

## **INTRODUCTION AND PROCEDURAL HISTORY**

Robert H. Cameron (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 19, 2001.

The Commission investigated the charge and found probable cause that S & S Manufacturing, Inc. (Respondent) engaged in unlawful retaliatory practices in violation of Revised Code (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on November 8, 2001. The Complaint alleged that Respondent discharged Complainant in retaliation for reporting complaints of sexual harassment.

The Commission filed a Motion to Compel Discovery on March 7, 2002. Respondent did not oppose the Motion. The Administrative Law Judge (ALJ) granted the Motion on April 5, 2002 and ordered Respondent to answer or object to the Commission's discovery requests by April 26, 2002.

The Commission filed a Motion to Deem Admitted on April 15, 2002 and a Motion for Sanctions and Default Hearing on May 3, 2002. Respondent did not oppose these Motions. The ALJ granted the Motions on the day of the public hearing.<sup>1</sup>

The public hearing was held on May 9, 2002 at the Tuscarawas County Commissioner's Office in New Philadelphia, Ohio. Complainant was present and testified at the hearing; neither counsel nor a representative of Respondent attended.

The record consists of the previously described pleadings, a 38-page transcript of the hearing, one exhibit admitted into evidence during the hearing, and a post-hearing brief filed by the Commission on June 13, 2002.

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<sup>1</sup> Respondent did not file an Answer in this case. Therefore, the ALJ deemed Respondent in default. Under the Commission's rules, a default judgment does not automatically result in a finding of discrimination or retaliation; the public hearing must go forward "on the evidence in support of the complaint." Ohio Adm.Code 4112-3-06(G). Since the Commission only has the authority to remedy violations of R.C. Chapter 4112, the Commission must still present direct evidence of retaliation or, as in most cases, establish a *prima facie* case of retaliation through circumstantial evidence.

## **FINDINGS OF FACT**

The following findings of fact are based, in part, upon the ALJ's assessment of the credibility of the witnesses who testified before him in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered the witnesses's appearance and demeanor while testifying. He considered whether the witness was evasive and whether his testimony appeared to consist of subjective opinion rather than factual recitation. He further considered the opportunity the witness had to observe and know the things discussed, the witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of the witness. Finally, the ALJ considered the extent to which the witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on March 19, 2001.

2. The Commission determined on September 27, 2001 that it was probable that Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(I).

3. The Commission attempted to resolve this case by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.<sup>2</sup>

4. Respondent is a corporation and an employer doing business in Sugarcreek, Ohio. Respondent manufactures American flags. Richard Spencer is Respondent's president.

5. Respondent began operations in January 2001. Respondent hired Complainant at that time as a supervisor. Complainant supervised the production and folding of flags. Complainant reported to Don Seymour, the Shop Manager.

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<sup>2</sup> Respondent admitted in its Answer that the Commission attempted conciliation by informal methods without success. Respondent also admitted that "all jurisdictional prerequisites" had been met during discovery. (Commission's Request for Admissions, #1)

6. Within weeks of his hire, Complainant began receiving complaints from female subordinates about Seymour. The complaints ranged from sexual comments and quid pro quo sexual propositions to physical touching of intimate body parts. Besides these complaints, Complainant observed Seymour touching the buttocks and back of one female subordinate “about four or five times.” (Tr. 13)

7. Complainant initially reported these complaints to Respondent’s Office Manager, Pat Yearian. Yearian indicated that Seymour had made sexual advances toward her as well. Yearian indicated that she would discuss the matter with Spencer.

8. In mid-February 2001, Complainant informed Spencer about the complaints after no action was taken against Seymour. Spencer indicated that he would “take care” of the matter. (Tr. 15) Shortly thereafter, Seymour apologized to the female subordinates (and Complainant) for engaging in sexually harassing behavior.

9. Seymour continued to engage in sexually harassing behavior after his apology. Complainant received another complaint from a female

subordinate about him the following day. The female subordinate told Complainant that she did not want to work in the same area as Seymour. Complainant again went to Yearian and asked her to apprise Spencer of the latest complaint.

10. On February 16, 2001, Complainant informed Spencer that Seymour was engaging in the same behavior, and one of his female subordinates was afraid to come to work. Complainant told Spencer that Seymour's actions violated company policy and was grounds for discharge. Spencer told Complainant that he would handle the matter. Spencer also commented that Complainant "acted like the one that's being sexually harassed", and he was making "too big of a deal" out of the situation. (Tr. 19)

11. Complainant approached Spencer again the following day. Complainant advised Spencer that the situation was "getting worse", e.g., Seymour's daughter, who also worked for Respondent, was calling the female subordinate names. Complainant implored Spencer take action against Seymour and resolve the other problems caused by his behavior.

12. Spencer replied that Complainant was causing “too much trouble” and made reference to his reporting of Seymour’s sexually harassing behavior. (Tr. 20, Request for Admissions, #4) Spencer indicated that Complainant was apparently unable to work with Seymour. Spencer discharged Complainant during their conversation.

## **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 in retaliation for reporting complaints of sexual harassment.

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

It shall be an unlawful discriminatory practice:

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

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(I) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means

evidence sufficient to support a finding of unlawful retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973) for disparate treatment cases applies to retaliation cases. This framework usually requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at n.8.

6. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas*, *supra* at 802, n.13. In this case, the Commission may establish a *prima facie* case of unlawful retaliation by proving that:

- (1) Complainant engaged in an activity protected by R.C. Chapter 4112;
- (2) Respondent knew about the protected activity;
- (3) Thereafter, Respondent subjected Complainant to an adverse employment action; and
- (4) There was a causal connection between the protected activity and the adverse employment action.

*Hollins v. Atlantic Co., Inc.*, 188, F.3d 652 (6<sup>th</sup> Cir. 1999).

7. The Commission proved a *prima facie* case of unlawful retaliation. Complainant engaged in protected activity by reporting subordinates' complaints of sexual harassment to management. Respondent was aware of this reporting and subjected Complainant to an adverse employment action by discharging him. Respondent discharged Complainant within days of his initial reporting of sexual harassment complaints and during his last attempt to resolve problems caused by the harasser's behavior. See *Holland v. Jefferson National Life Ins. Co.*, 883 F.2d 1307, 1314-15 (7<sup>th</sup> Cir. 1989) (causal connection may be inferred from evidence that adverse employment action closely followed protected activity).

8. The Commission also provided other evidence sufficient to establish the fourth element of a *prima facie* case. Respondent admitted

that Spencer made reference to Complainant's reporting of sexual harassment complaints during the meeting where he was discharged. (Request for Admissions, #4) Further, Complainant testified that Spencer told him that he was making "too big of a deal" out of Seymour's behavior and causing "too much trouble" when he reported the behavior and the problems that flowed from it. Complainant also testified that Spencer told him that he "acted like the one that's being sexually harassed." The ALJ credited Complainant's testimony about these statements. These statements and Spencer's reference to the protected activity are strong indicators that a causal connection existed between Complainant's reporting of sexual harassment complaints and his subsequent discharge.

9. The Commission having established a *prima facie* case of unlawful retaliation, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for the adverse 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.

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

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

10. Respondent failed to meet its burden of production. In other words, Respondent failed to articulate a legitimate, nondiscriminatory reason for Complainant’s discharge. Respondent’s failure to rebut the presumption of unlawful retaliation created by the *prima facie* case, coupled with the ALJ’s belief of the Commission’s evidence, entitles Complainant and the Commission to relief as a matter of law.

Establishment of a *prima facie* case in effect creates a presumption that the . . . [defendant] unlawfully discriminated against the . . . [plaintiff]. If the trier of fact believes the plaintiff’s evidence, and if the . . . [defendant] is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

*Burdine*, *supra* at 254, (emphasis added and footnote omitted).

## RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint #9185 that:

1. The Commission order Respondent to cease and desist from all retaliatory practices in violation of R.C. Chapter 4112; and
2. The Commission order Respondent to submit to the Commission within 10 days of the Commission's Final Order a certified check payable to Complainant for the amount that he would have earned had he been employed by Respondent as a supervisor on February 17, 2001 and continued to be so employed up to the date of the Commission's Final Order, less his interim earnings, plus interest at the maximum rate allowable by law.<sup>3</sup>

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TODD W. EVANS  
ADMINISTRATIVE LAW JUDGE

July 9, 2002

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<sup>3</sup> Complainant testified that he earned \$8.00 per hour and worked approximately 50 hours per week at the time of his discharge. Any ambiguity in the amount that Complainant would have earned during this period should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.