

## **INTRODUCTION AND PROCEDURAL HISTORY**

Carrie L. Brown (Complainant) filed sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 3, 2000.

The Commission investigated the charge and found probable cause that Lutheran Retirement Services, 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 February 22, 2001. The Complaint alleged that Respondent discharged Complainant because of her race and age.

Respondent filed an Answer to the Complaint. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent pled lack of jurisdiction on the age discrimination claim and other affirmative defenses.

A public hearing was held on September 12, 2001 at a Mahoning County Courtroom in Sebring, Ohio.

The record consists of the previously described pleadings, a 129-page transcript of the hearing, exhibits admitted into evidence during the hearing, stipulated exhibits submitted after the hearing,<sup>1</sup> and post-hearing briefs filed by the Commission on January 28, 2002 and by Respondent on February 25, 2002.

## **FINDINGS OF FACT**

The following findings of fact are based, in part, upon the Administrative Law Judge's assessment of the credibility of the witnesses who testified before him in this matter. The Administrative Law Judge (ALJ) 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

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<sup>1</sup> On April 29, 2002, the Commission's counsel and Respondent's counsel filed stipulated exhibits at the request of the ALJ. Specifically, counsel filed Complainant's charge affidavit and the Commission's Letter of Determination. These exhibits, which were not offered at hearing, are usually part of the Commission's investigatory file. The ALJ requested these documents in order to decide whether the Commission has jurisdiction over the age discrimination claim.

strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ 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 3, 2000.

2. The Commission determined on February 1, 2001 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.<sup>2</sup>

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<sup>2</sup> Respondent admitted in its Answer that the Commission attempted conciliation by informal methods without success.

4. Respondent is a corporation and an employer operating several nursing homes and assisted living facilities in northeast Ohio. One of these facilities is Shepherd of the Valley (Shepherd) located in Boardman. Shepherd has 147 beds and provides medical care for its residents. Most, if not all, of Sheperd's residents are elderly persons.

5. Complainant was born on April 18, 1936. She is a black person.

6. Respondent hired Complainant in September 1992 as a part-time cook. Complainant began working full-time within four months. Rich Lamonja, the Administrator at Shepherd, promoted Complainant to Dietary Supervisor in 1994. Complainant reported to the Food Service Director.  
(Comm.Ex. 1)

7. As a Dietary Supervisor, Complainant oversaw the kitchen staff and ensured that residents received meals according to their physicians' orders. Respondent used dietary cards for residents. These cards were placed on the residents' trays with each meal. These cards listed dietary

needs of the residents, as well as the food texture.<sup>3</sup> These cards also listed the residents' food allergies, food preferences and dislikes, and need for special eating utensils.

8. In June 1999, Respondent hired Josephine Greenfield as the Food Service Director at Shepherd. At that time, Complainant and Susan Kraljevic performed the duties of Dietary Supervisor.<sup>4</sup> Greenfield became their immediate supervisor.

9. Greenfield implemented a new dietary card system approximately six months after her hire. (Tr. 77) Under the new system, "a master set" of dietary cards were stored on a computer and kept in Greenfield's office. (Tr. 80) Each afternoon, the master set was updated to reflect any changes ordered by residents' physicians. Complainant and Kraljevic were supposed to print and photocopy dietary cards from the master set. Each

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<sup>3</sup> The texture of food is often as important as its nutritional value. Some residents are placed on "a puree diet" because they are unable to swallow certain foods. (Tr. 75) Other residents may need a "super cereal"—a mixture of rolled oats, brown sugar, and honey—used as a nutritional supplement for individuals who are underweight. (Tr. 62-63)

<sup>4</sup> Kraljevic was born on March 10, 1974. She is a white person.

dietary card was cut into thirds for breakfast, lunch, and dinner. Each third was placed on a resident's tray and discarded after the meal.<sup>5</sup>

10. In early 2000, Greenfield became aware that some residents received meals that did not match the information on the master set. This occurred on two or three occasions. (Tr. 84) When Greenfield questioned Complainant about the discrepancies, Complainant contended that she used the dietary cards from the master set.

11. On March 2, 1999, Kraljevic discovered a set of dietary cards, which were not updated, in a desk that she shared with Complainant. Kraljevic informed Greenfield about her discovery. Greenfield took the dietary cards out of the desk and brought them into her office.

12. When Complainant arrived for work, Greenfield called her into her office. Greenfield informed Complainant that Kraljevic found outdated dietary cards in their desk. Complainant denied keeping dietary cards in the desk. Greenfield again questioned Complainant about how residents were receiving meals that did not match the master set. Complainant

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<sup>5</sup> Previously, the dietary cards were kept in a "zip lock" bag and reused daily.

insisted that Kraljevic attend the meeting. Complainant walked to the kitchen area and escorted Kraljevic to Greenfield's office.

13. Once they entered the office, Complainant began yelling at Kraljevic. Complainant accused Kraljevic of planting the dietary cards in the desk and called her "a racist." (Tr. 88, 115) At one point, Kraljevic raised her hand (with her palm out) approximately a foot from her body while Complainant continued to yell at her. Complainant told Kraljevic, "Don't raise your hand to my face" or words to that effect. (Tr.117) Greenwood intervened at this juncture; she instructed Kraljevic to return to the kitchen area and attempted to calm Complainant down.

14. Greenfield spoke with Complainant for "a few minutes" after Kraljevic left. (Tr. 91) During their conversation, Complainant told Greenfield, "Susie runs this department, she's the Food Service Director, not you." *Id.* Complainant also told Greenfield that Kraljevic was smarter than Lamonja and Greenfield.

15. Complainant approached Kraljevic in the kitchen area after leaving Greenfield's office. Complainant resumed her tirade against

Kraljevic who was operating a food processor. Greenfield witnessed Complainant standing behind Kraljevic and heard Complainant yelling at her. Greenfield instructed Complainant to quit bothering Kraljevic. Greenfield again attempted to calm Complainant down.

16. Approximately 30 minutes after the second incident, Kraljevic came into Greenfield's office "crying hysterically." (Tr. 90) Kraljevic informed Greenfield that Complainant would not leave her alone. Kraljevic also informed Greenfield that Complainant had threatened her. Specifically, Kraljevic indicated that Complainant threatened to put Kraljevic's hand down if she raised it in front of her face again. (Tr. 120) Greenfield attempted to calm Kraljevic down; they talked in her office for approximately an hour.

17. Greenfield called Lamonja after Kraljevic left and apprised him of the situation. Lamonja instructed Greenfield to discharge Complainant for violating two Group IV Rules in Respondent's employee handbook, namely verbally abusing a coworker and insubordination. (R.Ex. D, Tr. 106) Lamonja instructed Greenfield to prepare a written discharge notice citing these rule violations.

18. Greenfield prepared the discharge notice as instructed. (Comm. Ex. 3) Later that afternoon, Greenfield called Complainant into her office and handed her the discharge notice. When Complainant asked Greenfield for an explanation for her discharge, Greenfield indicated that Lamonja made the decision based on Complainant's verbal abuse of Kraljevic early that day.

### **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.

## JURISDICTION

1. Respondent argues that the Commission lacks jurisdiction over the age discrimination claim because Complainant's charge affidavit only alleged race and disability discrimination.<sup>6</sup> As a result, Respondent contends that it was not placed on notice about any claim of age discrimination. Respondent further contends that it was denied "the opportunity to participate in a complete investigation or meaningful conciliation discussions regarding age discrimination." (R.Br. 9)

2. The evidence shows that the box for age discrimination was not checked in Complainant's charge affidavit. (Stip. Ex. 1) Nor did the narrative statement of the Charge give any indication of an allegation of age discrimination. The Charge specifically stated that Complainant believed that her "disparate treatment" was based "solely" on her race and Respondent's perception that she was disabled. *Id.*

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<sup>6</sup> The Commission found no probable cause on the disability claim. (Stip.Ex. 2)

3. In general, the scope of a discrimination complaint is limited by the scope of an administrative investigation that “can reasonably be expected to grow out of a charge of discrimination.” *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5<sup>th</sup> Cir. 1970); See also *Ang v. Proctor & Gamble*, 932 F.2d 540 (6<sup>th</sup> Cir. 1991). Other courts have allowed complaints to include any discrimination claims “like or reasonably related to” the allegations in the charge of discrimination. *Oubichin v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9<sup>th</sup> Cir. 1973). The primary functions of these rules are to ensure that those charged with discrimination are placed on notice of the charges and afforded the opportunity to conciliate the charges rather than litigate them. *Davis v. Sodexho, Cumberland College Cafeteria*, 157 F.3d 460, 463 (6<sup>th</sup> Cir. 1998).

4. As with most rules, there are exceptions. An exception to these general rules involves discrimination complaints brought by governmental agencies as opposed to individuals. When complaints are filed by such agencies, the relevant inquiry is whether the additional discrimination claim was uncovered during a reasonable investigation of the original charge. *EEOC v. Sears, Roebuck & Co.*, 50 FEP Cases 1123 (N.D.Cal. 1989).

5. The facts in this case are directly on point with the *Sears* case. Respondent does not challenge the reasonableness of the Commission's investigation of Complainant's charge of discrimination. The record lacks any evidence on this issue. Further, Respondent was placed on notice of the age discrimination claim when it received the Commission's Letter of Determination (LOD), dated January 25, 2001. (Stip.Ex. 2) Once Respondent received the LOD, Respondent had the opportunity to request reconsideration of the initial findings under the Commission's rules. Respondent was also invited to conciliate the claims *after* receiving notice of the probable cause findings of age and race discrimination in the LOD. Respondent was neither denied notice of the age discrimination claim nor the opportunity to conciliate the claim prior to the issuance of the Complaint. Therefore, the Commission has jurisdiction to decide the age discrimination claim.

## AGE DISCRIMINATION CLAIM

6. The Commission alleged in the Complaint that Respondent discharged Complainant because of her age.<sup>7</sup>

7. 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.<sup>8</sup>

8. 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).

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<sup>7</sup> The Complaint also alleged that Respondent discharged Complainant because of her race. The Commission did not present any evidence or argument on this claim. Since the Commission has abandoned this claim, the ALJ did not address it.

<sup>8</sup> R.C. 4112.01(A)(14) defines age as “at least forty years old.”

9. 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).

10. Under Title VII case law, the Commission must usually proceed through the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973). However, if the Commission proves by a preponderance of the evidence that an impermissible factor “played a motivating part” in the employment decision, the burden of persuasion shifts to the employer to show that, more likely than not, the same action would have been taken without considering that factor. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality).

11. To invoke *Price Waterhouse* and shift the burden of persuasion to Respondent, the Commission may rely on either direct evidence or circumstantial evidence “sufficient to prove, without benefit of the *McDonnell Douglas* presumption, that the defendant’s decision was more probably than not based on illegal discrimination.” *Hoffman v. Sebro*

*Plastics, Inc.*, 108 F.Supp.2d 757, 768 (E.D. Mich. 2000). The dictionary definition of direct evidence is “[e]vidence which, if believed, proves the fact in issue without inference or presumption.” *Black’s Law Dictionary*, Sixth Ed., p. 460. True direct evidence takes the form of admissions—actual statements from the decision-makers that they relied on an illegal criterion or other evidence that proves such reliance. *Hoffman, supra* at 767. Such evidence requires no inference or presumption of discrimination. Circumstantial evidence is sufficient to shift the burden of persuasion when it requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions. *Price Waterhouse, supra* at 258.

12. The Commission argues that Greenfield made statements that are direct evidence of age discrimination. Complainant testified that Greenfield told her on March 2, 2000, “You are a much older woman, Susie’s just a young girl starting out into the world. You should be able to take this better than you’re taking it.” (Tr. 32) Greenfield emphatically denied making these statements to Complainant. (Tr. 107) The ALJ resolved this factual dispute in Greenfield’s favor. In making this credibility determination, the ALJ considered that Complainant did not

allege in her charge affidavit that Greenfield made these statements. Complainant did not include these statements even though she filed her charge affidavit the day after her discharge. (Stip. Ex. 1)

13. Even if the ALJ credited Complainant's testimony about these statements, the evidence shows that Lamonja decided to discharge Complainant on March 2, 2000. There is no evidence that Greenfield played any role in this decision other than informing Lamonja about the events of that day. Discriminatory statements by nondecision-makers are insufficient to shift the burden of persuasion to Respondent. *See Price Waterhouse, supra* at 258 (stray remarks, *statements by nondecision-makers*, and statements by decision-makers unrelated to the decisional process are insufficient to conclude that the employer relied on an impermissible factor in reaching decision) (O'Connor, J., concurring) (emphasis added). This case must be analyzed under the *McDonnell Douglas* evidentiary framework.

14. The first stage of the *McDonnell Douglas* analysis requires the Commission to establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. The proof required to establish a *prima*

*facie* case is flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 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 (1981).

15. 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.<sup>9</sup>

*St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 507 (1993), quoting *Burdine, supra* at 254-55, n.8.

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<sup>9</sup> 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 (10<sup>th</sup> 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.

16. 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 (1983), quoting *Burdine, supra* at 255.

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.

17. Respondent met its burden of production with Josephine Greenfield’s testimony and documentary evidence, which indicated that Respondent discharged Complainant for verbally abusing a coworker and insubordination. These reasons are provided in the discharge notice that Complainant received on March 2, 2000. (Comm.Ex. 3)

18. 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 her 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.

19. 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.

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

20. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for Complainant's discharge. 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 (6<sup>th</sup> Cir. 1994); *See also Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021, (6<sup>th</sup> Cir. 2000). 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*.<sup>10</sup>

*Hicks, supra* at 511, (bracket removed); *See also Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2108 (2000).

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<sup>10</sup> 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* 511, n.4.

21. 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.*

22. The Commission attempted to prove pretext in this case by alleging disparate treatment. Proof of disparate treatment requires similarly situated comparatives. The Commission must show that the comparatives were "similarly situated in all respects":

Thus to be deemed "similarly situated", the individuals with whom . . . [Complainant] seeks to compare . . . her treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

*Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6<sup>th</sup> Cir. 1992) (citations omitted).

23. To be deemed similarly situated, “a precise equivalence in culpability” is not required; misconduct of “comparable seriousness” may suffice. *Harrison v. Metro. Gov’t. of Nashville and Davidson Cty.*, 80 F.3d 1107, 1115 (6<sup>th</sup> Cir. 1996) (citations omitted). Likewise, similarly situated employees “need not hold the exact same jobs; however, their duties[,] responsibilities and applicable standards of conduct must be sufficiently similar in all relevant aspects so as to render them comparable.” *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993), *citing Mitchell* at 583, n. 5.

24. The Commission argues that Complainant was subjected to disparate treatment because Kraljevic hit Complainant in the nose with her finger, and she was neither disciplined nor discharged. This argument is based on Complainant’s testimony that Kraljevic’s finger hit her in the nose while they were exiting the doorway of Greenwood’s office on March 2, 2000. Both Kraljevic and Greenwood denied that any physical contact occurred between Kraljevic and Complainant; the ALJ found their testimony on this issue more credible than Complainant’s testimony. As with the alleged age-related statements by Greenfield, the ALJ considered that Complainant did not make this allegation in her charge affidavit filed with the Commission the following day.

25. Assuming that Kraljevic touched Complainant's nose with her finger, there is no evidence that Greenfield saw the physical contact. Complainant's description of the touching made it seem accidental and innocuous. Complainant acknowledged that she did not tell Greenfield that Kraljevic touched her nose until after Greenfield handed her the discharge notice. (Tr. 36)

26. The evidence in this case supports Respondent's legitimate, nondiscriminatory reasons for Complainant's discharge. Complainant verbally abused Kraljevic, a coworker, on several occasions throughout the day and refused to stay away from her despite Greenwood's instruction to do so. The Commission did not present any evidence that Kraljevic or another substantially younger employee engaged in the same or similar conduct, and they were not discharged. Without such evidence, the Commission cannot prove pretext through disparate treatment.

27. The ALJ also considered the "same actor" inference in this case. 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 (6<sup>th</sup> 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.*

28. In *Burhmaster*, 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).

29. The evidence shows that Lamonja hired Complainant at the age of 56 and promoted her to Dietary Supervisor approximately two years later. In light of these facts, it is highly unlikely that Complainant's age was a factor in Lamonja's decision to discharge her. Further, the record is void of any evidence that Lamonja harbored a discriminatory animus toward Complainant because of her age or, for that matter, older persons in general. Nothing in the record raises the suspicion that Lamonja believed that age somehow affected a person's ability to perform the duties of Dietary Supervisor.

## **CONCLUSION**

30. After a careful review of the entire record, the ALJ is not convinced that Complainant was a victim of age discrimination. The Commission did not present any evidence that a similarly situated employee, who was substantially younger than Complainant, engaged in the same or similar behavior and was not discharged. Nor did the Commission present any evidence that the decision-maker harbored discriminatory animus toward Complainant because of her age. The

Commission failed to prove that Respondent's articulated reasons for Complainant's discharge were a pretext or cover-up for age discrimination.

### **RECOMMENDATION**

For all of the foregoing reasons, the Administrative Law Judge recommends that the Commission issue a Dismissal Order in Complaint #9019.

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TODD W. EVANS  
ADMINISTRATIVE LAW JUDGE

June 14, 2002