

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

CRYSTAL RIGSBY

Complainant

and

**VOIERS ENTERPRISES, INC. D/B/A
REST HAVEN NURSING HOME**

Respondent

Complaint #8991

(COL) 71092499 (27412) 031500

22A – A0 – 3403

HEARING EXAMINER'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATIONS

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HEARING EXAMINER'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Crystal Rigsby (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 15, 2000.

The Commission investigated and found probable cause that Voiers Enterprises, Inc. d/b/a Rest Haven Nursing Home (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 February 22, 2001. The Complaint alleged that Respondent discharged Complainant because of her sex (pregnancy).

Respondent filed a timely Answer to the complaint, admitting certain procedural allegations, but denying that it engaged in any unlawful discriminatory practices. Respondent denied that the Commission engaged in any conciliation. Respondent also pled affirmative defenses.

A public hearing was held on September 25, 2001 at the Scioto County Human Services building in Portsmouth, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 113 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on November 14, 2001 and by Respondent on December 6, 2001.

JURISDICTIONAL ISSUE

In its Answer Respondent denied that the Commission attempted conciliation as required by R.C. 4112.05(B). R.C. 4112.05(B)(4) provides that after a determination that it is probable that Respondent engaged in an unlawful discriminatory practice, the Commission shall try to eliminate the practice by informal methods of conference, conciliation, and persuasion.

The parties presented evidence at the hearing regarding the conciliation issue. The evidence showed that the Commission sent a letter to Respondent's attorney inviting Respondent to conciliate and set

up a meeting with a conciliator at the Columbus Regional Office. (Comm.Ex. 1) Respondent's representative and its attorney attended the meeting and made a settlement offer. Respondent's attorney also objected to the conciliation procedure. He expected Complainant to attend the conciliation meeting. (Comm.Ex. 2)

The meeting was concluded without any resolution. The settlement offer was communicated to Complainant's attorney on January 25, 2001. (Comm.Ex. 3) On January 29, 2001, the Commission received a letter from Respondent's attorney withdrawing the offer. (Comm.Ex. 2)

Based on the foregoing Findings of Fact and Conclusions of Law, the Commission attempted conciliation and it was unsuccessful. The belief of Respondent's counsel that Complainant should be present at the conciliation meeting is not a legal requirement since the Commission is mandated to attempt conciliation. There is no statutory mandate that Complainant attempt conciliation or attend the conciliation meeting.

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 March 15, 2000.

2. The Commission determined on January 4, 2001 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. Respondent is a corporation doing business in Ohio and an employer. Respondent operates a 23-bed, skilled and intermediate care nursing home in McDermott, Ohio. Deborah Voiers Akers (Akers) is the nursing home's assistant administrator.

4. Complainant began working for Respondent on March 23, 1999. She was employed as an activity aide two days per week and as a housekeeper two days per week. As an activity aide, Complainant was responsible for planning, coordinating, and directing the residents' activity program under the supervision of the activity director. (Comm.Ex. 5) As a housekeeper, she was responsible for performing basic cleaning duties, such as sweeping, dusting, and mopping. (Tr. 23-24) Up until her last day of

employment, September 15, 1999, neither of these positions required Complainant to do any heavy lifting.¹

5. On September 14, 1999, Complainant went to the doctor who confirmed that she was pregnant. She returned to work on September 15 with a doctor's note. At this time she told Akers that she was pregnant. Akers told her that she could not continue working until she brought in a doctor's note releasing her to work without any restrictions. She was told she had 30 days to bring in the note. (Tr. 31, Resp.Ex. A)

¹ The activity aide job description stated that an activity aide "must have no weight lifting limitations." However, I relied on Complainant's testimony that performance of the duties of an activity aide did not require her to engage in any heavy lifting. The activity aide job description was revised in November 2000. The lifting requirement was omitted, but the other job duties remained the same. Thus, Respondent's testimony that the aide would have to do lifting was not credible. Respondent was merely speculating there might be some occasions when an aide might be on a field trip, and they would have to assist a resident to the extent that some lifting would be involved. In fact, heavy lifting was never done by one person. In any event, it is clear that the essential job duties of the activity aide position could be performed without heavy lifting.

Likewise, the housekeeper position could be performed without heavy lifting. If any heavy lifting was necessary, Complainant was able to secure the assistance of the maintenance person to do the lifting for her.

6. On September 20, 1999, Complainant went to the CAO Health Clinic where she was examined by Laura Taylor, a nurse practitioner who specializes in OB/GYN. Linda Nichols, another nurse who works at the clinic, wrote Complainant another return-to-work note which stated that Complainant was pregnant, due to deliver on May 11, 2000, and was restricted from lifting over 25 pounds. Nichols signed the doctor's note and put a slash with her initials after the doctor's name, indicating that it was not his signature. (Comm.Ex. 9, Tr. 13-14)

7. Subsequently on September 23, 1999, Complainant met with Akers and Julie Emmons, a secretary. Emmons took notes during the meeting. (Comm.Ex. 17) Akers told Complainant that she could not continue working because she had a 25-pound lifting restriction. Akers also told Complainant that she was concerned that Complainant would injure herself or the baby if she tried to catch a falling resident. Complainant was told there was no job available for her with a 25-pound lifting restriction, and that Respondent was not willing to take the risk or let Complainant take the risk that she might get hurt while she was pregnant.²

² Respondent's policy manual also provides that employees are not entitled to any leaves of absence. (Comm.Ex. 11)

8. After her employment was terminated, Complainant applied for unemployment benefits. Respondent did not oppose her application. She was awarded unemployment benefits. She continued to look for work by applying for positions in nursing homes in the area. (Tr. 27) When she was unable to obtain employment at nursing homes, she began applying for clerk positions at discount departments stores and carry outs. (Tr. 37)

9. Complainant's baby was born on May 10, 2000. She was rehired by Respondent as an activity aide on August 10, 2000. She worked two days a week. She quit on December 26, 2000.

10. Complainant was hired by her father on July 9, 2001 to work in his store. She works 30 hours per week and earns \$6.00 an hour. When she worked for Respondent two days per week, she earned \$5.75 an hour.

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 issued presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.³

1. The Commission alleged in its Complaint that Respondent discharged Complainant because of her sex (pregnancy).

2. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

³ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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 adopted regulations on written and unwritten employment policies relating to pregnancy and childbirth. Ohio Administrative Code (Adm.Code) 4112-5-05(G). One of the central purposes of these regulations is to ensure that female employees are not “penalized in their employment because they require time from work on account of childbearing.” Ohio Adm.Code 4112-5-05(G)(5). Such protection is

necessary because only females bear the unique burden of childbearing, which inevitably involves some period of disability.

5. The Commission's pregnancy regulations in Ohio Adm. Code 4112-5-05(G) provide, in pertinent part, that:

- (1) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of their pregnancy is a prima facie violation of the prohibitions against sex discrimination contained in Chapter 4112 of the Revised Code;
- (2) Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination;
- (3) 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; and
- (6) . . . if the employer has no leave policy, childbearing must be considered by the employer to be a justification for leave of absence for a female employee for a reasonable period of time. Following childbirth, and upon signifying her intent to return to work within a reasonable time, such female employee shall be reinstated to her original position or to a position of like status and pay, without loss of service credits.

6. 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).

7. 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” of 1978 (PDA). *Priest v. TFH-EB, Inc. dba Electra Bore, Inc.*, 1998 Ohio App. LEXIS 1384; 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.

8. The Commission can sustain its burden of proof by direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. In this case, the Commission proved its case by both direct and circumstantial evidence. There was direct evidence that Respondent had a

“no work restrictions” policy. Such a policy arbitrarily prevents pregnant females from working, even if they are capable and willing to work. Before a pregnant female is required to take maternity leave, she must be evaluated individually based on her actual ability to perform her job in light of her medical status, including any work restrictions.⁴ See *Ohio Adm.Code 4112-5-05(G)(3)*, *supra*.

9. Respondent’s concern that Complainant would place herself or her unborn child at risk is also not a legally valid concern. A pregnant employee has the right to assume known risks to herself that may exist in the work place. *U.A.W. v. Johnson Controls, Inc.*, 499 U.S. 187, 55 FEP Cases 365 (1991). This right is exclusively hers, as long as she is capable of performing her job duties. In this case, Complainant was capable of performing the job duties of housekeeper and activity aide. Heavy lifting was not part of her routine job duties.

⁴ Respondent offered evidence that they have allowed pregnant employees to continue working as long as they were able to do so and provided them with employment when they indicated they desired to return to work. (Resp.Ex. F, H, I) However, no evidence was offered regarding their job duties. In any event, this evidence does not rebut the Commission’s evidence regarding how Respondent treated Complainant.

10. Respondent argues that Complainant was not discharged, but that she quit. There is substantial evidence to the contrary. The secretary's notes from the September 23 meeting do not indicate that Complainant quit. Likewise, Complainant testified she did not quit. (Tr. 35) I find her testimony credible. Furthermore, Akers stated that Complainant was discharged when she replied to the Ohio Bureau of Employment Services' (OBES) request for separation information. (Comm.Ex. 14)

11. Respondent also claimed that Complainant would have been allowed to work had she returned with a doctor's note that was actually signed by the doctor instead of the doctor's nurse. Respondent's testimony on this point is refuted by the secretary's notes. The notes clearly show that Respondent had a "no restrictions" policy. If Respondent was going to hold Complainant's job for her, Complainant would have had to secure a doctor's note that had no restrictions. This could not be done because Complainant's doctor routinely places a 25-pound lifting restriction on all pregnant patients. Respondent's reliance on the doctor's note was an after-the-fact justification, which Akers documented for the first time on October 21, 1999 while completing the OBES form.

12. Since the Commission proved that Respondent discriminated against Complainant because she was pregnant, Complainant is entitled to relief.

RELIEF

13. When the Commission makes a finding of unlawful discrimination, 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.

14. 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).

15. In providing a “make whole” remedy, victims are “presumptively

entitled to reinstatement.” *Ford v. Nicks*, 48 FEP Cases 1657, 1664 (6th Cir. 1989). There is also a strong presumption in favor of awarding back pay:

[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes eradicating discrimination throughout the economy and making persons whole for injuries suffered for past discrimination.

Albemarle Paper Co., *supra* at 421, 10 FEP Cases at 1189.

This presumption “can seldom be overcome.” *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 719, 17 FEP Cases 395, 403 (1978).

There must be “exceptional circumstances” to deny an award of back pay. *Rasimas v. Michigan Dept. of Mental Health*, 32 FEP Cases 688, 696 (6th Cir. 1983).

16. The difficulty in calculating back pay does not constitute an exceptional circumstance. The Commission should award back pay “even where the precise amount of the award cannot be determined.” *Id.*, at 698. In other words, the calculation of back pay does not require “unrealistic exactitude”, only a reasonable calculation is required. *Salinas v. Roadway Express, Inc.*, 35 FEP Cases 533, 536 (5th Cir. 1984). The Commission

should resolve any ambiguity in the amount of back pay against the retaliating employer. *Rasimas, supra* at 698; *Ingram, supra* at 94.

17. To be eligible for back pay, victims must attempt to mitigate their damages by seeking substantially equivalent employment. A substantially equivalent position affords the victim “virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status.” *Rasimas, supra* 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).

18. The discriminating employer has the burden of proving that the victim failed to mitigate damages. To meet this burden, the discriminating 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.

19. 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, supra* at 1664. The reasonableness of the victim's efforts 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. *Rasmus, supra* at 695.

20. Besides proving lack of mitigation, the retaliating 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).

21. In this case, the Commission presented evidence of Complainant's efforts to mitigate her damages. Complainant testified that she looked for work at several nursing homes and that she did not receive an offer. She testified that the nursing homes needed certified nurses' aides, and she was not certified. (Tr. 38) Complainant applied for jobs at carry-outs and clerk

jobs at places such as Wal-Mart and K Mart. (Tr. 37) Complainant's testimony regarding her job search was credible and was not disputed by Respondent.

22. Respondent did not offer any credible evidence that substantially equivalent positions to Complainant's position as an activity aide/housekeeper were available in the geographical area. Respondent's representative testified generally that there were advertisements in the Sunday newspaper for positions at nursing homes, but was not specific as to whether these positions were for someone with Complainant's qualifications. As Complainant testified, these may have been positions for registered nurses, licensed practical nurses, or other positions that required certification which Complainant did not possess. Absent more specific evidence, such as newspaper advertisements, Respondent cannot meet its burden of proving that Complainant failed to mitigate her damages. Therefore, Complainant is entitled to back pay.

23. Complainant was unemployed from September 16, 1999 until she delivered her baby on May 10, 2000. Since Complainant could have worked

up until her delivery date, she is entitled to approximately eight months of back pay at \$6.75 per hour for 35 hours per week. Although Complainant received unemployment compensation, unemployment compensation is not deductible from a back pay award. *Ingram, supra.*

24. After Complainant's baby was born, Complainant remained unemployed until she was rehired by Respondent on August 10, 2000. Given the normal six-week recuperative period, Complainant would be eligible for additional back pay from June 21, 2000 to August 10, 2000, approximately seven weeks.

25. When Complainant returned to work on August 10, 2000, she worked two days per week, (half of what she previously worked), at \$1.00 less per hour than what she was previously paid. She worked for Respondent until December 26, 2000, when she quit. This was approximately 18 weeks. Therefore, Complainant would be eligible for back pay for 17.5 hours per week at \$6.75 per hour. She would also be eligible for an additional \$1.00 an hour for the two days a week she worked where she only made \$5.75 an hour.

26. After Complainant quit, she remained unemployed until July 9, 2001, when her father bought a store and she began working 30 hours per week earning \$6.00 an hour. This is equivalent to what she was earning when she worked for Respondent.

27. The Commission argues that Complainant is entitled to back pay from December 26, 2000 to July 9, 2001. I disagree. Complainant had a duty to make a reasonable and good faith effort to maintain her job with Respondent after she was rehired. *Ford Motor Company, supra*. Complainant was not forced to quit.⁵ Therefore, Complainant is not entitled to back pay from December 26, 2000 to July 9, 2001.

⁵ Complainant was put on 30 days' probation for excessive absenteeism. There is no evidence Respondent intended to terminate her employment in the near future.

RECOMMENDATIONS

For all the foregoing reasons, it is recommended in Complaint #8991 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of Chapter 4112 of the Revised Code;

2. The Commission order Respondent to make an offer of employment to Complainant within ten days of the Commission's Final Order for a 32-hour per week position as an activity aide/housekeeper (or an equivalent position). If Complainant accepts Respondent's offer of employment, Complainant shall be paid at the same wage she would have been paid had she been employed as an activity aide/housekeeper on September 16, 1999 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 ten days of receipt of the Commission's Final Order a certified check payable to Complainant for the

amount Complainant would have earned had she been employed by Respondent as an activity aide/housekeeper from September 16, 1999 and continued to be employed up to December 26, 2000, including any raises Complainant would have received, less Complainant's interim earnings during that period, plus interest at the maximum rate allowed by law.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

January 10, 2002