

INTRODUCTION AND PROCEDURAL HISTORY

Ivan C. Turner (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on November 12, 1996.

The Commission investigated and found probable cause that the City of Cleveland (Respondent) engaged in unlawful discriminatory practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted and failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on September 18, 1997.

The Complaint alleged that Respondent “pre-positioned” a white employee for promotion and otherwise refused to promote Complainant because of his race.

Respondent filed a timely Answer to the Complaint, admitting certain procedural allegations but denying that it engaged in unlawful discriminatory practices. Respondent also denied that the Commission

attempted and failed to conciliate this matter. Lastly, Respondent pled affirmative defenses.

A public hearing was held on May 28, 1998 at the Lausche State Office Building in Cleveland, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 178 pages, exhibits admitted and proffered into evidence at the hearing, and post-hearing briefs filed by the Commission on September 17, 1998 and by Respondent on January 28, 1999.

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 November 12, 1996.

2. The Commission determined on July 31, 1997 that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation.¹ The Commission issued the Complaint after conciliation failed.

¹ Respondent's counsel indicated during the hearing that the Commission's conciliation efforts were no longer an issue. (Tr. 2)

4. Respondent is an employer and a political subdivision of the State of Ohio. Respondent has several departments that are divided into divisions. Since 1994, the Division of Accounts and the Division of Financial Reporting and Control (FRC) have worked together in processing payroll, accounts payable, accounting data, and other financial information. Both divisions are part of the Department of Finance.

5. Complainant is an interracial person who is, in part, black. He possesses a bachelor's degree in computer science from Central State University.

6. In the fall of 1995, Cheryl McConnell and Vanessa Tungstal left the Division of FRC. McConnell held a supervisory position. She was responsible for information control. Tungstal processed payroll during the day. Her job classification was Information Control Analyst. She was known as the payroll or day operator.

7. Meanwhile, Keith Schuster became City Controller in charge of the Division of FRC. Prior to Schuster's hire, Respondent interviewed Paul Beckwith for Information Control Analyst and offered him the position.

Schuster and Saed Razei, Supervisor of Computer Operations, later interviewed Complainant for Information Control Analyst and hired him. Complainant and Beckwith started on October 17, 1995.²

8. During their first week, Complainant and Beckwith received training on first shift. They subsequently received two weeks of training on second shift. John Winnicki, who worked as the night operator, trained them.

9. Following the training, Respondent promoted Winnicki to Supervisor of Operations, and he became Complainant's and Beckwith's immediate supervisor. Schuster assigned Complainant to night operator to replace Winnicki; he assigned Beckwith to day operator to replace Tungstal. Schuster made these assignments based on Complainant's experience with mainframe computers using digital or DEC systems and Beckwith's experience with personal computers using local area networks (LAN).

² Although Respondent hired Beckwith before Complainant, they started on the same day because Beckwith's paperwork "got held up." (Tr. 93)

10. As night operator, Complainant primarily processed accounting information using a mainframe computer and the Financial Accounting Management Information System (FAMIS).³

11. In February 1996, Razei left his employment with Respondent. Beckwith assumed additional duties upon Razei's departure. To perform these duties, Respondent granted Beckwith access to "supervisory password[s]", which allowed him to "provide security clearance to other users." (Tr. 133, 134)

12. In late June 1996, Respondent advertised to fill a vacancy for System Administrator. (Comm.Ex. 4) The primary function of this position was to manage all payroll network operations. Complainant and Beckwith were among the applicants. Respondent interviewed Beckwith and other applicants, but did not interview Complainant. Respondent hired Michelle Elshaw, a black female, for the position.

³ Complainant worked from 2:00 p.m. to 10:00 p.m. while the other employees worked days. The FAMIS required daily updating at night when employees did not use their computers. Complainant performed some payroll functions while running FAMIS.

13. In mid-July 1996, Schuster created the position of Senior Programmer Analyst to replace the position that Razei had earlier vacated.⁴ (Comm.Ex. 8) At the time, Beckwith continued to perform his duties and those he assumed from Razei. Later in the year, Schuster promoted Beckwith to Senior Programmer Analyst.

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

⁴ The salary for this position was approximately \$12,000 less than Razei's salary when he left.

various witnesses is not in accord with the findings therein, it is not credited.

1. The Commission alleged in the Complaint that Respondent “pre-positioned” a white employee for promotion and otherwise refused to promote Complainant because of his race.

2. These allegations, if proven, would constitute a violation of R.C. 4112.02 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 applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm.*, (1991), 61 Ohio St.3d 607. 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 normally must prove 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 Depart. 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 its actions.⁵ *McDonnell Douglas, supra* at

⁵ Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceedings. *Burdine, supra* at 254, 25 FEP Cases at 116.

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.

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 its actions. *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 its refusal to promote Complainant removes any need to determine whether the Commission proved a *prima facie* case, and the “factual inquiry proceeds into a new level of specificity.” *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 31 FEP Cases 609, 611, *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 Schuster's testimony. Schuster testified that he assigned Beckwith to day operator because he had more experience on personal computers using local area networks (LAN) than Complainant. Schuster testified that Complainant was better suited for night operator because of his experience on mainframe computers using digital or DEC systems. Schuster also testified that he promoted Beckwith to Senior Programmer Analyst because he possessed knowledge of LAN and "client server technology" that Complainant lacked. (Tr. 84-85, 118)

9. Respondent having met its burden of production, the Commission must prove that Respondent intentionally discriminated against Complainant because of his 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 its refusal to promote Complainant were not its true reasons, but were "a pretext for discrimination." *Id.*, at

515, 62 FEP Cases at 102, *quoting Burdine*, 450 U.S. 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.

11. Although it is not enough to simply disbelieve Respondent’s articulated reasons to infer intentional discrimination,

[t]he 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 a prima facie case, suffice to show intentional discrimination.⁶

Id., at 511, 62 FEP Cases at 100.

⁶ Even though rejection of 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.

Ultimately, the factfinder must be convinced that Complainant was “the victim of unlawful discrimination.” *Id.*, at 508, 62 FEP Cases at 99, *quoting Burdine, supra* at 256, 25 FEP Cases at 116.

12. It is undisputed in this case that Beckwith, a white co-worker, possessed more experience on personal computers using LAN than Complainant at the time of their hire. Likewise, it is undisputed that Complainant possessed more experience than Beckwith on mainframe computers using digital or DEC systems at that time. Given their relative strengths at hire, Schuster assigned Beckwith to day operator and Complainant to night operator.⁷ These assignments were based on legitimate, nondiscriminatory reasons.

13. The Commission alleged in its Complaint that Respondent “pre-positioned” Beckwith for promotion. Complainant testified Schuster promised to rotate him with Beckwith for cross-training purposes within a few months of their hire. Complainant testified that he approached

⁷ Schuster testified that he was impressed with Complainant’s experience on mainframe computers and knowledge of digital or DEC systems, which the night operator used to process accounting information. This testimony demonstrated that the same strength that played a pivotal role in Complainant’s hire also lead to his placement as night operator.

Schuster on several occasions in early 1996 about rotating with Beckwith, but such rotation never occurred. Complainant also testified that Respondent refused to give him passwords to access “sensitive systems”, which were given to Beckwith. (Tr. 14)

14. The evidence showed that Respondent also had legitimate, nondiscriminatory reasons for not rotating Complainant and Beckwith in early 1996 and granting the latter passwords to provide security clearances. Winnicki testified that the issue of rotating Complainant and Beckwith was discussed during their 90-day probationary period, but “nothing was final.” (Tr. 128) Winnicki testified that such rotation never occurred because “people left”, and he believed that rotating employees at that time would have “just caused a little more chaos.” *Id.* The Hearing Examiner found Winnicki’s testimony on this issue credible.

15. The Hearing Examiner also credited Winnicki’s testimony about why Respondent granted Beckwith access to sensitive data. Winnicki testified that Beckwith received access to “supervisory password[s]” after Razei left because Respondent needed someone to “provide security clearances to other users.” (Tr. 133, 134) Winnicki testified that he was

unable to perform this function because he lacked sufficient knowledge of LAN, “coming from a mainframe environment.” (Tr. 133) In light of Complainant’s limited knowledge of LAN and mainframe background like Winnicki, Respondent’s refusal to grant Complainant access to such passwords made sense. It also made sense to limit the number of employees who have access to sensitive data to reduce “the possibility of corrupting files.” (Tr. 134)

16. In its brief, the Commission asks the Hearing Examiner to infer intentional race discrimination from Respondent’s refusal to interview Complainant for Systems Administrator and its “pre-selection” of Beckwith as Senior Programmer Analyst. (Comm.Br. 8-9) While it is true that Respondent refused to interview Complainant for Systems Administrator, the ultimate selection of Michelle Elshaw, a black female, belies any inference that race was a factor in this refusal. The more likely reason is that Complainant’s payroll experience paled in comparison to Elshaw, Beckwith, and other interviewees.⁸

⁸ The Commission apparently found “No Probable Cause” on this issue, which would explain why Respondent did not provide an explanation during the hearing for its refusal to interview Complainant for this position.

17. The evidence also showed that Respondent had legitimate, nondiscriminatory reasons for promoting Beckwith to Senior Programmer Analyst. Schuster testified about the decision to create the position of Senior Programmer Analyst to fill the void left by Razei's departure. Schuster testified that Respondent intended to change its accounting system from a "mainframe type environment" using DEC systems to a "client server type environment" using LAN. (Tr. 84-85) Schuster testified that he promoted Beckwith to Senior Programmer Analyst because he possessed knowledge of LAN and "client server technology" and had experience in installing such networks. *Id.* Complainant, by his own admission, lacked knowledge of Respondent's "client server system" at the time of Beckwith's promotion. (Tr. 16)

18. Finally, there is insufficient evidence to conclude that Schuster, the primary decision-maker in this case, harbored racial animus toward Complainant or black persons in general in late 1995 or 1996. To the contrary, the evidence showed that Schuster and Razei recommended that Respondent hire Complainant in mid-October 1995 despite a gap in his

history because of drug and alcohol abuse.⁹ Schuster testified that:

We were at the time willing to overlook some of those issues to see that Mr. Turner was . . . ready to get on with his life and move forward. And we were at the time . . . willing to help him get to that next step because he also possessed some of the knowledge that we felt was necessary in helping to run our accounting system. (Tr. 81)

19. In its brief, Respondent argued that the “same actor” inference applies in this case. (R.Br. 11-12) This argument is well taken. Schuster’s willingness to recommend Complainant for hire despite his personal problems creates an inference that race was not a factor in his refusal to promote Complainant less than a year later. *Buhrmaster v. Overnite Trans. Co.*, 68 FEP Cases 76 (6th Cir. 1995). The Commission failed to rebut this inference with evidence that Schuster developed a racial animus toward Complainant or black persons in general within the short period between Complainant’s hire and his denial of promotion.

⁹ The evidence also showed that Schuster had a history of recommending minorities for hire. Schuster testified that he recommended nine persons for hire during his tenure as City Controller, and six were minorities. (Tr. 76) The Commission did not rebut this testimony.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8094.

TODD W. EVANS
HEARING EXAMINER

March 10, 1999