

INTRODUCTION AND PROCEDURAL HISTORY

Anthony N. Nwankwo (Complainant) filed sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on August 5, 1999.

The Commission investigated the charge and found probable cause that Watson, Rice & Company, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code (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 June 8, 2000. The Complaint alleged that Respondent discharged Complainant because of his age.

Respondent filed an Answer on July 5, 2000. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also denied that the Commission attempted and failed to conciliate this matter prior to issuing the Complaint.

On October 30, 2000, the Commission filed a Motion to Compel Discovery. The Hearing Examiner conducted a pre-hearing conference in this case on November 15, 2000. One of the topics of the conference was whether the discovery dispute was resolved. Respondent's counsel indicated that he would answer the Commission's outstanding discovery requests by the beginning of the following week. This was not done. The Commission renewed its Motion to Compel Discovery on November 24, 2000.

The Hearing Examiner granted the Commission's Motion to Compel Discovery on December 1, 2000. The public hearing, initially set for December 11, 2000, was rescheduled for February 1, 2001.

In late December 2000, the Commission issued and served subpoenas on Robert Rice, Respondent's managing partner, and Dale Carnahan, the Audit Manager. Rice and Carnahan were compelled to appear for their depositions on January 4, 2001, and January 8, 2001,

respectively. Neither Rice, Carnahan, nor any other representative of Respondent appeared on those dates.¹

On January 12, 2000, the Commission filed a Motion to Enforce Subpoenas after informally attempting to resolve the matter. The Hearing Examiner scheduled a telephonic status conference to discuss the matter on February 1, 2001. Respondent's counsel failed to make himself available for the call. The Hearing Examiner then issued two subpoenas on February 6, 2001; the Hearing Examiner ordered Rice and Carnahan to appear for their depositions on February 15, 2001. The Hearing Examiner also sent notice on that date that the public hearing was rescheduled to March 20-21, 2001.

Neither Rice, Carnahan, nor any other representative of Respondent appeared for the depositions scheduled for February 15, 2001. An assistant of Respondent's counsel called the Commission's counsel later

¹ Rice apparently did accompany Valencia Yancy and Norvella Shelton, both former coworkers of Complainant, when the Commission's counsel deposed them on January 5, 2001. The Commission's counsel began Rice's deposition that day, but it was suspended prior to completion. Rice agreed to complete his deposition on January 8, 2001, but he failed to appear on that date.

that day and informed him that Rice had suffered a stroke on January 29, 2001. The assistant later sent the Commission's counsel a letter via facsimile from Rice's treating physician, Dr. Andrew Jimerson. Dr. Jimerson indicated that Rice was "currently disabled" and recommended that he maintain "a relaxed low stress environment."

The Commission filed a Motion for Sanctions on February 26, 2001. The Commission moved for sanctions against Respondent for failing to comply with subpoenas issued by the Commission and the Hearing Examiner. The Commission requested reimbursement of service costs and court reporter fees related to the failure to honor these subpoenas. The Hearing Examiner reserved ruling on the Motion for Sanctions until after the hearing was held and briefing process was completed.²

² Upon good cause shown, the Commission's Motion for Sanctions is hereby granted. Rice and Carnahan, both supervisory employees of Respondent, disregarded subpoenas issued by the Commission and the Hearing Examiner on two separate occasions. Respondent did not file motions to revoke or modify these subpoenas as provided in the Ohio Administrative Code. Nor did Respondent inform the Commission prior to the depositions that neither deponent intended to appear; thus, the Commission did not have the opportunity to avoid court reporter fees. The Commission is entitled to \$277.74 for reimbursement of service costs and court reporter fees related to the failure to honor these subpoenas. (See service affidavits and invoices attached to the Commission's Motion for Sanctions.)

The Hearing Examiner conducted a telephonic status conference on March 8, 2001. Respondent's counsel informed the Hearing Examiner that Rice, the ultimate decision-maker in this case, was still indefinitely disabled and therefore, he was unable to complete his deposition and testify at the hearing. The Hearing Examiner requested another medical update from Complainant's treating physician. The Hearing Examiner informed counsel that he intended to proceed with the hearing dates on March 20-21 and leave the record open for Rice's testimony at a later date. Neither counsel objected at that time. Respondent provided the Hearing Examiner with a physician's statement from Dr. Jimerson the following day. Dr. Jimerson indicated Rice "continues to be disabled indefinitely."

On March 19, 2001, Respondent's counsel verbally requested a continuance of the hearing. Respondent's counsel indicated that his client would be prejudiced by proceeding with the hearing without Rice present. The Hearing Examiner denied Respondent's request for a continuance. The Hearing Examiner reiterated that he intended to proceed with the hearing and leave the record open for Rice to recuperate enough to testify later.

A public hearing was held on March 20, 2001 at the Lausche State Office Building in Cleveland, Ohio. The Commission's counsel and Complainant appeared; Respondent's counsel did not appear.³ The Commission called Complainant and Yancy as witnesses. Complainant testified at the hearing. Yancy appeared, but she refused to testify (without Respondent's counsel present) despite a Commission Subpoena requiring her to do so.

On April 12, 2001, the Commission petitioned the Cuyahoga County Court of Common Pleas on to enforce the Subpoena. Five days later, the Court ordered Yancy to comply with the Subpoena. The Court instructed Yancy to make herself available for testimony when the hearing reconvened on May 4, 2001.⁴

³ Respondent filed a Motion for Continuance on March 20, 2001 at 12:15 a.m. Respondent moved for a continuance because Rice was unavailable for the hearing, and Respondent's counsel had a jury trial that day in another matter. The Hearing Examiner denied the Motion at the hearing.

⁴ The Hearing Examiner issued an Order to reconvene the hearing on May 4, 2001. In addition, the Hearing Examiner also ordered Respondent to make Rice available to complete his deposition on that date or provide a physician's statement, which indicated that he was medically unable to do so. The Hearing Examiner requested that the statement describe Rice's current condition with specificity, list any limitations caused by his condition, and provide an opinion about when, if ever, Rice would be able to complete his deposition and testify in this case.

On May 3, 2001, Respondent filed a physician's statement from Dr. Jimerson. Dr. Jimerson indicated that Rice had "multiple medical problems" causing him to suffer "severe anxiety and stress reaction." Dr. Jimerson further indicated that Rice was "currently totally disabled" and advised that he "should not be exposed or subjected to working or going to court or anything that would cause unnecessary stress."

The hearing reconvened on May 4, 2001. Yancy testified as if on cross-examination. Respondent requested the opportunity to question Yancy, cross-examine Complainant, and present additional witnesses (Carnahan and Shelton) on its behalf. The Commission did not object to this request, which the Hearing Examiner granted. The hearing adjourned with plans to continue to monitor Rice's medical condition and reconvene to hear Shelton's testimony and, if possible, Rice's testimony.

On July 2, 2001, Respondent filed a physician's statement from Dr. Jimerson. Dr. Jimerson indicated that it was against his medical advice to place Rice, who had not returned to work, "in any situation that he feels is stressful, high pressure, fast paced, physically or mentally taxing or

demanding.” Dr. Jimerson further indicated that this would “especially” include testifying in any court.

The hearing reconvened on August 16, 2001. At the end of the hearing, the Commission objected to the first three documents identified as Respondent’s Exhibit A. The Commission argued that these documents were not authenticated during the hearing. Respondent requested the opportunity for the parties to argue the admissibility during the briefing process.⁵ The Hearing Examiner granted this request and reserved ruling on the admissibility of these documents.

During the hearing, the Commission moved to admit the partial deposition of Rice into evidence. Respondent requested 21 days to allow Rice to review the deposition transcript and make any necessary corrections. Respondent was instructed to file any objections within that period.

⁵ Gene Goings appeared on behalf of Respondent that day. Goings indicated that he was acting as Respondent’s counsel because Michael Watson was unavailable. Goings did not attend the prior days of hearing. This is why he requested the opportunity for Respondent to argue the issue after receipt of the transcript of the earlier proceedings.

The Commission filed a Motion to Admit Deposition Transcript on September 13, 2001. The Commission moved to admit Rice's partial deposition transcript after Respondent failed to object or otherwise respond during the 21-day period. The Hearing Examiner granted the Motion.

The record consists of the previously described pleadings, a 424-page transcript of the hearing, exhibits admitted into evidence during the hearing, Rice's partial deposition transcript, and the Commission's post-hearing brief filed on November 6, 2001. Respondent did not file a post-hearing brief.⁶

⁶ The Commission's objection to the admission of the first three documents identified as Respondent's Exhibit A is hereby granted. These documents were not properly authenticated during the hearing.

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 August 5, 1999.

2. The Commission determined on April 27, 2000 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 case by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.⁷

4. Respondent is a small accounting firm and an employer doing business in Cleveland, Ohio. Respondent usually has five employees including its managing partner and a secretary. Respondent predominantly performs audits for non-profit organizations. Respondent also performs special accounting projects and assists national accounting firms in completing audits.

⁷ The Commission called Patrick McGraw as a witness. McGraw acted as the Commission Conciliator in this case. The Commission argues that “McGraw’s testimony, along with his notes and letters, reveals that reasonable efforts were made to conciliate the case, and that those efforts were unsuccessful.” (Comm.Br. 3) This argument is well taken.

5. Robert Rice is Respondent's managing partner. Rice oversees Respondent's daily operations and the "quality control" of its work product. (Rice's Dep. 10) Rice also makes all of the hiring and firing decisions.

6. Complainant was born on October 14, 1957. He graduated from Youngstown State University in 1987 with a Bachelor's Degree in accounting. After graduation, he performed accounting and bookkeeping functions for three different employers. He became a Certified Public Accountant (CPA) in 1993.

7. In February 1994, Rice hired Complainant to work for Respondent as a Staff Accountant. Most of Complainant's duties involved compliance and procedural testing; he also prepared trial balances that became part of draft financial statements.⁸ Complainant usually performed testing at the client's place of business. Complainant initially went on these on-sites with either Steve Fante, Senior Accountant and his immediate supervisor, or Dale Carnahan, the Audit Manager.

⁸ Complainant performed compliance testing for clients who received grants. Complainant checked the procedures of these clients to ensure that they followed the specific accounting requirements of the particular grant. In comparison, procedural testing involved ensuring that clients were following their own money-handling procedures.

8. On April 21, 1995, Fante completed a work performance evaluation for Complainant. Although the evaluation had favorable aspects, Fante commented that Complainant's "attitude towards clients and sometimes superiors limits the potential for advancement", and he tended to be "aggressive towards client personnel." (Comm.Ex. 19) Fante wrote the following summary in Complainant's evaluation:

In summary, Anthony has the basic skills, knowledge and professionalism to do well in his position, but this is often overshadowed by his attitude. [F]or the most part, he is easy to work with, but at times, is very difficult too. Anthony appears extremely dedicated to the profession, but likes to work on his own terms, i.e., when and how he sees appropriate. His technical ability is very good and has steadily improved over the last year.

Id.

9. Meanwhile, Carnahan sent Complainant a memorandum on April 21 about his "extreme displeasure" with Complainant's attitude, "unprofessional off-hand comments" toward him, and his unwillingness to follow verbal instructions during an on-site audit that Complainant worked under Carnahan's direction. (Comm.Ex. 20) The memorandum indicated that Carnahan had discussed these issues with Rice who "support[ed]" his position. *Id.* The memorandum further indicated that a copy of the

correspondence would be provided to Rice and placed in Complainant's personnel file.

10. Complainant was upset upon receipt of the memorandum; he expressed his disagreement with its contents to Rice. Rice encouraged Complainant to write a response.

11. On April 24, 1995, Rice met with Complainant and Carnahan about the matter. Prior to the meeting, Complainant provided Rice and Carnahan a copy of his response. The response, *inter alia*, chastised Carnahan for his lack of respect for Complainant and dictatorial managerial style, as well as his personal hygiene and mannerisms. For example, the last paragraph of the response provides:

Talking about unacceptable behavior, I do not go around crowning [sic] out clients with foul odor, nor do I dig my nose and ears without minding who is watching. I do not scratch and peel white flecks from my skin, nor do I exhibit myself weird before clients. They may not tell you how offended they feel, but they do tell us. The question is: How can such clients [sic] feelings be conveyed to a perfect man, who thinks he knows it all?

(Comm.Ex. 21)

12. Rice gave Complainant a verbal reprimand for the behavior outlined in Carnahan's memorandum. (Rice's Dep. 37) Complainant and Carnahan were no longer scheduled to work together after this disagreement. (Rice's Dep. 63, Tr. 278) Complainant continued to work with Fante on-site until Fante left his employment with Respondent in 1997. Complainant worked on-site by himself after Fante left. (Tr. 41)

13. In mid-1997, Rice spoke with Valencia Yancy, his niece, about working for Respondent. Rice informed Yancy that Respondent had an opening. At the time, Yancy was working as a Staff Accountant for a corporation in Alabama.

14. Rice hired Yancy as a Staff Accountant in June 1997.⁹ Upon her hire, Yancy relocated to Cleveland and moved into Rice's residence. Rice instructed Complainant to train Yancy. This training required Yancy to work with Complainant on-site.

⁹ Yancy received a Bachelor's Degree in accounting from Auburn University in 1994. (Comm.Ex. 51) Yancy was born on June 11, 1972; therefore, she was 24 years of age when Rice hired her.

15. By January 1998, Rice had promoted Complainant to Senior Accountant. In this position, Complainant supervised Yancy and was responsible for completing the “field work” for a particular auditing job. (Rice’s dep. 51) Complainant also began to prepare draft audit reports. Complainant was required to submit these reports to Rice for review. Rice had to approve these reports before they were sent to clients.

16. In February 1998, Rice hired Norvella Shelton to work for Respondent. Shelton initially replaced Respondent’s secretary, Maria Warren, while she was on maternity leave. From April through May 1998, Shelton observed and assisted at an on-site audit. Shelton primarily performed data entry and referencing.

17. Shelton continued to assist on-site throughout the summer of 1998.¹⁰ Shelton performed very basic accounting procedures. Shelton also performed secretarial duties during that time as needed.

¹⁰ Shelton was born on December 22, 1972. She received a Bachelor’s Degree in Accounting from David Myers College (formerly Dyke College) in June 1998. (Comm.Ex. 57)

18. In the latter part of 1998, Yancey began working on-site without Complainant or other supervision. Shelton assisted Complainant at some of these on-sites. Rice instructed Yancy to train Shelton to perform the duties of Staff Accountant.

19. In early 1999, Complainant and Shelton continued to work together on-site. Some of these on-sites were clients that Complainant previously performed auditing work for. Complainant missed one week of work in mid-January 1999 after Rice called Complainant over the weekend and told him he did not have work for him the following week. (Comm.Ex. 22, Tr. 56, 59-60) Yancy worked that week for a client that Complainant previously worked for. (Comm.Ex. 54)

20. In February 1999, Rice asked Complainant to prepare a proposal where Complainant would work for Respondent as needed, and the money received from his work would be divided proportionally. Rice suggested that Respondent receive two-thirds ($2/3$) while Complainant receive one-third ($1/3$).

21. On March 22, 1999, Complainant sent Rice written notice that he was taking eight weeks of unpaid leave from April 5 to June 1 “to take care of some personal matters.”¹¹ (Comm.Ex. 24) Rice approved Complainant’s request for unpaid leave.

22. Complainant returned to work on June 3, 1999. Rice informed Complainant that Respondent did not have any work for him. Rice cited the loss of “a major client”, namely the Legal Aid Society of Cleveland. (Tr. 63) Rice asked Complainant about the work arrangement that they discussed in February, i.e., Complainant would work for Respondent as needed, and he would receive one-third (1/3) of the money received. Complainant rejected this work arrangement. (Tr. 240-241)

23. Later that day, Rice prepared a termination letter and sent it to Complainant. Rice indicated in the letter that Complainant was terminated as of May 31, 1999 “due to the lack of business.” (Comm.Ex. 26) Rice

¹¹ Complainant testified that he needed the time off in 1999 because his wife underwent major surgery, and he needed to help her watch their two children. It is not clear in the record whether Complainant told Rice specifically why he needed this time off. Complainant also took off two months around the same time in 1998. Rice testified in his deposition that he “suspected” that Complainant’s leave in 1998 had “something to do” with his outside business (ANNCO International) of preparing income tax returns. (Rice’s Dep. 32)

further indicated that it was “equally regrettable” that they could not agree on an alternative work arrangement. *Id.*

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 discharged Complainant because of his age.

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 . . . age, . . . 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.¹²

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and R.C. 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 under the Age Discrimination in Employment Act of 1967 (ADEA).

5. Under federal case law, the Commission is usually required to first establish a *prima facie* case of unlawful discrimination by a preponderance

¹² R.C. 4112.01(A)(14) defines age as “at least forty years old.”

of the evidence. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973). The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (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 254, n.8.

6. 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, n.13. In this case, the Commission may establish a *prima facie* case of age discrimination by proving that:

- (1) Complainant was at least 40 years of age on the date of harm;
- (2) Complainant was qualified for his position;
- (3) Respondent took an adverse employment action against Complainant; and
- (4) Respondent replaced Complainant with, or his discharge permitted the retention of, a substantially younger person.

O'Connor, supra at 313.

7. The Commission proved the first three elements of a *prima facie* case. The evidence shows that Rice discharged Complainant after he refused to agree to an alternative work arrangement. This constitutes an adverse employment action. Complainant was 41 years of age at the time of his discharge and thus, he was within the protected age class. Lastly, Complainant was, if anything, overqualified for the position of Senior Accountant. Complainant was a CPA even though the position obviously did not require such certification.¹³

8. The Commission also proved the fourth element of a *prima facie* case with evidence that Yancy replaced Complainant or at least that his discharge permitted the retention of Yancy and Shelton, both who are substantially younger than Complainant. The evidence shows that Complainant trained Yancy to perform the duties of Staff Accountant. As Yancy became more experienced, she began to work on-site without Complainant. This occurred as early as November 1998. Yancy also was

¹³ The record lacks evidence on the objective qualifications of Senior Accountant. As a small employer, Respondent apparently does not have written qualifications for the position. The Hearing Examiner concluded that Respondent does not require Senior Accountants to be CPAs because Rice promoted Yancy to the position even though she lacks this professional certification.

assigned the responsibility of training Shelton at that time. Yancy, instead of Complainant, trained Shelton to perform the duties of Staff Accountant.

9. Yancy also began working on accounts that Complainant previously worked on. This resulted in less work for Complainant. In mid-January 1999, Complainant missed one week of work because Rice told him that Respondent did not have any work for him. Yancy's time sheets show that she worked that week for a client that Complainant previously worked for. (Comm.Ex. 54)

10. The evidence also shows that Yancy's responsibilities increased after Complainant's discharge. (Tr. 142) Yancy began to perform the duties that Complainant performed as a Senior Accountant, such as preparing draft audit reports. (Tr. 144) Yancey performed the duties of Senior Accountant before she officially assumed that job title in 2000.

11. The Commission argues that even if Yancy did not replace Complainant, his discharge allowed Respondent to retain both Yancy and Shelton who eventually became a Senior Accountant and Staff Accountant, respectively. This argument is well taken. Since Complainant's hire in 1994, Respondent has employed four persons (including its managing

partner) who perform accounting work and one full-time secretary. Even the current configuration of one managing partner, one audit manager, one Senior Accountant, and one Staff Accountant is the same. Only the persons holding the positions of Senior Accountant and Staff Accountant have changed.

12. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action. *McDonnell Douglas, supra* at 802. 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.¹⁴

St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507 (1993), quoting *Burdine, supra* at 254-255, n.8.

¹⁴ Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254.

The defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for the termination; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.

EEOC v. Flasher Co., 986 F.2d 1312, 1316 (10th Cir. 1992) (citations and footnote omitted).

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 the employment action. *Hicks, supra* at 511.

13. Although it was unfortunate that Rice, the ultimate decision-maker, was not medically released to testify, Respondent met its burden of production with documentary evidence which indicates that Respondent discharged Complainant because of a lack of work, and his unwillingness to agree on an alternative work arrangement. These reasons are provided in Complainant’s termination letter prepared by Rice on June 3, 1999. (Comm.Ex. 26)

14. Respondent having met its burden of production, the inquiry moves to the ultimate issue of the case, i.e., whether Respondent discharged Complainant because of his age. The Commission must show by a preponderance of the evidence that Respondent’s articulated reasons for Complainant’s discharge were not its true reasons, but were “a pretext for discrimination.” *Hicks, supra* at 515, *quoting Burdine, supra* at 253.

[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.

15. 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 . . . [age] is correct. That remains a question for the factfinder to answer

Id., at 524.

In other words, "[i]t is not enough . . . to *disbelieve* the employer, the factfinder must *believe* the . . . [Commission's] explanation of intentional discrimination." *Id.*, at 519. Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of age discrimination.

16. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for discharging Complainant. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that the reasons had no basis *in fact* or were *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the factfinder

to infer intentional discrimination from the rejection of the reasons without additional evidence of unlawful 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. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination, and . . . no additional proof of discrimination is *required*.¹⁵

Hicks, supra at 511, (bracket removed).

17. The Commission may indirectly challenge the credibility of Respondent's reasons by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reasons are a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that the reasons did not *actually* motivate the employment decisions, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

¹⁵ Even though rejection of a respondent's articulated reasons is "enough at law to *sustain* finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* 511, n.4.

18. The Commission argues that Respondent's assertion that Complainant was discharged "due to a lack of work" has no basis in fact. Yet the Commission argues at the same time that Respondent only had enough work for Rice, Carnahan, and two other employees working as a Senior Accountant or Staff Accountant. These arguments are inconsistent.

19. It is undisputed that Respondent had five employees in June 1999 who performed accounting work: Rice, Carnahan, Yancy, Shelton, and Complainant. The record tends to support the Commission's argument that Respondent did not have enough work to employ one additional professional employee on a weekly basis. Although the stated reason of "lack of work" is vague and does not explain why Rice offered Complainant provisional or "on call" work instead of Yancy or Shelton, this reason appears to be factually accurate.

20. The Commission attempts to prove pretext in this case not so much by showing that Respondent, in fact, had work for Complainant in June 1999. Instead, the Commission focuses on Rice's decision to discharge Complainant rather than Yancy or Shelton—both who happen to be substantially younger than him. It is undisputed that Yancey's and

Shelton's work product required more supervisory review than the same work produced by Complainant, and they had less seniority, less accounting experience, and lesser professional qualifications than him. Although Complainant was superior to Yancey and Shelton in these areas, the relevant inquiry is necessarily limited to whether Complainant's age played a factor in Rice's decisions to offer Complainant provisional work and discharge him upon his rejection of the offer. *Hartzel v. Keys*, 87 F.3d 795, 801 (6th Cir. 1996).

[C]ourts are not in the position of determining whether a business decision was good or bad . . . Title VII is not violated by erroneous or even illogical business judgment . . . An employer's business judgment is relevant only insofar as it relates to the motivation of the employer with respect to the allegedly illegal conduct.

Sanchez v. Phillip Morris, 992 F.2d 244, 247 (10th Cir. 1993) (citations and parentheticals omitted).

21. In making this inquiry, the Hearing Examiner considered the "same actor" inference. This inference allows the factfinder to infer "a lack of discrimination from the fact that the same individual both hired and fired the employee." *Burhmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463 (6th Cir. 1995). The rationale for this inference is simple:

An individual who is willing to hire and promote a person of a certain class is unlikely to fire them simply because they are a member of that class.

Id.

22. In *Buhrmaster*, the court recognized that since an individual may develop an animus toward a class of people over time, the length of time between the hiring and firing affects the strength of the same actor inference. *Id.*, at 464. The court also recognized that a short period of time is not essential to create the same actor inference in cases where the employee's class has not changed.

However, to say that time weakens the same actor inference is not to say that time destroys it. In discrimination cases where the employee's class does not change, it remains possible that an employer who has nothing against women *per se* when it hires a certain female will have nothing against women *per se* when it fires that female, regardless of the number of years that pass. *Thus, a short period of time is not an essential element of the same actor inference, at least in cases where the plaintiff's class does not change.*

Id., (footnote omitted and emphasis added).

23. The evidence in this case shows that Rice hired Complainant at the age of 36 and promoted him to Senior Accountant three to four years later. Complainant's age did not prevent Rice from hiring Complainant in

his mid-thirties and later promoting him as Complainant approached membership in the statutorily protected age class. It is highly unlikely that Rice then reversed course and took Complainant's age (41 years) into consideration in offering him provisional work less than two years after his promotion to Senior Accountant.

24. Further, the record is void of any evidence that Rice, who is substantially older than Complainant, harbored a discriminatory animus toward Complainant because of his age. Complainant acknowledged that Rice never made any derogatory comments to him about his age. (Tr. 75) Nothing in the record raises the suspicion that Rice believed that age somehow affected a person's ability to perform auditing or other accounting work.

25. The Commission argues that the "only possible explanation . . . (for retaining Yancy and Shelton over Complainant) is age discrimination." (Comm.Br. 32) The Hearing Examiner disagrees. The record is replete with plausible explanations, which are independent of Complainant's age. These explanations, particularly when viewed together, create a strong inference that Complainant's age was a non-factor in Rice's decisions to

offer Complainant provisional work and discharge him after he rejected the offer.

26. The evidence shows that Complainant had the technical ability and experience to perform his Senior Accountant duties, but his work performance was “often overshadowed by his attitude” toward clients and supervisors. (Comm.Ex. 19) Steve Fante also noted in Complainant’s only work performance evaluation Complainant’s tendency to be “aggressive towards client personnel” and his preference to work on “his own terms.”¹⁶
Id.

27. Ironically, Carnahan sent Complainant a memorandum on the same day that Fante completed his work performance evaluation. (Comm.Ex. 20) The work performance evaluation and Carnahan’s

¹⁶ The Hearing Examiner considered that the evaluation was conducted in 1995. The Hearing Examiner also considered there was no evidence that Complainant’s attitude and demeanor toward clients and superiors, as well as his ability to work with them, had improved during his employment. Carnahan testified that several clients requested in 1999 that Respondent no longer send Complainant to their place of business because of his aggressive attitude toward female employees and his “bossy” attitude. (Tr. 272) Even if credible, these complaints cannot be considered as a reason for Rice offering Complainant provisional work because Carnahan acknowledged that he did not directly receive any complaints from clients about Complainant, and he did not hear about these complaints until after Complainant’s discharge. More importantly, Respondent was unable to show that Rice had received these complaints prior to offering Complainant provisional work.

memorandum were consistent with each other. Carnahan expressed his “extreme displeasure” with Complainant’s attitude, “unprofessional off-hand comments” toward him, and his unwillingness to follow verbal instructions. *Id.*

28. The fallout from Carnahan’s memorandum had other lasting disadvantages for Complainant. In his response, Complainant wrote a stinging personal attack on Carnahan, which neither Carnahan nor Rice was likely to forget. (Comm.Ex. 21) The Hearing Examiner also credited Rice’s and Carnahan’s testimony that Complainant was not scheduled to work with Carnahan after their disagreement. (Rice’s Dep. 63, Tr. 278) This restriction was significant given the small size of Respondent’s staff.

29. Similarly, Complainant’s practice of taking unpaid leave for two months in early-to-late spring was burdensome for a small accounting firm. Although Rice approved these leaves, Complainant’s absence created extra work for Rice and the employees during the “busy season.” (Tr. 267, 270)

30. Perhaps, most compelling is Yancy's relationship to Rice as his niece. Nepotism is not uncommon in small businesses. It is reasonable to conclude that Rice gave his niece (who lived with him) every opportunity to succeed with Respondent, even at the expense of more senior employees working there.

31. There was also evidence in the record that Shelton was, as Complainant testified, "a friend of Mr. Rice." (Tr. 395) Assuming Shelton had some type of family or personal friendship with Rice, this would be a nondiscriminatory reason for Rice favoring her over Complainant. The use of favoritism toward friends and relatives in making employment decisions, however distasteful and unfair, does not constitute unlawful discrimination under either R.C. Chapter 4112 or Title VII. *Betkerur v. Aultman Hosp. Assoc.*, 78 F.3d 1079, 1096 (6th Cir. 1996).

32. After a careful review of the entire record, the Hearing Examiner is not convinced that Complainant was the victim of age discrimination. The Commission failed to prove that Respondent's articulated reasons for offering Complainant provisional work and discharging him upon his rejection of the offer were a pretext or cover-up for age discrimination.

The substantial weight of the evidence suggests that other reasons, unrelated to Complainant's age, led to the end of his employment with Respondent.

RECOMMENDATIONS

For all of the foregoing reasons, the Hearing Examiner recommends the following in Complaint #8787:

1. The Commission issue a Dismissal Order; and
2. The Commission order Respondent to submit to the Commission's Central Office in Columbus, a certified check payable to the Commission for \$277.74, within 10 days of receipt of the Commission's Final Order.

TODD W. EVANS
HEARING EXAMINER

January 24, 2002