

INTRODUCTION AND PROCEDURAL HISTORY

Paula M. Wray (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on January 22, 1998.

The Commission investigated the charge and found probable cause that Wal-Mart Stores, Inc. (Respondent) engaged in unlawful discrimination in violation of Revised Code Section (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 January 7, 1999.

The Complaint alleged that Respondent discharged Complainant because of her race.

Respondent filed an Answer to the Complaint on February 3, 1999. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices.

A public hearing was held on January 18, 2000 at the Ocasek Government Building in Akron, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 177 pages, exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on March 31, 2000 and by Respondent on May 2, 2000.

FINDINGS OF FACT

The following findings of fact 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 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 January 22, 1998.

2. The Commission determined on October 1, 1998 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a corporation and an employer doing business in Ohio. Respondent operates discount department stores.

5. Complainant is a black person.

6. Respondent hired Complainant as a pharmacy technician on October 9, 1997. Terry Pritchard, pharmacy manager, white, interviewed Complainant and made the decision to hire her. Like all new associates, Respondent placed Complainant on 90-day probation. (R.Ex. A)

7. Complainant performed various functions as a pharmacy technician. Her primary responsibilities were customer-related. For example, she waited on customers at the store, answered customer calls, and otherwise assisted customers in obtaining or refilling prescriptions. Complainant also stocked and pulled medication, counted pills, and entered data into a computer. Complainant occasionally worked on the floor of the Over-The-Counter (OTC) Department located near the Pharmacy Department.

8. During her first month of employment, Complainant worked primarily with Pritchard and Edna Harmon, a pharmacy technician.¹ Pritchard attempted to ease Complainant into the position. Pritchard handled most of the telephone calls for the first several weeks while

¹ Complainant also worked with at least one pharmacy technician who worked part-time.

Complainant primarily operated the cash register. When Complainant did answer the phone, she usually “complicated” matters by taking too much time providing service to the customer. (Tr. 171) For example, Complainant took “15 minutes getting an order for maybe three refills.” *Id.*

9. Later in the month, Pritchard told Complainant to answer the telephone within three rings. Pritchard also told Complainant to be “more aggressive” in waiting on customers. (Tr. 14, 147) In general, Pritchard stressed customer service as the main priority.

10. In mid-November 1997, Maryann Casey, assistant pharmacy manager, white, returned from maternity leave. Casey initially was “very civil” toward Complainant. (Tr. 15) However, within “a week or so”, Casey began to yell at Complainant in front of customers and co-workers for work-related matters. (Tr. 16)

11. By early to mid-December 1997, Pritchard became frustrated with Complainant’s minimal improvement in her work performance,

particularly in customer service.² Complainant continued to make customers wait or let the telephone ring seven or eight times while she was preoccupied with other tasks. Complainant also continued to take too much time when providing service to customers, whether in person or over the telephone.

12. In addition, Pritchard became frustrated with the number of personal phone calls that Complainant received at work. Pritchard told Complainant that these calls were disrupting the workflow in the department. Pritchard also told Complainant that he had to either cut her hours or discharge her because she was “not catching on” and “too slow.” (Comm.Ex. 2)

13. In late December 1997, Complainant complained to Barbara Schaffer, the personnel manager, about Casey yelling at her in front of customers. Schaffer asked Complainant to put her complaint in writing before she scheduled a meeting with the store manager.

² Once during the month, Pritchard yelled at Complainant when the cash register had no change approximately two hours into the shift

³ Although the burden of production shifts to Respondent at this point, the

14. Meanwhile, Pritchard completed a 90-day associate evaluation for Complainant. Pritchard rated Complainant's overall work performance as "below standard." (Comm.Ex. 3) In the customer service section, Pritchard wrote that he had to "constantly" remind Complainant when a customer was at the window, and her "lack of aggressiveness" hurt customer service. In another section, Pritchard wrote that Complainant "has not shown continuous improvement." Pritchard rated Complainant as poor in productivity, follow up, problem-solving skills, attendance, and having a sense of urgency.

15. On January 2, 1998, Pritchard conducted an exit interview with Complainant. Pritchard told Complainant that she was being discharged because her work performance was "below standard." (Tr. 66) Pritchard showed Complainant her work performance evaluation and discussed it with her. Pritchard told Complainant that working in the Pharmacy Department was not her niche; Complainant agreed. (Tr. 172) Pritchard recommended Complainant for rehire in another department on the exit interview form. (Comm.Ex. 4, Tr. 163)

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 race.

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 race, . . . 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 case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The proof required to establish a

prima facie case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981).

6. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action.³ *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

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

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

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

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

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

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

8. Respondent met its burden of production with Terry Pritchard's testimony and documentary evidence. Pritchard testified that he discharged Complainant due to her poor work performance and lack of

continuous improvement during her probationary period. Pritchard further testified that he became frustrated with Complainant's inability to perform basic functions such as answering phones and waiting on customers in a timely manner. Pritchard outlined Complainant's other deficiencies in her 90-day work performance evaluation. (Comm.Ex. 3)

9. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her race. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for Complainant's discharge were not the true reasons, but were "a pretext for discrimination." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine, supra* at 253, 25 FEP Cases at 115.

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

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

10. 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 race is correct. That remains a question for the factfinder to answer

Id., at 524, 62 FEP Cases at 106.

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

11. 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 (6th Cir. 1994). Such direct attacks, if successful, permit the factfinder to infer intentional discrimination from the rejection of the reasons without additional evidence of unlawful discrimination.

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the

prima facie case, suffice to show intentional discrimination . . . [n]o additional proof is required.⁴

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

12. 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.*

13. In this case, the Commission did not provide any evidence that challenged the factual accuracy of Respondent's articulated reasons for Complainant's discharge. Nor did the Commission provide any evidence that other employees had the same or similar work performance deficiencies as Complainant, and Pritchard did not discharge them.

⁴ Even though rejection of a respondent's articulated reasons is "enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* at 511, 62 FEP Cases at 100, n.4.

Overall, the Commission failed to provide sufficient circumstantial evidence to infer that Respondent's articulated reasons for Complainant's discharge were a pretext for race discrimination.

14. Respondent, on the other hand, presented witnesses whose testimony corroborated Pritchard's testimony about Complainant's poor work performance. Mary Lewis, the OTC Manager, testified that Complainant had difficulty performing multiple tasks when the pharmacy was busy. Lewis testified that she believed that Complainant was better suited to work in her department because pharmacy was usually "very busy."

I think she'd be better off if she'd be able to work on [the] floor with us because it's not as fast-paced out there. It's a really hard job to work in pharmacy . . . I really didn't think she could keep up with pharmacy as well as she could do on the floor.

(Tr. 78)

15. Maria Gutierrez, who also worked in the OTC Department, testified that Complainant was "a little slow" and not as good as the other pharmacy technicians. (Tr. 101, 102) Gutierrez testified that she advised Complainant to reduce her absences and receipt of personal phone calls at

work.⁵ Both Lewis and Gutierrez testified that they heard Pritchard yell at Complainant to answer the telephone.

16. The Commission argues that Casey yelled at Complainant in front of customers and coworkers because she was “simply a racist.” (Comm.Br. 7) This argument is contrary to the substantial weight of the evidence, which shows that Casey yelled at both white and black coworkers alike.

17. Lewis testified that she observed Casey yelling at Complainant and white pharmacy technicians. Lewis testified that Casey was a “very demanding” person who became upset when others performed below her expectations. (Tr. 80) Gutierrez testified that working with Casey made her nervous because Casey demanded that employees to be at their “very best.” (Tr. 100)

18. Pritchard testified that he never heard Casey make any racially derogatory comments. He also described Casey as “very intense” and

⁵ Complainant regularly complained to Gutierrez about Casey yelling at her and her job in general.

difficult to work with. (Tr. 151) Pritchard testified that he observed Casey raise her voice to Complainant and other pharmacy technicians. Pritchard, who also had conflicts with Casey, testified that he approached her about being more tactful in dealing with coworkers, but she was not receptive to his advice.⁶

19. Assuming for purposes of argument that Casey was racist, the evidence shows that Pritchard made the decision to discharge Complainant. There is no evidence that Casey played any part in Pritchard's decision to discharge Complainant or somehow influenced his decision.

20. The Commission suggests that Complainant's work performance problems were created by Casey's discriminatory conduct. However, the evidence shows that Complainant had difficulty performing her job *before* Casey returned from maternity leave in mid-November 1997. Pritchard testified he became concerned with Complainant's progress after approximately two weeks. As a result, Pritchard told Complainant to be

⁶ Pritchard testified that he did not have supervisory authority over Casey; she reported to the District Manager who hired her.

“more aggressive” in waiting on customers and answer the telephone within three rings. (Tr. 147) Complainant acknowledged that “there were times” in October and early November 1997 that Pritchard told her to be “more aggressive”, ask questions, and prioritize her work. (Tr. 14)

21. Lastly, Respondent argues that the same actor inference applies in this case. The same actor inference permits the factfinder to infer “a lack of discrimination from the fact that the same individual both hired and fired the employee.” *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463 (6th Cir. 1995). One federal court provided the following rationale for this inference:

From the standpoint of the putative discriminator, it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.

Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) (citation, brackets, and quotation marks omitted).

22. To apply the same actor inference, a short period of time between hiring and firing is not essential when the employee’s class does not change. *Buhrmaster, supra* at 464. However, the closer these events occur in proximity, the stronger the inference becomes.

[I]n cases where the hirer and firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor in the adverse action taken by the employer.

Proud, supra at 797.

23. The facts in this case demonstrate that Pritchard was the sole person involved in Complainant's hire on October 9, 1997 and her discharge approximately three months later. The brief period between these employment actions creates a strong inference that race discrimination was not a determinative factor in Complainant's discharge. See *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267 (9th Cir. 1996) (employee's evidence was insufficient to counter strong inference of nondiscrimination that arose because the same person who hired her terminated her only one year later). The Commission did not present any evidence to rebut this inference.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8455.

TODD W. EVANS
HEARING EXAMINER

May 15, 2000