

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**KIM R. IFFT LEE**

Complainant

and

Complaint #8842

(CLE) 4070999 (31415) 081399

22A – 99 – 0504

**HILLBROOK MANAGEMENT COMPANY**

Respondent

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

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## INTRODUCTION AND PROCEDURAL HISTORY

Kim R. Ifft Lee (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on August 13, 1999.

The Commission investigated and found probable cause that Hillbrook Management Company (Respondent) engaged in unlawful discriminatory practices in violation of Revised Code (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on July 13, 2000. The Complaint alleged that Respondent discharged Complainant in retaliation for engaging in protected activity.

Respondent filed a timely Answer to the complaint, admitting certain procedural allegations but denying that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.<sup>1</sup>

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<sup>1</sup> The Complaint was subsequently amended on February 8, 2001 to correct a typographical error. Respondent filed an Answer to the Amended Complaint on April 5, 2001. Respondent also filed numerous motions which the Commission responded to and the Hearing Examiner addressed. The flurry of motions ceased when Respondent obtained new counsel on May 30, 2001.

A public hearing was held on August 28-29, 2001 at the Lausche State Office Building in Cleveland, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 416 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on November 19, 2001 and by Respondent on December 17, 2001. The Commission filed a reply brief on December 27, 2001.

## **FINDINGS OF FACT**

The following findings are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed; each

witness's strength of memory; frankness or the lack of frankness; and the bias, prejudice, and interest of each witness. Finally, the Hearing Examiner considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on August 13, 1999.

2. The Commission determined on May 18, 2000 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(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 real estate management company doing business in Ohio and an employer.

5. Complainant, who is Caucasian, was a resident at Hillbrook Apartments, one of the properties managed by Respondent. She applied and was hired for a position as a leasing agent. Shortly thereafter, there was an opening for a leasing manager at Deer Creek Apartments (Deer Creek).

6. Respondent's multi-site property manager, Patricia Silverman, decided to offer Complainant the position at Deer Creek. Complainant accepted the position; her compensation included a rent-free apartment at Deer Creek.

7. While she was living at Deer Creek, Complainant became engaged to Carmen Lee, a black person. Lee also resided at Deer Creek. Complainant and Lee planned to be married in July 1999.

8. In February 1999, Complainant approached Silverman and spoke to her about Lee vacating his apartment and moving into her apartment. Silverman spoke to Stuart Graines, her supervisor in the corporate office, about Complainant's proposal. Graines is also Respondent's in-house counsel.

9. Graines and Silverman created a new rental policy. The policy required non-spouses living with employees to pay one half the customary monthly rent.

10. When Silverman communicated this policy to Complainant, Complainant was upset because she believed the policy was being implemented because Lee was a black person. On May 21, 1999, Complainant filed a lawsuit against Respondent in federal court alleging discrimination on the basis of racial association. Graines and Silverman were both named as defendants, along with Hillbrook Management Company.

11. When she was first employed at Deer Creek, Complainant was able to lease numerous vacant apartments. She was an excellent salesperson. Other aspects of Complainant's performance were less than satisfactory. She was reprimanded by Silverman on November 4, 1998 for tardiness and carelessness. Complainant had a problem accurately completing her paperwork. She was also habitually tardy every morning. Complainant and Silverman discussed the reprimand.

12. Complainant received another warning on December 30, 1998 for tardiness and carelessness regarding paperwork. Silverman discussed this reprimand with Complainant. During the discussion, Complainant told Silverman she was upset about the Christmas party at Deer Creek. Silverman and Graines decided to invite residents of two other properties to attend the party. Complainant was upset with that decision. In the reprimand Silverman noted that she was “seeing a change in Kim’s attitude in her teamwork with coworkers.” (Comm.Ex.4)

13. Complainant received another written reprimand from Silverman on March 22, 1999. Complainant had called in sick and told her coworkers to call her at home if needed. When they attempted to call her, no one was there to answer the calls. (Comm.Ex. 5)

14. After the lawsuit was filed, Graines had a meeting with Silverman. He told her to be sure to document Complainant’s performance. Shortly thereafter Silverman’s stepson, (who was also employed by Respondent and worked at Deer Creek), began documenting Complainant’s activities at work

on the days that he was there. He took notes of his observations and passed them onto Silverman. His notes documented Complainant's habitual tardiness, her association with family members and Lee during business hours, numerous personal telephone calls, (many of which concerned her upcoming wedding), her use of company property to make 50 copies of a map for her wedding, and a general lack of effort in performing her duties. (Comm.Ex. 7)

15. On June 11, 1999, Silverman received a memo from the corporate office complaining about Complainant's paperwork errors and not receiving coupons or guest cards with applications. (Comm.Ex. 6)

16. On June 14, 1999, Silverman met with Complainant after Complainant told six employees at Deer Creek that she had filed a federal lawsuit. The employees were very upset. Silverman told Complainant that the lawsuit did not make any difference in the way she dealt with her. Silverman also told Complainant that she was concerned about Complainant discussing the lawsuit with other employees and making an issue about it. (Comm.Ex. 9)

17. On June 8, 1999, a shopping report was performed on Complainant. The report was ordered by Silverman. Silverman had periodically ordered shopping reports on other leasing agents.<sup>2</sup>

18. A shopping report is performed by an outside organization. They send a consultant to the apartment complex, posing as a prospective renter, to ascertain the quality of services that is being performed by the leasing agent. The report that was generated as a result of the appointment with Complainant resulted in a score of 58%, which is unsatisfactory. Normally, a satisfactory score must be at least 75%.

19. On June 25, 1999, Silverman wrote a memo to the attorney who was representing Respondent in the federal lawsuit advising him about Complainant's inadequate job performance. She summed up the situation in the last paragraph of her memo:

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<sup>2</sup> Silverman referred to Complainant as a leasing agent in some documents and a leasing manager in others.

If this were any other employee and the number of times I have talked with her over the last couple weeks about her attitude and about the way I have been told she is talking with staff members I would have definitely terminated her or at least put her on report for 30 days. Her sales ability is a zero. Her enthusiasm is probably a minus and her management skills are not even gradeable. She leaves the office to supposedly go do a move-out and she is gone for an hour where a move-out should take no more than 15-20 minutes. I personally have caught her in apartments of friends that I know live on the property when she was supposedly doing work. I have had to hunt her down in buildings where she said she was going and was not there and found her in her apartment. She has used excuses that she had to go pick up something or she forgot something at home and went to get it. This has now become a battle of who is going to be in charge. She has given the idea to her staff around her that she is not going to be fired and there is nothing we are going to do so therefore she can pretty much come and go as she pleases.

(Comm.Ex. 12)

20. On June 28, 1999, a resident of Deer Creek obtained a restraining order against her husband because of domestic violence. She brought the restraining order to Complainant. Complainant failed to advise the other staff about it. This violated Respondent's written procedures that had been in effect since January 1999. Silverman counseled Complainant about this violation, as well as other problems regarding "market readies" that were not completed. The memo outlined other problems with Complainant's performance relating to her coworkers and residents. (Comm.Ex. 13)

21. On July 12, 1999, Silverman terminated Complainant's employment. She filled out a separation form where she listed the reasons Complainant was being fired.<sup>3</sup>

22. After Complainant was terminated, she refused to move out of her apartment. The federal court refused to issue a restraining order allowing Complainant to remain in possession.

23. Shortly thereafter, Graines discharged Silverman. She was discharged because she paid an employee for two weeks' work when she knew he was in jail.

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<sup>3</sup> The stated reasons were:

1. Stays in her office all day;
2. Numerous personal phone calls;
3. late every morning;
4. 58% on leasing shopping report (very low);
5. Not leasing suites;
6. Not checking the market readies;
7. Could not audit petty cash on last 3-4 months. Never had complete money or receipts;
8. Did not turn in petty cash of \$300 (no receipts or money);
9. Took service requests from residents and never wrote work orders;
10. Did not do paperwork correctly;
11. Was asked numerous times over the last few months to limit personal calls and limit friends and relatives [coming] to office during working hours – never corrected;

## 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.<sup>4</sup>

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12. Was rude to many residents.

<sup>4</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleged in the Complaint that Complainant was discharged in retaliation for having participated in protected activity.

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:

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

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(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 retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. 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.

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, 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 (6<sup>th</sup> Cir. 1999), *aff'd. in part and rev'd. in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

7. The Commission proved the first prong of the *prima facie* case. The Commission proved that Complainant opposed what she believed was an unlawful discriminatory practice when she filed a lawsuit against Respondent in federal court. Filing a lawsuit is protected activity. *Cf. Clark Co. School Dist. v. Breeden*, 532 U.S. 268 (2001) (court referred to plaintiff's Title VII lawsuit when discussing protected activity).<sup>5</sup>

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<sup>5</sup> Respondent cites *Crawford v. Medina General Hospital*, an unpublished opinion, for the proposition that filing a lawsuit is not protected activity under the opposition clause. However, in the *Crawford* case, the Court never discussed the opposition clause. Instead, the Court addressed the plaintiff's arguments that filing a lawsuit was protected activity under the participation clause and ruled that the participation clause was not applicable.

8. As the Commission points out in its brief, if the opposition clause protects writing a letter complaining about a discriminatory practice, then filing a lawsuit should also be protected.

9. The Commission also proved the second prong of the *prima facie* case. Complainant's discharge was an adverse employment action. It was not disputed that Stuart Graines, the alleged retaliator, knew about the lawsuit prior to the decision to terminate Complainant's employment.

10. The fourth prong of the *prima facie* case is the one that is most difficult to prove. The Commission must prove the decision to discharge Complainant was motivated by the protected activity. The Commission claims that Graines told Silverman to terminate Complainant's employment shortly after he was served with the lawsuit. The Commission characterizes this as direct evidence of retaliation. The Commission also argues that Complainant's job performance was subjected to heightened scrutiny immediately after she filed the lawsuit and the temporal proximity between filing the lawsuit and the heightened scrutiny is enough to establish the causal connection for purposes of proving a *prima facie* case.

11. The Commission's legal arguments are correct. The fourth prong of the *prima facie* case can be proved by direct or circumstantial evidence. Circumstantial evidence could include the proximity between the protected activity and some change in the terms and conditions of Complainant's employment. In this case, a decision was made to closely monitor Complainant's performance almost immediately after she filed a lawsuit against Respondent. This supports the inference that there was a causal connection between her filing a lawsuit and her ultimate discharge. Therefore, the Commission proved a *prima facie* case.

12. If the Commission proves a *prima facie* case, Respondent must "articulate some legitimate, nondiscriminatory reason" for the adverse employment action. *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. Since this is a burden of production and not a burden of proof, Respondent only needs to:

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

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

The presumption 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 action. *Hicks, supra* at 511, 62 FEP Cases at 100.

13. Respondent did more than meet its burden of production in this case. Patricia Silverman testified that all of the performance problems and deficient work habits that she extensively documented were true and accurate representations of Complainant’s conduct. They were based on reports from her stepson, other coworkers, and her own observations. Silverman was a Commission witness.

14. 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 discharging Complainant 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.

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 . . . [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.

16. The Commission argues that Complainant's performance problems were "minor" and that Silverman did not really believe that they merited discharge. However, when one reads through the documentation that Silverman collected, the overall impression is that Complainant was not performing satisfactorily in any aspect of her job duties. Instead Complainant was focusing all of her attention on personal matters, such as

preparing for her wedding. No employer would tolerate this behavior. Silverman terminated other employees for much less. (Resp.Exs. A, C)

17. This brings us to the Commission's "direct evidence" argument. Direct evidence is evidence that "directly proves a fact, without an inference or presumption, which in itself, if true, conclusively establishes that fact." *Mauzy v. Kelly Services*, 75 Ohio St.3d 578. In its brief, the Commission points to what it argues is the most compelling direct evidence that Graines intended to discharge Complainant because she filed a federal lawsuit against him.

18. However, when one examines this evidence, it is not direct evidence at all because it does not establish Graines's intent. It only establishes that he wanted to fire Complainant and that he was concerned that she would claim it was because of the lawsuit. Silverman testified Graines told her to "build a case" to support the decision to fire Complainant. Given Complainant's performance problems, such an instruction is not necessarily evidence of retaliatory motive.

. . . if an employer is shown to have engaged in the kind of unusual surveillance of, or attention to, an employee's work such that retaliation may seem the likely motive, a successful rebuttal

can be premised on the showing that this attention was necessary.

Larson, *Employ. Disc.*, Sec. 35.03.

19. It is appropriate and logical that Graines, as the in-house counsel for Respondent, would be concerned that any discipline that was given to an employee who had engaged in protected activity be documented. Failure to document would arguably be evidence of pretext.

20. Assuming for purposes of argument Graines's alleged statements to Silverman constitute direct evidence of retaliatory motive, then her credibility becomes a crucial issue. I did not find her testimony credible.

21. One of the reasons it was not credible was her failure to memorialize any of the conversations she had with Graines. In all of the memos that she wrote to Respondent's attorney, where she copied Graines, she never said anything that would lead one to believe that she was being directed by Graines to document Complainant's performance because she had filed a lawsuit or to exaggerate Complainant's deficiencies because Complainant had filed a lawsuit. If Silverman was compiling adverse

information about Complainant solely because she filed a lawsuit and because she was directed to do so by Graines, one would expect that somewhere in all of these memos she wrote, she would refer to his directive. There were no such references.

22. Silverman's testimony about her decision-making authority was not credible. She was not being micro-managed by Graines. Silverman's testimony was contradicted by her own documentary evidence. Silverman stated she did not have authority to order shopping reports when the memo she wrote regarding the shopping reports stated she had ordered them many times in the past. She also testified she did not have the authority to fire employees without Graines's permission. However, Respondent offered documentary evidence which showed she had fired other employees and there was no evidence, other than her own testimony, that Graines had made the decision, although he may have been consulted.

23. In one memo she specifically states that if Complainant had been any other employee she would have "definitely terminated her . . . ." (Comm.Ex. 12) She did not qualify this statement by saying she would have

“recommended” Complainant’s termination. This corroborates Respondent’s testimony that she had the authority to terminate employees on her own and that she alone made the decision to terminate Complainant.

24. In addition, Silverman admitted that she falsified records and was dishonest in her business relationship with Graines when she agreed to pay one of Respondent’s employees, who was also a good friend of hers, when he was in jail. This incident reflects adversely on her credibility.

25. The Commission has the burden of proof in these proceedings. The Commission’s burden was not satisfied by Silverman’s testimony because her testimony is not credible.<sup>6</sup>

26. If the Commission were to find Silverman’s testimony both believable and legally sufficient to prove retaliatory animus, this case would be

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<sup>6</sup> The Commission attacks Graines’s credibility, arguing he was not forthright in his testimony regarding his connection with the business. While it is true he attempted to distance himself as far as possible from the decisions that were made in this case, his testimony about his role in the various entities that were involved, such as Hillbrook Management and GMS Management, were answers that were technically and legally correct. As an attorney, he was merely responding to the Commission’s questions and not volunteering any information. Counsel for the Commission, and to a certain extent, the Hearing Examiner, found this somewhat frustrating. However, it was not intentional deception. For instance, it was true he did not own any of the properties. The properties were owned by a family trust. He may have been one of the trustees, but that does not

a “mixed motive” case. A mixed motive case is one where there is evidence of discriminatory animus and evidence that Complainant was discharged for a legitimate, nondiscriminatory reason. When this occurs, Respondent has the burden to prove that Complainant would have been discharged in spite of the discriminatory animus. If Respondent meets its burden of proof, Complainant is not entitled to any back pay. The only remedy would be a Cease and Desist Order and other affirmative action, such as training.<sup>7</sup>

27. Applying the mixed motive analysis to this case, Respondent proved Complainant would have been fired absent any retaliatory motive. Other employees were fired for less. Silverman fired Complainant because of her work performance, not because Complainant filed a lawsuit against Respondent.

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make him the owner. In any event, even if his testimony was not believable, the Commission cannot prevail because Silverman’s testimony was also not believable.

<sup>7</sup> The *McDonnell Douglas* evidentiary framework does not apply when there is direct evidence of unlawful discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion). In such cases, the burden of persuasion shifts to the employer to show by a preponderance of the evidence that it would have taken the same action despite its unlawful discriminatory practices. *Id.*, at 258.

Title VII does not provide protection to an employee regardless of the adequacy of his job performance and does not insulate an employee from the risk of termination of his employment by filing charges against the employer or opposing unfair practices. It is clear that Title VII does not guarantee continued employment.

*Hochstadt v. Worcester Foundation*, 11 FEP Cases 1426 (D. Mass. 1976), *aff'd*. 545 F.2d 222, 13 FEP Cases 804 (1<sup>st</sup> Cir. 1976).

### **RECOMMENDATION**

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8842.

FRANKLIN A. MARTENS  
CHIEF HEARING EXAMINER

January 31, 2002