

INTRODUCTION AND PROCEDURAL HISTORY

Carla S. Thomas (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on April 15, 2000.

The Commission investigated the charge and found probable cause that the State of Ohio, Department of Youth Services (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 March 15, 2001. The Complaint alleged that Respondent discharged Complainant because of her religion.

Respondent filed an Answer to the Complaint. 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 November 28, 2002 at Pickaway County Commissioner's Office in Circleville, Ohio. The following day, the hearing reconvened at the Commission's Central Office in Columbus.¹

The record consists of the previously described pleadings, a 510-page transcript of the hearing, exhibits admitted into evidence during the hearing, stipulated exhibits, and post-hearing briefs filed by the Commission on February 1, 2002 and by Respondent on February 20, 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

¹ The parties mutually agreed to this alternative location to accommodate witnesses.

rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the 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 April 15, 2000.

2. The Commission determined on February 22, 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.²

² Respondent stipulated to the Commission's exhibits regarding its conciliation efforts. These exhibits show that the Commission invited Respondent to conciliate this matter after the probable cause finding, and Respondent indicated that "there was no settlement offer" at that time. (Comm.Exs. 11, 12)

4. Complainant is a member of the Apostolic Pentecostal Church. She wears “modest” skirts/dresses in her daily life. (Tr. 114) She believes that the biblical verse, Deuteronomy 22:5, prohibits women from wearing “pants or anything that pertains to a man.” (Tr. 102) In the King James Version of the Bible, Deuteronomy 22:5 reads:

The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so *are* abomination unto the LORD thy God.

(Tr. 107-08)

5. Respondent is a state agency and an employer. Respondent operates correctional facilities in Ohio for juveniles convicted of felonies. One of these facilities is the Circleville Youth Center (CYC). In February and March 2000, the CYC was the reception center for all recently convicted male juveniles in the state.³ The juveniles were held at the CYC for assessment to determine where they would be housed during their incarceration. The juveniles usually stayed at the CYC for four-to-six weeks until they were reassigned to another correctional facility within the state system. (Tr. 19, 327)

³ The CYC is no longer the reception center for male juvenile felony offenders. As of the hearing, the CYC only housed male juveniles convicted of sex offenses.

6. While at the CYC, the juveniles were housed in three buildings. The buildings were divided into two units with approximately 30 to 40 juveniles per unit. Respondent assigned two Juvenile Correction Officers (JCOs) to each unit during the first and second shifts; a total of three JCOs were assigned to each building during third shift when the juveniles were locked down.⁴ The JCOs were supervised by a Unit Manager.

7. The JCOs performed various duties while directly monitoring the activities of the juveniles in their unit. For example, they disciplined juveniles who violated institutional rules, transported them within the facility, assisted in their orientation, and otherwise provided them guidance on “basic living skills.” (Comm.Ex. 2, R.Ex. C) The JCOs were also responsible for ensuring the “safety and security” of not only the juveniles in their unit, but also the other juveniles and staff within the entire facility. (Tr. 111, 330) This duty required the JCOs to respond promptly to “man-down” alarms. These alarms signaled that a JCO needed immediate assistance at a particular location.⁵ The JCOs were expected to physically intervene

⁴ One of the three JCOs on third shift floated from one unit to the other.

⁵ All JCOs are required to wear “man-down” alarms/radios. These devices sounded an alarm in the Control Center when a switch was tilted a certain way. The alarm indicated the number and location of the “man-down” alarm. This information was then relayed to staff over the intercom or radio systems.

between juveniles who were fighting with each other or staff and otherwise physically restrain juveniles when necessary.

8. In mid-February 2000, Complainant was among a group of individuals hired as JCOs. Respondent required all new hires to undergo orientation and Pre-Service Training (PST) prior to working at one of its facilities. During the orientation, Complainant and the other new hires received a copy of all of Respondent's directives, including the dress code for uniformed personnel set forth in Directive B-15. This Directive required JCOs to wear "gray trousers with [a] black strip on [the] side seam or optional split skirts for females." (R.Ex. H, Attach. 1) This Directive was one of the few policies that the new hires were required to read at the orientation. This reading was followed by an opportunity to ask questions about the particular policy.

9. The PST began immediately after the one-day orientation. The PST, which was held at a hotel in Columbus, Ohio, covered various topics over a three-week period. The PST began on February 15 and ended on March 9 with a “skip week” from February 21-25. (Comm.Ex. 4, R.Ex. E)

10. During the skip week, Complainant and the other new hires observed JCOs working with the juveniles at the CYC. Complainant witnessed several “man-down” alerts, but she did not participate in the physical restraint of the juveniles involved. Complainant wore gray mid-calf length skirts/dresses during that week.⁶

11. One of the Unit Managers, a female, instructed Complainant not to wear skirts or dresses while working on her unit. Later that day, Complainant approached Mark Tackett, a personnel officer, in the parking lot and briefly discussed the conflict between her religious beliefs and the Unit Manager’s instruction. Complainant also discussed this conflict with Clifton Duckson, the Operations Administrator, before she returned to the PST.

⁶ None of the new employees had received uniforms at that time. Respondent instructed them to wear gray or black clothing that was “comparable” to the uniforms worn by the JCOs. (Tr. 122-23, 307)

12. Complainant completed the remaining two weeks of the PST. During the last week, Complainant participated in Unarmed Self-Defense (USD) training while wearing skirts/dresses.⁷

13. On Monday, March 13, 2000, Complainant reported to work at CYC wearing a gray mid-calf length skirt/dress. During roll call, Ronald Page, the Acting Operations Manager, refused to assign Complainant to work on a unit because she was in violation of Respondent's dress code. Page referred Complainant to Duckson and Leroy Payton, the Deputy Superintendent of Direct Services.

14. Complainant met with Payton and others about her attire. Payton informed Complainant that Respondent's dress code required JCOs to wear uniforms, and she would not be permitted to wear skirts or dresses. Payton also indicated that he had safety concerns about a JCO wearing a skirt or a dress while working on a unit. (Tr. 346-47)

15. Complainant informed Payton that her religious beliefs prohibited her from wearing pants. Payton indicated that Complainant had the option

⁷ Respondent currently provides training in Response to Resistance techniques instead of USD. These techniques require JCOs to use more "take-downs" and ground maneuvers in physically restraining juveniles. (Tr. 438-39, R.Ex. O)

of wearing split skirts or “skorts” under Respondent’s dress code. (Tr. 183, 346) Complainant told Payton that she considered skorts to be pants. Payton assigned Complainant to work at the entry post where she monitored visitors and staff entering and leaving the facility.⁸ Complainant received a written order to comply with Respondent’s dress code for uniformed personnel, Directive B-15. (Comm.Ex. 5, R.Ex. I)

16. Complainant was not scheduled to work again until March 16, 2000. Complainant wore a gray mid-length skirt/dress to work that day. Duckson escorted Complainant to Harry Kamdar’s office upon her arrival. Kamdar, the Superintendent, expressed “the seriousness” of Complainant’s failure to comply with Directive B-15, and indicated that this was her “last opportunity . . . to come into compliance.” (Tr. 143, 238) Payton handed Complainant a memorandum that outlined the “safety and security concerns” of JCOs wearing skirts or dresses on the job. (R.Ex. J) Complainant also received a second written order to comply with Respondent’s dress code for uniformed personnel, Directive B-15. (Comm.Ex. 6, R.Ex. K)

⁸ Complainant testified that she also worked in the Control Center. This is also a post where JCOs have no contact with juveniles. The JCO in the Control Center monitors the entire facility via cameras and relays information to staff during “man-down” alerts. The JCO does not leave the Control Center during such alerts.

17. During the meeting, Complainant stated that other employees, such as Unit Managers, were allowed to wear skirts or dresses in the facility, and suggested that she could work in that position. Complainant also mentioned that she could sew “an enclosure” into her skirts to lessen the safety concerns.⁹ (Tr. 139-41; Comm.Ex. 8, R.Ex. Q)

18. On March 17, 2000, Complainant reported for work wearing a gray mid-calf length skirt/dress. Upon her arrival, Payton and Duckson escorted Complainant to Kamdar’s office where she received written notice of her “probationary removal” from her position. (Comm.Ex. 7, R.Ex. L)

⁹ Complainant did not elaborate on how she would make such an enclosure or how it would prevent her dresses from being pulled over her thighs. (Tr. 177-80)

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.

1. The Commission alleged in the Complaint that Respondent discharged Complainant because of her religion.

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 . . . religion, . . . 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 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).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII, “religion” includes:

. . . all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that . . . [it] is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.

42 U.S.C. § 2000e(j).

6. The Sixth Circuit uses a two-step analysis in evaluating claims of religious discrimination.¹⁰ *Cooper v. Oak Rubber Co.* (C.A. 6, 1994), 15 F.3d 1375; *EEOC v. Arlington Transit Mix, Inc.* (C.A. 6, 1991), 957 F.2d 219. The Commission bears the initial burden of proving a *prima facie* case of religious discrimination. *Cooper, supra* at 1378. Once the Commission establishes a *prima facie* case, the burden shifts to the employer to show that it could not reasonably accommodate the employee without incurring undue hardship in conducting its business. *Id.*

PRIMA FACIE CASE

7. The Commission may establish a *prima facie* case of religious discrimination by showing that:

- (1) Complainant holds a sincere religious belief that conflicts with an employment requirement;
- (2) Complainant informed Respondent about the conflict; and
- (3) Respondent discharged Complainant for failing to comply with the conflicting employment requirement.

Id.; *Franks v. National Lime & Stone Co.* (2000), 138 Ohio App.3d 124.

¹⁰ The Sixth Circuit is the federal Court of Appeals that reviews lower federal court cases in Ohio. Therefore, Sixth Circuit cases are usually accorded more weight by Ohio courts than decisions by other circuits.

8. The Commission's burden of proving the sincerity of the particular religious belief is "not a heavy one." *Philbrook v. Ansonia Bd. of Educ.* (C.A. 2, 1985), 757 F.2d 476, *remanded on other grounds*, (1986), 479 U.S. 60. This inquiry often turns on the credibility of the employee who brought the claim of religious discrimination, e.g., how consistently has the employee followed the religious belief in question or whether evidence exists that suggests other motives besides religious conviction. *Id.*, at 482.

9. In this case, Complainant testified that she became a member of the Apostolic Pentecostal Church in 1987, and she has followed the tenants of this religious sect since joining. Complainant testified that one of these tenants prohibit women from wearing "pants or anything that pertains to a man." (Tr. 102) Complainant testified that this tenant is based on the biblical verse, Deuteronomy 22:5.¹¹ The ALJ credited Complainant's testimony about her conviction to this religious belief.

¹¹ Complainant testified that her religious beliefs also prohibit women from cutting their hair based on a biblical verse in Corinthians. Complainant testified that she has not cut her hair since 1987.

10. Respondent contends that Complainant was aware of the conflict between her religious beliefs and the dress code for JCOs during her interview and orientation, yet she failed to inform management about the conflict. Respondent argues that Complainant's failure to disclose "a known religious conflict" during her interview and orientation raises suspicion about the sincerity of the religious belief in question, and whether this belief actually conflicted with an employment requirement. (R.Br. 7) Such evidence, though relevant, is only part of the totality of the evidence on these issues. *Franks, supra* at 129-30.

11. The ALJ also considered that the record is void of any evidence that Complainant has deviated from her religious beliefs since 1987, or she acted with ulterior motives other than adhering to these beliefs. To the contrary, the evidence shows that Complainant remained steadfast in her religious beliefs despite direct orders from Respondent to comply with its dress code for JCOs or lose her job. The ALJ concludes after examining the totality of the evidence that Complainant held a sincere religious belief that conflicted with an employment requirement. Therefore, the Commission established the first element of a *prima facie* case.

12. The Commission also established the second and third elements of a *prima facie* case. The evidence shows Respondent was aware of the conflict between Directive B-15, its dress code for uniformed personnel, and Complainant's religious beliefs prior to issuing the direct orders for her to comply with the Directive. Further, the evidence shows that Respondent discharged Complainant for failing to comply with the Directive.

REASONABLE ACCOMMODATION/UNDUE HARDSHIP

13. Since the Commission established a *prima facie* case of religious discrimination, the burden shifted to Respondent to show that it could not reasonably accommodate Complainant without incurring undue hardship in its operations. The reasonableness of an accommodation is determined on a case-by-case basis. *Cooper, supra* at 1378. A proposed accommodation is an undue hardship if it results in more than a "*de minimis*" cost or burden to the employer. *Trans World Airlines, Inc. v. Hardison* (1977), 432 U.S. 63, 84. In other words, it is an undue hardship to require an employer to bear more than a minimal cost or burden in accommodating an employee's religious beliefs.

14. Respondent argues that it would be an undue hardship on its operations to allow Complainant to wear a skirt or a dress while working in a unit as a JCO. Leroy Payton, the Deputy Superintendent of Direct Services, testified that the JCOs are not only required to wear uniforms for identification purposes, but also to safely perform their duties as “the primary responders” to situations that arise within the facility. (Tr. 330) For example, Payton testified that JCOs are expected to run to “man-down” alerts and physically restrain juveniles who are fighting with each other or staff and otherwise engaging in disorderly or insubordinate conduct. Payton testified that uniformity in dress among JCOs is important to maintain a professional appearance with the juveniles and prevent them from preying on certain officers based on their attire. (Tr. 388)

15. Payton testified that the JCOs had to establish their authority every four-to-six weeks as new juveniles arrived at the CYC. Payton testified that “man-down” alerts were common, particularly when the CYC was a reception center, because there was “a learning process” for juveniles who have never been incarcerated before. (Tr. 327) Payton also testified that it was “common” for JCOs to take juveniles to the ground while restraining them. (Tr. 333) Payton testified that a skirt or a dress

would be “a hinderance” in these situations because it could be pulled over an officer’s head, stepped on, tripped over, and otherwise used as “a cape” while on the ground blocking the vision of the person wearing the skirt/dress and others assisting them in restraining the juvenile.¹² (Tr. 355, 377, 388, R.Ex. J)

16. The Commission argues that Complainant was qualified to work as a JCO and capable of performing the job in a skirt or a dress. In making these arguments, the Commission relies upon Complainant’s completion of the USD training and her presence at the CYC during the skip week. These factors are not accurate indicators of whether Complainant could safely perform the duties of a JCO in a skirt or dress.

17. Both the Commission and Respondent presented witnesses who testified that “minimal” force was used during the USD training, and the techniques were not executed at full speed. (Tr. 52, 440) The evidence also shows that Complainant and the other new hires only observed JCOs

¹² Harry Kamdar, the Superintendent, reiterated similar safety concerns as expressed by Payton. Kamdar also testified that he was concerned about a JCO wearing a skirt or dress because the CYC housed all juvenile felony offenders at that time, including those convicted of sex offenses.

working with the juveniles during the skip week; they did not participate in the physical restraint of juveniles during “man-down” alerts.

18. In any work environment, “safety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer’s business.” *Draper v. United States Pipe & Foundry Co.* (C.A. 6, 1975), 527 F.2d 515, 521. This is especially true in prisons, correctional facilities, and other institutions where individuals are held against their own will.

19. In order to show undue hardship for safety reasons, Respondent is not required to prove that Complainant would be injured if she wore a skirt or dress while working as a JCO. *EEOC v. Oak-Rite Manufacturing Corp.* (S.D.Ind., 2001), 88 FEP Cases 126 (citation omitted). Respondent must only demonstrate that Complainant’s deviation from its uniform policy would either cause or increase safety risks to herself, or to her coworkers who were required to come to her aid during “man-down” alerts. See *Kalsi v. New York City Transit Auth.* (E.D.N.Y., 1998), 62 F.Supp.2d 745, *aff’d*, (C.A. 2, 1999), 189 F.3d 461 (accommodating employee’s refusal to wear hard hat due to his religious beliefs would increase risk of injury to

employee and coworkers). Respondent presented sufficient evidence to meet this burden.

20. The ALJ credited Payton's testimony about the increased safety risks of a JCO wearing a skirt or dress while responding to "man-down" alerts. Payton began his career as a corrections officer and has 27 years of experience in the correctional field. He has witnessed numerous "man-down" situations in his career.

21. Further, the Response to Resistance techniques, which are currently taught at the PST, require JCOs to use more "take-downs" and ground maneuvers to physically restrain juveniles. (Tr. 438-39, 458, R.Ex. O) Chris Simon, the Training Manager, testified that "the majority" of these techniques would be problematic for a JCO wearing a skirt or dress.¹³ (Tr. 458-59) The Commission did not rebut this testimony. An employer's limited duty of religious accommodation does not require the assumption of increased safety risks to an employee and their coworkers. In this case,

¹³ For example, the guard position is a technique designed to allow JCOs to protect themselves once they have been knocked to the ground. While lying on the ground, JCOs are instructed to lift their feet in the air and block any punches or an attempt by the juvenile to jump on them. The JCOs are taught to wrap their legs around the juvenile's hips and pull the juvenile close to them, if the opportunity presented itself.

the increased safety risks to Complainant and her coworkers associated with her wearing a skirt or dress as a JCO would impose more than a *de minimis* burden on Respondent's operations.

22. The Commission also argues that Respondent failed to explore Complainant's suggestion that she could sew "an enclosure" into her skirts or dresses to prevent them from being pulled over her thighs. Other than Complainant's testimony, the Commission did not present any evidence on this issue. The Commission failed, or was unable to offer, any expert testimony on how skirts or dresses could have been altered to alleviate the legitimate safety concerns expressed by Respondent. Nor did the Commission provide any evidence that the proposed alteration has worked safely in a comparable institutional setting. Like its federal counterpart, R.C. Chapter 4112 does not require employers to experiment with employee safety in order to accommodate an employee's religious beliefs. See *Oak-Rite, supra* (EEOC's proposed accommodation that employee whose religious beliefs prevented her from wearing pants could wear reasonably close-fitting, ankle-length denim or canvas dress/skirt with above-the-ankle leather boots would impose undue hardship on employer

by requiring it to experiment with employee safety in manufacturing setting).

23. Lastly, the Commission argues that Respondent failed to place Complainant in “no-contact” positions, such as the entry post, the Control Center, or the Sally Port gate, or poll other employees about voluntarily swapping posts with her. These proposed accommodations are not reasonable because they would have required Respondent to violate the collective bargaining agreement and a memorandum of understanding that existed with the union at that time. It is well settled that employers are not required to “deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others.” *Hardison, supra* at 81.

24. The evidence shows that Respondent operated under a Pick-a-Post agreement with the union in March 2000. Under the Agreement, the JCOs were permitted to bid on posts, often daily, based on their seniority. The entry post, the Control Center, and the Sally Port gate were “highly desirable posts” because they involved no contact with the juveniles.¹⁴

¹⁴ Normally, only one employee worked at these posts per shift.

(Tr. 236) The most senior employees who selected these posts would be unable to voluntarily swap posts with Complainant, a probationary employee, without violating the contractual rights of the other employees in line for those posts. (Tr. 287-88)

RECOMMENDATION

For all of the foregoing reasons, the Administrative Law Judge recommends that the Commission issue a Dismissal Order in Complaint #9039.

TODD W. EVANS
ADMINISTRATIVE LAW JUDGE

July 22, 2002