her diary for those months. Given this fact and Complainant’s strong response of telling Chief Yost “to keep his fucking hands to himself”, the actual number of occurrences is more likely closer to two than 15.

15. In reviewing the frequency and severity of the alleged sexually harassing behavior, these incidents were isolated and occurred sporadically over a period of 10 months. Offhand sexual comments and isolated incidents of harassment, unless extremely serious, rarely “amount

to discriminatory changes in the terms or conditions of employment.” *Bowman, supra*. None of the incidents in this case, by themselves, were severe enough to alter Complainant’s working conditions and create an abusive working environment. These incidents, even when viewed together under the totality of the circumstances, were neither sufficiently severe nor pervasive to create a hostile work environment as a matter of law. See *Burnett v. Tyco Corp.*, 203 F.3d 980 (6th Cir. 2000) (the act of reaching inside plaintiff’s blouse and placing a cigarette pack under her bra strap coupled with two merely offensive remarks over a six-month period was neither sufficiently severe nor pervasive to create a hostile work environment).

16. Assuming for purposes of argument that the alleged sexually harassing behavior was sufficiently severe or pervasive, the record is void of evidence that Complainant perceived her work environment to be hostile or abusive. The Commission cannot prove that Complainant was the victim of a hostile work environment without such evidence.

. . . if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.

Harris, supra at 21-22.

17. The evidence in this case suggests, if anything, that Complainant did not actually perceive her work environment to be hostile or abusive. For example, Complainant never complained of sexual harassment *to Council* at either the October 6 or October 20 meeting even though her employment hung in the balance.¹⁰ While the subjective component of a hostile work environment claim does not require a complainant to report the alleged sexually harassing behavior, the Hearing Examiner may consider such failure, as part of the totality of the circumstances, in determining whether that component has been met.

18. The Hearing Examiner may also consider Complainant's willingness to engage in sexually explicit discussions with her male coworkers. Captain Adams testified that Complainant openly discussed her sex life (and her menstrual cycle) when he rode with her on patrol. Complainant did not rebut this testimony. To the contrary, Complainant's

¹⁰ Complainant testified that she did not recall raising the issue of sexual harassment at the October 6 meeting. Jeffrey Kapron, the current Council President, was a Council member in October 1997. Kapron testified that he did not recall Complainant raising the issue at the October 20 meeting either. When asked directly at the hearing what she said to Council at that meeting, Complainant did not mention sexual harassment. (Tr. 184-85) Complainant apparently mentioned sexual harassment to Respondent's counsel as she was leaving the October 20 meeting. Respondent's counsel told Complainant that she could file a sexual harassment complaint in court or with a civil rights enforcement agency.

earlier testimony corroborates Adams's testimony on this issue. Complainant gave the following description of a conversation that she had with Officer Domenico Davide while on patrol:

. . . he was talking about going and sleeping with his girlfriend. And how she likes sex. And when they had sex. He kept stating all women or most women like it slow . . . I just turned around and said[,] 'No some women like it hard' . . .¹¹ (Tr. 45)

Complainant's willingness to engage in sexual discussions with male coworkers diminishes the notion that she regarded her work environment as hostile or abusive, at least in part, because of a few offhand sexual comments made to her by Chief Yost and Sergeant Adams.

19. The record is also void of any evidence that the alleged sexually harassing behavior unreasonably interfered with Complainant's work performance or altered her working conditions. In other words, the Commission failed to demonstrate that a reasonable person subjected to the alleged harassing behavior would find that the conduct so altered working conditions as to "ma[k]e it more difficult to do the job." *Harris*, 63 FEP Cases at 229, (Justice Ginsburg's concurrence), *quoting Davis v. Monsanto Chemical Co.*, 47 FEP Cases 1825, 1828 (6th Cir. 1988).

¹¹ Complainant's testimony that she told Officer Davide "No some women like it hard" to stop his sexually explicit commentary is not credible. (Tr. 45)

20. In summary, the alleged sexually harassing behavior, although inappropriate in the workplace, was neither sufficiently severe nor pervasive to alter Complainant's conditions of employment and create a hostile work environment as a matter of law. Even if the behavior met the standard for severity or pervasiveness, there is no evidence that Complainant actually perceived her work environment to be hostile or abusive. Further, the record also lacks evidence that the behavior unreasonably interfered with Complainant's work performance or altered her working conditions. For all of the foregoing reasons, the allegation of sexual harassment must be dismissed.

RETALIATION

21. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973) for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, 116, (1981). It

is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at n.8.

22. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases 969, n.13. In this case, the Commission may establish a *prima facie* case of unlawful retaliation by proving that:

- (1) Complainant engaged in an activity protected by R.C. Chapter 4112;
- (2) The alleged retaliator knew about the protected activity;
- (3) Thereafter, Respondent subjected Complainant to an adverse employment action; and
- (4) There was a causal connection between the protected activity and the adverse employment action.

Hollins v. Atlantic Co., Inc., 80 FEP Cases 835 (6th Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

23. The retaliation provision under R.C. 4112.02(I) contains an opposition clause and a participation clause. The Commission contends that Complainant engaged in protected activity by opposing what she perceived to be sex discrimination. A wide array of conduct, including

verbal complaints to management, may constitute opposition to unlawful discrimination. See *EEOC v. Hacienda Hotel*, 50 FEP Cases 877 (9th Cir. 1989) (employee engaged in protected activity when she complained to management about her supervisor's refusal to accommodate her religious beliefs). Employees engage in protected activity under the opposition clause when they oppose, in good faith, what they reasonably believe is unlawful discrimination on the part of their employer.

It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful discriminatory practices, but also that his belief was *objectively* reasonable in light of the facts and record presented.

Little v. United Technologies, Carrier Transicold Div., 72 FEP Cases 1560, 1563 (11th Cir. 1997).

24. The evidence in this case shows that Complainant complained to Chief Yost on September 11, 1997 about being replaced on afternoons by Randy Ecrement, male, who had less work experience with the Police Department. Complainant also questioned why Chief Yost refused to schedule her work hours around her bowling night as he did for male officers who also bowled in leagues. Chief Yost documented these

complaints in a memorandum, which he prepared contemporaneously. (Ex. 15) Chief Yost also wrote in the memorandum that Complainant repeatedly stated that “she was tired of getting fucked because she was a woman.” *Id.* This language provides conclusive evidence that Complainant complained to Chief Yost about sex discrimination.¹²

25. In light of her complaint of sex discrimination, the question then becomes whether Complainant made this complaint in good faith and reasonably believed that she was opposing discrimination at the time. Besides her complaints in Chief Yost’s memorandum, Complainant testified about other disparate treatment that she perceived to be discriminatory on the basis of her sex.¹³

26. Complainant testified that she became an auxiliary officer around the same time as Shannon McCalla and Domenico Davide. Complainant testified that McCalla and Davide, both male, were allowed to ride on

¹² Chief Yost acknowledged that this language could be construed as a complaint of sex discrimination. (Tr. 646)

¹³ In cases of retaliation, the Commission is not required to prove that the underlying discrimination claim actually violated Ohio’s anti-discrimination statute. *Cf. Little, supra* at 1563; *Drey v. Colt Const. & Development Co.*, 65 FEP Cases 523, 531 (7th Cir. 1994).

patrol with part-time and full-time officers while she was restricted to riding with Chief Yost, Lieutenant McConnaughy, and Sergeant Adams. Complainant testified that Respondent promoted McCalla and Davide to part-time officers within a few months while she remained on auxiliary.

27. Complainant also testified about a conversation she had with Mayor Dale Lewis in Chief Yost's presence. Complainant testified that Mayor Lewis restricted her from entering bars by herself to conduct police business. Complainant testified that Mayor Lewis told her that it was not a "female thing" when she advised him that male officers were not similarly restricted. (Tr. 43, 47)

28. The Hearing Examiner credited Complainant's testimony about these perceived acts of sex discrimination. Although Chief Yost was apparently present during Complainant's meeting with Mayor Lewis, Chief Yost did not rebut her testimony about being restricted from entering bars.¹⁴ Likewise, Chief Yost did not rebut Complainant's testimony about her riding

¹⁴ The September 11 memorandum indicates that Complainant had complained previously about Mayor Lewis "fucking her because she was a woman." (Ex. 15) This reference corroborates Complainant's testimony about her earlier disagreement with Mayor Lewis over her access to bars while conducting police business.

restrictions compared to male officers or the allegation that he worked around male officers' bowling leagues, but refused to provide her the same accommodation.

29. There is also no evidence that Complainant lacked sincerity in complaining of sex discrimination. The Hearing Examiner concludes that Complainant had a reasonable, good faith belief that she was opposing sex discrimination when she complained to Chief Yost on September 11, 1997. Therefore, Complainant engaged in protected activity under R.C. 4112.02(I).

30. The Commission also established the second and third elements of a *prima facie* case. Chief Yost's memorandum shows that he was aware of Complainant's complaint of sex discrimination on September 11, 1997. Complainant's later suspension and ultimate discharge were adverse employment actions.

31. Lastly, the Commission established the fourth element of a *prima facie* case by showing a causal connection between Complainant's complaint of sex discrimination and her subsequent suspension pending

discharge. A causal connection may be inferred with evidence that the adverse employment action closely followed the protected activity. *Holland v. Jefferson National Life Ins. Co.*, 50 FEP Cases 1215 (7th Cir. 1989). The closer the proximity between the protected activity and the adverse employment action, the stronger the inference of a causal connection becomes.

32. The evidence shows that Complainant complained to Chief Yost of sex discrimination on September 11, 1997. The following day, Complainant was involved in a motor vehicle accident while on duty. Complainant returned to work approximately a week and a half later. Complainant worked two days before Chief Yost suspended her on September 23, 1997. Chief Yost advised Complainant then that she could resign now or be discharged at the next Council meeting.

33. Chief Yost testified that he decided to discharge Complainant on September 12, 1997—one day after she complained of sex discrimination. The close proximity between Complainant's engagement in protected activity and the adverse employment actions creates an inference of a causal connection. Such evidence is sufficient to establish a causal

connection between these events for purposes of proving a *prima facie* case of unlawful retaliation.

. . . a court may look to the temporal proximity of the adverse action to the protected activity to determine where there is a causal connection.

EEOC v. Avery Dennison Corp., 72 FEP Cases 1602, 1609 (6th Cir. 1997) (citation and quote within a quote omitted).

Temporal relationship between a plaintiff's participation in protected activities and a defendant's alleged retaliatory conduct is an important factor in establishing a causal connection.

Gonzales v. State of Ohio, Dept. of Taxation, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).

34. The Commission having established a *prima facie* case, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for the employment actions. *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 . . . [retaliation] 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 of unlawful retaliation created by the establishment of a *prima facie* case “drops out of the picture” when the employer articulates a legitimate, nondiscriminatory reason for the employment actions. *Hicks, supra* at 511, 62 FEP Cases at 100.

35. Respondent met its burden of production with Chief Yost’s testimony and documentary evidence. Chief Yost gave Complainant a letter on September 23, 1997 that listed the following reasons for her suspension: “neglect of duty, inefficiency, insubordination, discourteous treatment of the public and for other reasonable and just causes.” (Ex. 19) Chief Yost testified that he decided to discharge Complainant after a nurse called him on September 12, 1997 and informed him that Complainant was “very rude” to hospital staff earlier that day. (Ex. 16, Tr. 628, 635)

36. Respondent having met its burden of production, the Commission must prove that Respondent retaliated against Complainant because she engaged in protected activity. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent’s articulated reasons for Complainant’s suspension and discharge were not its true reasons, but were a “pretext for . . . [unlawful

retaliation].” *Id.*, at 515, 62 FEP Cases at 102, quoting *Burdine*, 450 U.S. at 253, 25 FEP Cases at 115.

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

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

37. 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 . . . [unlawful retaliation] is correct. That remains for the factfinder to answer

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

Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of unlawful retaliation.

38. In determining the true reason or reasons for Complainant’s discharge, the logical starting point is the suspension letter that she received from Chief Yost on September 23, 1997. The suspension letter lists specific reasons such as “neglect of duty, inefficiency, insubordination,

[and] discourteous treatment of the public” and the general, catch-all phrase “for other reasonable and just causes.” (Ex. 19) The Commission contends that Chief Yost took this language “from the statutory provision for removing a village marshall.” (Comm.Br. 9, n.4) Chief Yost did not dispute this contention at the hearing. Instead, Chief Yost testified that he used this language because he “wanted to give some reasons” for Complainant’s suspension. (Tr. 506) This testimony may be construed as a concession that the specific reasons in the suspension letter are not necessarily the true reasons for Complainant’s suspension and ultimate discharge.

39. The suspension letter also states that Complainant “rebuffed” efforts to resolve her problems and demonstrated “no improvement in . . . [her] official duties or work attitude.” (Ex.19) Chief Yost testified that he discussed work performance issues with Complainant in the summer of 1997. Chief Yost testified that Captain Adams was present during these discussions.

40. Assuming that Chief Yost and Captain Adams met with Complainant about work performance issues, the evidence shows that

such issues were neither serious nor repetitive enough to warrant disciplinary action. In fact, Complainant never received any discipline prior to her suspension pending discharge. In her only work performance evaluation, Chief Yost rated Complainant in late February 1997 as “excellent” in 9 out of 14 categories including work quality and attitude. (Ex. 8) Complainant received “good” or “fair” ratings in the other categories. *Id.* Captain Adams informed Complainant as late as September 8, 1997 that she had “not done anything to jeopardize her job.” (Ex. 14)

41. The evidence also shows that Complainant showed improvement in certain areas. For example, Captain Adams told Complainant on September 8, 1997 that “she got better” after he and Chief Yost talked to her about how she conducted traffic stops. *Id.* Chief Yost testified that he agreed with this statement “for the most part.” (Tr. 600-01)

42. In weighing credibility, the Hearing Examiner also considered that Chief Yost provided conflicting testimony at the hearing about the timing of Complainant’s discharge. Chief Yost initially testified that he decided to discharge Complainant prior to her accident after receiving

letters from an assistant prosecuting attorney regarding deficiencies in her police reports. Chief Yost later testified that he made the decision after he received the call from a nurse about Complainant's behavior at the hospital following her accident.¹⁵ Chief Yost's inconsistent testimony about when he decided to discharge Complainant damaged his credibility.

43. The Commission presented other evidence that casts doubt on Chief Yost's testimony about the reasons for Complainant's discharge. While the "nursing process form" does indicate that Complainant was, at times, "verbally abusive" with hospital staff, this conduct along with two deficient police reports and problems with traffic stops was insufficient to motivate Complainant's discharge in light of comparative evidence. The Commission may attack Respondent's articulated reasons with evidence that Respondent treated Complainant differently than similarly situated employees who had not engaged in protected activity. This is known as disparate treatment.

¹⁵ Chief Yost testified that neither Complainant's accident nor her alleged refusal to take a drug test was a factor in her discharge. (Tr. 620, 635)

44. 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).

45. 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, the 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).

46. The comparative evidence shows that Chief Yost treated Shannon McCalla, a male officer, more favorably than Complainant. McCalla received several written warnings and two suspensions while employed full-time from January 1997 to his resignation in July 1997. In comparison, Chief Yost recommended Complainant's discharge without affording her the same benefit of progressive discipline.¹⁶ McCalla engaged in a pattern of serious misconduct including insubordinate behavior, yet Chief Yost did not discharge him.

47. Although Complainant and McCalla did not engage in identical conduct, both made mistakes relating to police reports. In January 1997, Chief Yost issued a disciplinary warning to McCalla for "not logging . . . traffic stop information." (Ex. 36) Chief Yost's comments at the time referred to this failure as "very serious" and suggested that it was not the first time he warned McCalla about such behavior:

I warned Ptl. McCalla for the last time[.] This is very serious. The next time he will be suspended for three days.

Id.

¹⁶ As of October 1997, Complainant was the only full-time police officer that Chief Yost recommended for discharge since he assumed the position in November 1994.

48. In April 1997, Chief Yost suspended McCalla for two days for improper conduct during traffic stops. One of these incidents involved McCalla's failure to arrest a drunk driver who failed a breathalyzer test at the scene. *Id.* Later in the month, Chief Yost documented other incidents where McCalla failed to follow police procedures during traffic stops. According to Chief Yost, Complainant also had difficulty with traffic stops; however, her problems were apparently not serious enough to put in writing or cause him to take disciplinary action against her.

49. In June 1997, Chief Yost suspended McCalla for five days for another incident where he failed to arrest a drunk driver and otherwise did not follow police procedure. Chief Yost also documented McCalla's continuous problems handling traffic stops and following orders:

You aslo [sic] are still having problems with the cam corder[.] You are not doing what your [sic] told to do because no one else is having problems with it. And it shows on your stops. *You have been disrespectful and insubordinate.* You refuse to fill out a car checklist when you were told to[.] You didn't like what was put up on the bulletin board so you signed your name so no one could read it. You were told to put all information in your logs and you still don't.

Id., (Emphasis added.)

50. In attempting to explain the disparate treatment, Chief Yost testified that he considered that McCalla was “going out on midnights on very serious calls” such as DUIs. (Tr. 507, 620) While this might have been true when McCalla worked on auxiliary or part-time, the evidence shows that Complainant replaced McCalla on afternoons when he resigned as a full-time officer. The majority of the discipline that McCalla received stemmed from his actions on afternoon rather than midnight shifts. Chief Yost was forced to concede this fact during cross-examination:

Q: Will you agree with us now that these incidents that you wrote him [McCalla] up for, the majority of them didn't happen on the midnight shift?

A: That's what the document [sic] say, ma'am.

(Tr. 639)

51. When McCalla's disciplinary record is compared to Complainant's alleged misconduct, it is readily apparent that McCalla, at the very least, engaged in misconduct of comparable seriousness. Therefore, they are similarly situated for comparison purposes. Chief Yost's explanation for the disparate treatment is unworthy of credence. The evidence of disparate treatment not only supports the allegation of unlawful retaliation, but also a claim of sex discrimination.

52. After a careful review of the entire record, the Hearing Examiner disbelieves Respondent's articulated reasons for Complainant's discharge and concludes that they are, more likely than not, a pretext for both unlawful retaliation and sex discrimination.

The 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 the *prima facie* case, suffice to show intentional discrimination . . . [n]o additional proof is required.¹⁷

Hicks, supra at 511, 62 FEP Cases at 100.

The Hearing Examiner is convinced that Complainant's complaint of sex discrimination on September 11, 1997 was a motivating factor in her discharge. Complainant is entitled to relief as a matter of law.

¹⁷ Even though rejection of a respondent's articulated reason is "enough at law to *sustain* finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* at 511, 62 FEP Cases at 100, n.4.

RELIEF

53. When the Commission makes a finding of unlawful discrimination or retaliation, the victims of such behavior are entitled to relief. R.C. 4112.05(G)(1). Title VII standards apply in determining the appropriate relief under the statute. *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89.

54. Like Title VII, one of the purposes of R.C. Chapter 4112 is to make “persons whole for injuries suffered through past discrimination.” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 10 FEP Cases 1181, 1187 (1975). The attainment of this objective requires that:

. . . persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

Franks v. Bowman Transportation Co., 424 U.S. 747, 763, 12 FEP Cases 549, 555 (1976) (footnotes omitted).

55. In providing a “make whole” remedy, there is a strong presumption in favor of awarding back pay. To be eligible for back pay, victims must attempt to mitigate their damages by seeking substantially

equivalent employment. *Rasimas v. Michigan Dept. of Mental Health*, 32 FEP Cases 688, 694 (6th Cir. 1983). A substantially equivalent position affords the victim “virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status.” *Id.*, at 695. Victims forfeit their right to back pay if they refuse to accept a substantially equivalent position or fail to make reasonable and good faith efforts to maintain such a job once accepted. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 29 FEP Cases 121 (1982); *Brady v. Thurston Motor Lines*, 36 FEP Cases 1805 (4th Cir. 1985).

56. The employer has the burden of proving that the victim failed to mitigate damages. To meet this burden, the employer must establish that: (1) there were substantially equivalent positions available, and (2) the victim failed to use reasonable diligence in seeking such positions. *Rasimus, supra* at 695.

57. The victim’s duty to use reasonable diligence is not burdensome. Victims are not required to be successful or go to “heroic lengths” to mitigate damages, only reasonable steps are required. *Ford v. Nicks*, 48 FEP Cases 1657, 1664 (6th Cir. 1989). The reasonableness of the victim’s

effort to find substantially equivalent employment should be evaluated in light of the victim's individual characteristics (such as educational background and work experience) and the job market. *Rasimus, supra* at 695.

58. Besides proving lack of mitigation, the employer also has the burden of proving that the victim had interim earnings. The victim's interim earnings are deducted from the back pay award. R.C. 4112.05(G)(1).

59. The evidence in this case shows that Complainant failed to mitigate her damages by seeking substantially equivalent employment during the remainder of 1997 and 1998. Therefore, Complainant is not entitled to back pay for those years.

60. Although Complainant increased the hours of her part-time job after Respondent discharged her, Complainant admitted that she did not attempt to obtain police work or other substantially equivalent employment in 1997 or 1998 even though she was aware of vacancies for such

positions.¹⁸ See *Sellers v. Delgado College*, 902 F.2d 1189 (5th Cir. 1990) (duty to mitigate requires claimant to exercise reasonable diligence not just to obtain employment, but to obtain “substantially equivalent” employment). Complainant testified that she heard Akron and Canton were hiring police officers within “a few months” after her discharge, but she did not apply for these openings because she believed that Chief Yost had “blackballed” her from police work. (Tr. 195-96) Complainant’s reliance on such speculation did not absolve her duty to mitigate damages by seeking substantially equivalent employment.

61. Complainant is also not entitled to back pay from January 1999 through March 1999. The evidence shows that Complainant was physically unable to work during that period due to her pregnancy. See *Mitchell v. Board of Trustees, Pickens City*, 23 FEP Cases 533 (D.S.C. 1980) (plaintiff successfully challenged defendants’ policy of forced maternity leave and was awarded back pay that included the weeks she was compelled not to

¹⁸ In August 1997, Complainant began providing home health care for an elderly woman on a part-time basis. Complainant provided full-time care for this woman shortly after Respondent discharged her. Complainant continued to provide full-time care until her physician placed her on pregnancy leave in January 1999.

work until the date upon which she testified she would have voluntarily taken maternity leave).

62. Complainant testified that she applied for an opening with the East Canton Police Department in March or April 1999. Complainant testified that she applied for this vacancy in response to an advertisement in *The Canton Repository*. Complainant testified that she stopped looking for police work in July 1999 after enrolling in school to become a nursing assistant. Unlike the previous two years, Complainant's testimony shows that she made some effort in 1999 to obtain work as a police officer.

63. During the hearing, Respondent did not present any evidence that police officer jobs or other substantially equivalent positions were available from April through June 1999 in geographical areas that Complainant had reasonable access to. Nor did Respondent provide any evidence to conclude that Complainant failed to exercise reasonable diligence in seeking such positions. Absent such evidence, Respondent failed to meet its burden of proving that Complainant's mitigation efforts from April through June 1999 were insufficient. Therefore, Complainant is

entitled to back pay for those three months, less her interim earnings over that period.¹⁹

64. As part of a “make whole” remedy, Complainant is also “presumptively entitled to reinstatement.” *Ford, supra* at 1666. The Commission requests that Complainant receive front pay in lieu of reinstatement. Front pay is compensation for the “post-judgment effects of past discrimination”; it is designed to make victims whole for a reasonable future period required for them to be placed in the same position they would have occupied but for the employer’s illegal conduct. *Shore v. Federal Express Corp.*, 39 FEP Cases 809, 811 (6th Cir. 1985). Front pay is an option in cases where reinstatement is impossible or inappropriate.

65. While a certain degree of hostility appears to exist between Complainant and Chief Yost, front pay is not an option in this case. Complainant’s present failure to obtain substantially equivalent employment is primarily attributed to her lack of reasonable diligence in actively and

¹⁹ Complainant is also entitled to prejudgment interest on this amount. *Ingram, supra* at 93.

consistently pursuing such employment. *Sellers, supra* at 1196 (court upheld denial of front pay where plaintiff's lack of reasonable diligence, not employer's actions, accounted for her present failure to obtain substantially equivalent employment).

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint #8397 that:

1. The Commission order Respondent to cease and desist from all discriminatory and retaliatory practices in violation of R.C. Chapter 4112;
2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for a full-time police officer position. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a full-time police officer on October 20, 1997 and continued to be so employed up to the date of Respondent's offer of employment; and

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the Commission's Final Order a certified check payable to Complainant for the amount that Complainant would have earned had she been employed as a full-time police officer with Respondent from April 1, 1999 to June 30, 1999, including any raises that she would have received, less her interim earnings during that period, plus interest at the maximum rate allowed by law.²⁰

TODD W. EVANS
HEARING EXAMINER

August 22, 2000

²⁰ Any ambiguity in the amount that Complainant would have earned during this period should be resolved against Respondent.