

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

DAWN HAVENS

Complainant

and

McKESSON HBOC, INC.

Respondent

Complaint #8910

(CIN) 25092899 (28038) 113099

22A – A0 – 0272

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

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INTRODUCTION AND PROCEDURAL HISTORY

Dawn Havens (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on November 30, 1999.

The Commission investigated and found probable cause that McKesson HBOC, Inc. (Respondent) engaged in unlawful discriminatory 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 November 16, 2000. The Complaint alleged that Complainant was discharged for reasons related to her sex (pregnancy).

Respondent filed a timely Answer to the Complaint on December 18, 2000. Respondent admitted certain procedural allegations but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on June 28-29, 2001 at the Municipal Court House in Washington Court House, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 248 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on October 10, 2001 and by Respondent on October 31, 2001. The Commission filed a reply brief on November 8, 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 November 30, 1999.

2. The Commission determined on October 26, 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 matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a corporation doing business in Ohio and an employer. Respondent is a distributor of wholesale pharmaceuticals, over-the-counter drugs, sundries, and services to its customers. Its

customers are independent retail pharmacies, hospitals, and regional and national chain stores.

5. Complainant began working for Respondent as a warehouse laborer on March 9, 1998. Complainant became pregnant in February or March 1999. Complainant's pregnancy was complicated by a previously-existing heart condition. This caused Complainant's doctor to take her off work for a week in March 1999 and a week in April 1999. After the absence in April, Complainant's doctor ordered her to take a leave of absence from work to the end of her pregnancy because of her pregnancy-related condition.

6. Respondent provides all employees who have to leave work for health-related reasons, including pregnancy, with twelve weeks of unpaid leave, pursuant to the Family Medical Leave Act (FMLA). In addition, any employee whose medical condition rises to the level of a disability is entitled to 26 weeks of disability benefits. The short-term disability policy runs concurrently with the FMLA leave. Thus, an employee could exhaust their

FMLA benefits but still continue to collect short-term disability benefits up to 26 weeks.¹

7. Pursuant to its usual policies, Respondent did not replace Complainant when she first went on leave. Instead, Complainant's duties were assumed by other employees who were asked to work faster or work overtime.

8. Complainant's 12 weeks of leave ended in mid-July 1999. Pursuant to its policies, Respondent could have replaced Complainant at this time. Instead, Respondent continued to use existing employees to absorb Complainant's work load.

9. In September 1999 one of Complainant's supervisors expressed concern to the Human Resources Department about Complainant's vacant position. On September 28, 1999, the other supervisor told the Director of Operations that he needed a replacement for Complainant's position.

¹ The disability benefits plan provides 100% of an employee's base salary for the first four weeks of disability, and 70% up to an additional 22 weeks of disability.

This resulted in a letter being sent to Complainant notifying her, that effective September 28, 1999, her employment was terminated. The letter advised Complainant that she was eligible for rehire once she was released for full-time employment by her physician. Complainant was also advised that she would continue to receive her short-term disability benefits for 26 weeks.

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.²

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleged that Complainant was discharged because she became pregnant and took maternity leave. (Comm.Br. 4)

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 . . . sex, . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The term “because of sex” for the purposes of R.C. 4112.02(A) includes, but it is not limited to, discrimination based upon pregnancy, pregnancy-related illnesses, childbirth, or related medical conditions. R.C. 4112.01(B). This division further provides that:

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

4. 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 4112.06(E).

5. 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. Federal case law is especially relevant in this case because R.C. 4112.01(B) reads “almost verbatim to the Pregnancy Discrimination Act” (PDA) of 1978. *Priest v. TFH-EB, Inc. d/b/a Electra Bore, Inc.*, 127 Ohio App. 3d 159, 711 N.E. 2d 1070, 1073 (Ohio App. 10th Dist. 1998); See 42 U.S.C. § 2000e(k). Thus, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the PDA.

6. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. The establishment of a *prima facie* case creates a rebuttable presumption of

unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981).

7. 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.³ *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

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

³ 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, 25 FEP Cases at 116.

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., 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

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

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

8. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent’s articulation of legitimate, nondiscriminatory reasons for Complainant’s discharge removes any need to determine whether the Commission proved a *prima facie* case, and the “factual inquiry proceeds to a new level of specificity.” *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 31 FEP Cases 609, 611 (1983), quoting *Burdine, supra* at 255, 25 FEP Cases at 116.

Where the defendant has done everything that would be required of him if the plaintiff has properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant.

Aikens, supra at 713, 31 FEP Cases at 611.

9. Respondent met its burden of production through the testimony of its witnesses. Respondent gave two reasons for its decision: Complainant was replaced because her leave had exceeded 12 weeks, and Respondent needed to replace her for business reasons.

10. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her sex (pregnancy). *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 the true reasons, but were "a pretext for discrimination." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine, supra* at 253, 25 FEP Cases at 115.

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

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

11. Thus, even if the Commission proves that Respondent's articulated reasons are false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the . . . [Commission's] proffered reason of . . . [sex] is correct. That remains a question 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 sex discrimination.

12. 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).

13. 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 . . . [n]o additional proof is required.⁴

Hicks, supra at 511, 62 FEP Cases at 100 (emphasis added).

14. 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 decision, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

15. In this case, the Commission argued Respondent's first reason for terminating Complainant was pretextual because Complainant was not provided a reasonable leave time considering her pregnancy-related medical condition. The Commission also argued that Respondent's second reason (that Complainant was replaced because of business needs) was not true,

⁴ 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

because a temporary worker could have been utilized to fill her position.

16. In support of the first argument, the Commission relies on the Commission's Administrative Rules, specifically Rule 4112-5-05(G)(3), which provides, in pertinent part, that ". . . Written and unwritten employment policies involving commencement and duration of maternity leave shall be so construed as to provide for individual capacities and the medical status of the woman involved" The Commission argues that this section requires employers to provide unlimited maternity leave for women if such leave is justified by their pregnancy-related medical conditions. This argument is not supported by the Administrative Code, the statute, or Ohio and federal case law interpreting the PDA.

17. Ohio law does not require that pregnant employees be given preferential treatment. *Priest, supra* at 1074 ("Ohio courts implicitly, . . . and expressly recognize that an employer need not accommodate pregnant women to the extent that such accommodation amounts to preferential treatment.") (citations omitted). *See also Davidson v. Franciscan Health*

511, 62 FEP Cases at 100, n.4.

System of the Ohio Valley, Inc., 82 F.Supp. 2d 768, 774 (S.D. Ohio 2000) (“The case law and the statute are clear – the PDA does not require that employers treat pregnant employees more favorably.”) (citations omitted); *Dormeyer v. Comerica Bank of Illinois*, 223 F.3d 579, 583 (7th Cir. 2000) (PDA does not protect a pregnant employee from being discharged for absenteeism, even if absences are due to complications of pregnancy, unless absences of non-pregnant employees are overlooked).

18 Furthermore, an Ohio court has held in a case very similar to this one that a policy that provides for termination of employment after 12 weeks of leave does not violate R.C. 4112.02(B). Violation of the policy is a legitimate, nondiscriminatory reason for termination and is not a pretext for sex discrimination. *Parker v. Bank One*, 2001 WL 303284 (Ohio App. 2 Dist. 2001).

19. Respondent’s policy is applied equally to males and females, and provides a reasonable length of time for pregnancy leave. A total of 12 weeks of leave is reasonable since most pregnancies only require a six-week recuperation period. An additional six weeks is reasonable for those

pregnancies where complications arise and some additional absence is necessary. Such a policy balances the employees' need to be off work for pregnancy and pregnancy-related reasons and still retain their jobs and the needs of the employer to have a stable and trained work force to run their business.

20. Congress envisioned this when they passed the FMLA and provided that covered employers must offer 12 weeks annual unpaid leave for medical reasons, specifically including pregnancy and pregnancy-related illnesses. In this case, Respondent considered Complainant's situation, which was unusual, and allowed her to be off an additional 10 weeks. When 22 weeks had passed, Complainant's supervisors made a business judgment that they could no longer ask other employees to work harder, work faster, or work overtime to pick up the slack.

21. The Commission did not offer any evidence which conflicted with Respondent's evidence that Respondent needed to replace Complainant. Instead, the Commission argued that Complainant could have been replaced by a temporary worker. However, Respondent's witnesses testified that

Respondent does not have a policy or practice of using temporary labor to replace warehouse employees who fill orders, or as Complainant did, process returns. Temporary workers are only used to perform special projects. Thus, Respondent would have to deviate from its normal practice to accommodate Complainant's absence. The PDA does not require such an accommodation. *Cf. Priest, supra* at 1076 (employer had no duty to change smoking policy to accommodate pregnant employee).

22. Respondent's policy decision not to use temporary workers to replace employees on short-term disability is a business judgment. The Commission cannot second guess good faith business judgment decisions. *See Goad v. Sterling Commerce, Inc.*, 2000 WL 756386 (Ohio App. 10 Dist. 2000) (" . . . it is important that the judiciary be careful to not second guess, in a discrimination action brought by an employee, a business judgment by an employer making personnel decisions") (citation and quote within a quote omitted).

[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.

Combs v. Meadowcraft, Inc., 73 FEP Cases 232, 249 (11th Cir. 1997).

23. Since the Commission was unable to prove that Respondent discharged Complainant because she was pregnant and took a reasonable maternity leave, the Complaint must be dismissed.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8910.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

January 9, 2002